

**Employee transferred under  
TUPE despite client  
instruction to remove her  
from the contract**

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If a client instructs that an employee be removed from working on its contract which is set to transfer under TUPE, that employee will still transfer if the outgoing employer decides not to heed the instruction.

Ms Jakowlew was a care manager employed by Saga Care, which provided care services to the London Borough of Enfield. Saga's contract with Enfield was set to expire, at which point the services would be provided by Westminster Homecare Ltd. Conflict between Ms Jakowlew and her manager led to her being suspended pending a disciplinary hearing. Following Ms Jakowlew's suspension, Enfield exercised its contractual right to instruct Saga to remove Ms Jakowlew from the team providing its care services. Saga refused and gave Ms Jakowlew a final written warning the day before the TUPE transfer was due to occur. Saga advised Ms Jakowlew that her employment had transferred to Westminster; however, Westminster alleged she had never transferred. Ms Jakowlew claimed to have been unfairly dismissed.

The Employment Appeal Tribunal found that Ms Jakowlew's employment had indeed transferred to Westminster as part of the TUPE transfer. The instruction by Enfield to remove her from the undertaking was not of itself enough to prevent a transfer taking place. To prevent the transfer, it would have been necessary for Saga to act on the request by reassigning Ms Jakowlew. As Saga had refused to do so, Ms Jakowlew went across with the undertaking.

It appears to have been material in this case that Enfield had a potential breach of contract claim against Saga for its failure to act on instructions to reassign Ms Jakowlew. However, such a claim would only be worth pursuing if it had suffered actual loss because of the breach and whether Saga

was obliged to indemnify it for the loss. With that in mind, service recipients may wish to ensure that any outsourcing agreements are negotiated to include indemnities for loss suffered by them as a result of employees transferring under TUPE contrary to their direct instructions.

Jakowlew v Nestor Primecare Services Ltd (t/a Saga Care) and another UKEAT/0432/14

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