

TUPE and the Date of Transfer

The European Acquired Rights Directive was introduced in order to safeguard workers' rights in the event of a business transfer and gave rise to the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) in the UK.

A recent case has raised questions regarding the position arising when the transfer of the business or undertaking occurs over a period of time.

In *Celtec Ltd. v Astley and others* the House of Lords sought a ruling from the European Court of Justice (ECJ) as to what exactly is meant by the words 'date of transfer' in article 3(1) of the Directive.

The House of Lords referred three questions to the ECJ for clarification. These were:

1. Do the words 'on the date of transfer', in article 3(1) of the Directive, refer to a particular point in time when the transfer is deemed to have been completed?
2. If 'yes', how can that particular point in time be identified?
3. If 'no', how are the words 'on the date of transfer' to be interpreted?

The ECJ decided that the 'date of transfer' does refer to a particular point in time, this being the date on which responsibility as employer for carrying on the business or unit transferred moves from the transferor to the transferee. This date cannot be changed by those involved. Contracts of employment or employment relationships existing at the date of transfer are deemed to be handed over on that date and it is not open to the transferor and the transferee to choose a different date.

Whilst this interpretation of the Directive is consistent with existing ECJ case law, it is at variance with the opinion of the ECJ Advocate General, who had suggested that a business transfer can take place over a period of time. Furthermore, the ECJ's judgment leaves a question mark over the TUPE Regulations which do provide that a transfer may be effected by a series of transactions.

The House of Lords must now decide what this ruling means in the case in question. It is worth noting that the ECJ failed to give specific advice in reply to the second question posed by the House of Lords and this may, therefore, require further clarification.

Says Paul Davies, "This is a complex issue and we await with interest the Law Lords' decision on the facts of this case. However, the ruling of the ECJ should be regarded as taking precedence as EU law takes priority over the law of member states if there is inconsistency between them. The date of transfer of a business undertaking therefore must be a particular point in time and cannot refer to the length of time it takes to complete the process. Always take advice in the early planning stages, before any action is taken."

For further information or to discuss how to proceed with this or other employment related issues please contact Paul Davies at paul.davies@emsleys.co.uk or tel: 0113 287 4333.