



TUPE: automatic unfair dismissal

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As we know, r.7(1) Transfer of Undertakings (Protection of Employment) Regulations 2006 provides that a dismissal is unfair if the reason or principal reason is the transfer. When is a 'TUPE transfer' the reason for dismissal? Moreover, when is the reason for dismissal the transfer itself as opposed to the transfer merely being the occasion that gave rise to the dismissal?

The starting point is the well-known description of the 'reason for dismissal' given by the Court of Appeal in *Abernethy v. Mott, Hay, and Anderson* [1974] ICR 323, namely 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'. Only the employer really knows why s/he dismissed, so the real reason must often be deduced from the surrounding facts. Many look at the temporal proximity of the transfer and the dismissal, although that is not necessarily determinative, just as a significant gap in time between transfer and dismissal does not preclude the latter being the reason for the former.

A better option might be to consider whether there had been a change in circumstances. TUPE operates so as to place the transferee in the shoes of the transferor as if nothing else had occurred. If there is then a dismissal with no other apparent legitimate reason, that may be a good indicator that the dismissal was the real reason.

This is the situation that faced the employee in *Hare Wines Ltd. v. Kaur* [2019] EWCA Civ 216. There, the Claimant had a difficult relationship with a colleague, who was to become director of the Respondent. The Respondent took on the business of the Claimant's employer, who wrote to her on the day of the transfer and dismissed her on the basis that the company had ceased trading. The Claimant had been told in a meeting earlier that the Respondent did not want her because of the relationship difficulties. The Employment Tribunal found that the reason for the dismissal was the transfer.

The Respondent appealed, and the matter came before the Court of Appeal in early 2019. The Respondent submitted that the Tribunal could not have found that the relationship difficulties were the reason for dismissal, then go on to conclude that the reason was the transfer. The transfer was the occasion but not the reason.

The Court of Appeal disagreed. Whilst it was decided that the Tribunal was entitled to reach the decision it did on the facts of the case, Underhill LJ shed some light on when a dismissal might be because of a transfer. He said at para. 25 that '*The problems between Ms Kaur and Mr Chatha had been going on for some time, but there was no evidence that until the transfer they were regarded as cause for dismissal...the transfer was not simply the occasion for her dismissal but was, if not the sole reason, at least the principal reason for it: it was the transfer that made the difference between the problems being treated as a cause for dismissal and not'* (my emphasis).

This was, as with a lot of cases, fact-sensitive, but it is useful to note that a test that might be considered is whether the transfer 'made the difference'. Given that an employer is not likely to admit dismissing because of a transfer, an employee might be well-advised to list all the facts in play and how matters unfolded, then, in light of that, ask whether (even in a case with more than one

ostensible reason) the transfer tipped the balance in favour of dismissal. Note, however, that a 'but for' test would not suffice and, in any event, is not correct.

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