Tupe: the scope of ‘short term’ exemption widened

Another month has brought another decision of the Employment Appeal Tribunal focusing on TUPE.

In our previous TUPE alert we commented on the increasing number of TUPE cases over the past 18 months which have ruled against TUPE applying, and the way in which the Tribunals seem to be narrowing the application of the “service provision change” head of TUPE. The latest case, Liddell’s Coaches v Cook, continues this trend, this time by focusing on the relatively little known exemption which disapplies TUPE in circumstances where services transferred are connected to a “specific event” or “task of short term duration”.

In this case, a one-year contract between a local authority and a coach operator to transport schoolchildren was said by the Tribunal to be ‘short-term’, given the fact that similar contracts were usually awarded for between three to five years. As a result, the service provision change head of TUPE did not apply, and there was no TUPE protection for the employees concerned on a change of the coach operators. This decision is noteworthy because not only does it continue the trend of narrowing the application of the service provision change head of TUPE, but also because it contradicts government guidance.

Background

Mr. Cook worked as a coach driver for Liddell’s Coaches. In 2010, Liddell’s Coaches won five contracts to transport school children who had to be accommodated at other schools in the area while their school was rebuilt.

Before these contracts expired at the end of the 2010/11 school year, Liddell’s Coaches was invited to tender for further one-year contracts, covering the period up to the scheduled opening of the re-built school. Liddell’s Coaches won only one of the retendered contracts and three were awarded to another company, AC Ltd.

When Liddell’s Coaches terminated Mr. Cook’s employment in July 2011 it asserted that his employment had transferred under TUPE to AC Ltd. AC Ltd denied liability and Mr. Cook brought a claim in the Employment Tribunal. The tribunal decided there was no service provision change and liability for Mr. Cook’s dismissal rested with Liddell’s Coaches. Liddell’s Coaches appealed.

The Employment Appeal Tribunal (EAT) decision

In order for there to be a ‘service provision change’ under TUPE, the client must intend that the activities performed pre-transfer will be carried out by the contractor (or subsequent contractor) other than in connection with a ‘single specific event’ or a ‘task of short-term duration’ (this is the
exemption to TUPE applying under the service provision change head to which we have referred above).

The EAT concluded that this exemption applied (and so Mr Cook’s employment did not transfer) because:

– the activities were provided in connection with the short term task of transporting children for one year in the 2011/12 school session. The contract could be regarded as short term since the contract was awarded for a considerably shorter period than was customary in the market where contracts lasting three or five year were the norm.

– the re-building of the school was a “task of short term duration”.

The EAT also considered the Guidance by the Department for Business Innovation and Skills’ (BIS Guidance) which suggests that the exemption applies only where the event or task are both one-off and of short term duration. The guidance compares a contract for the provision of security advice over a period of several years in the run-up to the Olympic Games (to which the exemption would not apply, says the Government Guidance, because although the event is one-off, the contract is not of short duration) with a contract to provide security staff at the Games themselves (to which the exemption would apply, says the Government Guidance, because the contract relates both to a one-off event and is of a short-term duration).

However, the EAT said that the Government Guidance was incorrect in two respects. First, the exemption does not require that the event or task must be both one-off and of short term duration – it is enough that there is either a “single specific event” or a “task of short term duration”. Second, the example given in relation to provision of security advice over a period of several years in the run up to the Olympics was incorrect – the EAT said that the exemption would apply to take this outside the scope of TUPE because the “single specific event” in this example was the two week Olympic period – not the term over which the activities themselves were taking place (which was several years). It did not matter, the EAT said, that the activities themselves were long term – the key is whether they are connected to a “single specific event”.

What this decision means to employers

This is the first decision of its kind in relation to the meaning of the TUPE exemption which relates to the transfer of services connected with a single specific event or task of short term duration.

Prior to this decision, the exemption has not been relied on to any great extent. This has probably been for two reasons. Firstly, given the Government Guidance, it was thought that the exemption would be very narrowly construed – it is rare that you have activities which would otherwise fall under the service provision change head of TUPE, but which are nevertheless for a short term duration and connected to a single specific event. Secondly, the natural assumption of employers, and lawyers, that TUPE will be interpreted to protect employees, leads to a reluctance to rely on an imprecise and uncertain exemption to TUPE applying.

So does this decision now mean that employers will be queuing up to use the exemption? To answer this, let’s first summarise what the case actually states:

– firstly, the case makes clear that “single specific event” and “task of short term duration” are separate and distinct terms – so either one can lead to TUPE not applying (rather than the previously understood position from the Government Guidance where both needed to be present).
– secondly, the case gives guidance on the meaning of “task of short term duration”. In looking at whether the task is a short term duration – you can look at what the normal term would be – and if in the particular instance it is a far shorter term (in this case it was 1 year as compared to a normal of 3 – 5 years), that can be a “task of a short term duration”. This is despite the fact that if most people looked at a task lasting one year, we would not expect it to be characterised as short term!

– thirdly, the case assists with the meaning of “single specific event” – the EAT said that the term “event” is a single happening or occurrence and, of itself, connotes short duration. Hence, although the words “of short term duration” should not be added, in practice the word “event” indicates its finite, short term nature. Note that the activities themselves do not need to be the single specific event – they just need to be connected to a single specific event (the example of the Olympics described above illustrates this).

Following this, we can certainly see that the exemption will be more seriously, and more often considered, by employers in terms of their normal considerations as to whether TUPE will apply. It is also the case that the number of instances in which it might actually be thought to potentially apply, as a result of these considerations, will increase.

However, given the uncertainty in terms of working out precisely what either a short term duration is, and whether something is a single specific event or not, we think it will remain only in rare cases whereby an employer will be able to say with enough certainty that this exemption applies. As a result we believe that despite this case, this will remain a little used exemption in practice.