



TUPE: Assignment

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I have recently had cause to consider the question of whether employees were assigned to work that was transferring from one business to another, specifically employees who split their time between parts of a transferor's business.

I hope this short article will serve as a brief reminder of the test that an employment tribunal will apply in such cases.

Only employees assigned to the part of a business transferring immediately before the transfer will have their employment transferred to the transferee. As part of the due diligence, and particularly the Employee Liability Information process, outgoing employers send to incoming employers a list of those people they consider 'in scope' for transfer. Frequently, those employers identify individuals that spend more than half their time in the part of the business transferring, and disputes arise as to whether the particular percentage of time spent is sufficient to establish assignment to the transferring part-business.

The reality is that percentage time splits alone are unhelpful. Certainly, calculations of time do not appear to be supported by the ECJ decision in *Botzen v Rotterdamsche Droogdok Maatschappij BV* [1985] ECR 519. There, the ECJ determined that '*An employment relationship is essentially characterized by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties*'. The ECJ did not apply the Advocate General's proposed test of 'wholly employed' in the part transferred. Work in more than one part of the business is therefore not inconsistent with assignment to one of those parts.

A better consideration might be 'where does the employee actually work'? An employee's main responsibility may be one part of a business, even if they work in others that have secondary importance within that individual's overall employment. The EAT in *London Borough of Hillingdon v Gormanley* UKEAT/0169/14/KN (unreported) stated that *Botzen* requires consideration of the contractual duties of employees and their role in the organisational framework of the putative transferor – these are questions of fact for the Tribunal.

In line with the above suggestion of looking for where the employee actually works, the Court of Appeal put the question of assignment as whether the employee was 'part of the ... human stock or resources' of the transferring part. Transferors and transferees can consider, in addition to time spent, the value given to each part of the business in which the employee worked and how that employee's cost is allocated between parts of the business (*Gale v Northern General Hospital NHS Trust* [1994] ICR 426).

One issue that does arise reasonably often is the concern that the transferor has moved unwanted employees to the part of the business transferring in order to 'dump' them on the transferee. On the face of it, at the time of the transfer, those employees are assigned, and their employment should transfer, even though everybody knows what has taken place.

Fortunately, such an attempt, despite fitting with the letter of the TUPE Regulations if not the spirit, will not necessarily always amount to assignment. That was what happened in *Carisway Cleaning*

Consultants Ltd v Richards EAT/0629/97 (unreported). The transferor moved the employee to a transferring contract, knowing that it had lost that contract, but at a time before the transfer took place. The Tribunal found that the employee could not be considered part of the undertaking transferred given the way in which he came to work for it. The EAT upheld the decision but went on to describe the transferor's conduct as fraudulent and stated that what was fraudulent was void.

Assessing where an individual really works is not necessarily scientific. It will often be a case of establishing a 'feel'.

Of course, some employees do not have an assigned role and their job is genuinely not fixed, or they are deliberately not assigned to any one part of a business. In those cases, percentage time-splits would be unhelpful.

In light of the above, advisors will want to outline all the facts, take a step back and ask what is really going on.

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