

Employment Appeal Tribunal holds that project manager should not have been assigned to a new contractor on a TUPE transfer

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transfer

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The EAT has held that an employee, who was a project manager, did not transfer under TUPE. The EAT cautioned against placing too much emphasis on how much time an employee spends on each project and said that careful consideration should be given to the group transferring and whether the employee belongs to it.

Mr Armitage was a project engineer at ERH Communications Limited. ERH provided communications services to the Welsh Assembly under a regional maintenance contract, a framework agreement and an ancillary contract (under which it could bid for additional work).

In October 2012, Mr Armitage was promoted to the role of Project Manager and had to manage several matters including the regional maintenance contract. ERH subsequently lost this contract (but retained the other two contracts) to its competitor, Costain Limited, who took over the provision of services on 1 February 2013.

ERH conducted a consultation process to determine which of its employees should be transferred to Costain under TUPE and it informed Mr Armitage that he would transfer because he spent 80% of his time on the regional maintenance contract. Mr Armitage objected to this assessment which did not take account of the fact that his responsibilities had changed since his promotion. Costain also did not agree that TUPE should apply to Mr Armitage. They argued that he had spent most of his time working under ancillary projects rather than the regional maintenance contract and therefore he had not

transferred.

The EAT held that when making a decision on whether or not an employee had transferred under TUPE, the courts should first consider the group of employees who would transfer and then consider whether the employee belonged to that group. It noted that: i) the group must be deliberately put together for the purpose of the relevant work; ii) it should not assume that every employee carrying out work for the relevant client is assigned; and iii) the decision on assignment should be made by a proper examination of the facts and was not a formality.

The EAT was critical of the reliance placed on the percentages of time Mr Armitage had spent on each contract, particularly given that he may have been more involved ahead of the transfer because it was likely to be a time that his skills were needed and that this in itself would not mean that he should be deemed assigned.

Although the case was remitted back to the Tribunal for a final decision, the EAT exercised its discretion and ordered ERH (not Mr Armitage) to pay Costain's EAT fees. Indeed, when making the cost award the EAT commented that Mr Armitage was prevented from knowing who was liable for the termination of his employment until the current arguments between the two companies were resolved. This approach indicates that where two employers are the real protagonists in the litigation, the tribunals will follow a "loser pays" approach towards costs more readily.

Costain Limited v Armitage and another UKEAT/0048/14

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