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Debating transfer of employees on long-term sick leave

By Lauren Salt

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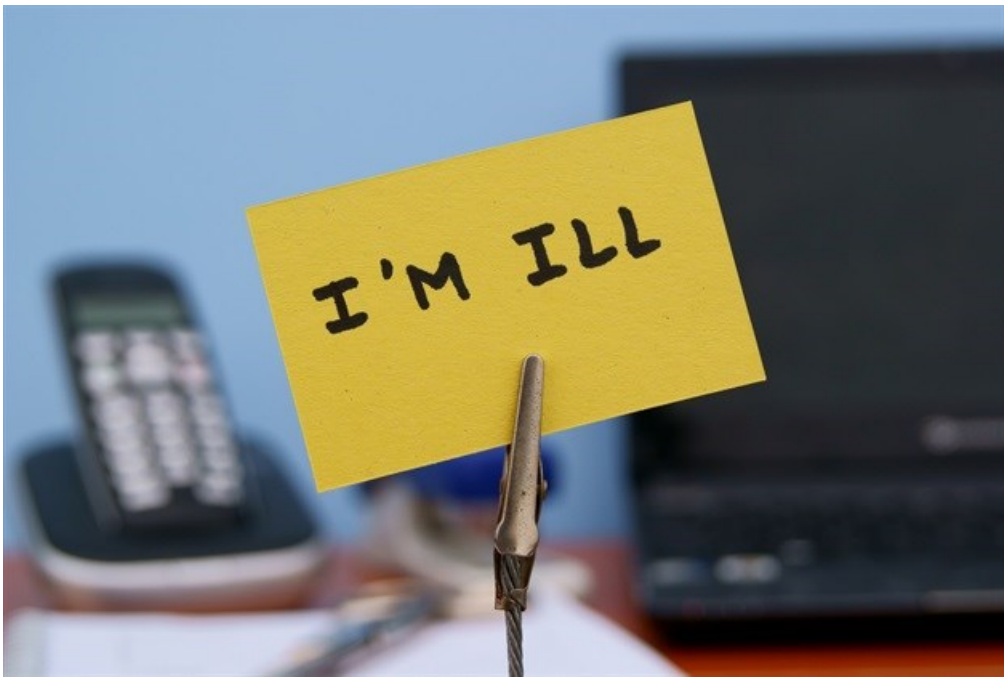
In the UK judgment of BT Managed Services v Edwards & Anor, the European Employment Appeal Tribunal considered whether an employee, who had been on long-term sick leave, was 'assigned' to a team that was transferred in terms of a service provision change under regulation 4(3) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).



UK equivalent of South Africa's s197

In terms of regulation 3 of TUPE, 'a relevant transfer' includes a transfer of an undertaking or business or a part thereof to another person with there being a transfer of an economic entity which retains its identity. A 'relevant transfer' also includes situations that fall within the definition of a service provision change set out in regulation 3 of TUPE.

In terms of regulation 4(1) of TUPE, a relevant transfer does not terminate contracts of employment of persons employed by the transferor and assigned to the organised grouping of resources or employees that are subject to the relevant transfer, which would otherwise be terminated by the transfer, but such contracts shall have effect after the transfer as if originally made between the employees and the transferee.

In terms of regulation 4(3) of TUPE, persons referred to in regulation 4(1) are employees that are employed as such prior to the transfer.

Facts of Edwards' case

In this case, Edwards was part of a team involved in a domestic network outsource (DNO) contract, providing operational maintenance for Orange mobile networks. Edwards was, however, on long-term sick leave. His employer attempted, without success, to provide him with alternative work. Due to his inability to perform his duties, Edwards stopped working in January 2008 and received permanent health insurance (PHI) benefits.

Edwards' managers had not recruited any replacement for him and his work was taken up and completed by other team members. In 2009, Orange transferred the DNO contract to BT Managed Services (BT). Edwards and his team were transferred to BT. His PHI package was also transferred to BT. Each of the contracts undertaken by BT had its own structure, including separate staff, managers and operations. Edwards was still unable to work, but he remained in contact with BT and its occupational health department to facilitate a possible return to work.

On 1 June 2013, the contract operation that Orange had with BT was transferred to Ericsson. At this stage, Edwards had not worked for five years. There was no prospect of him returning to work. He remained a member of the DNO team merely for administrative purposes and to retain his PHI payments. The transfer from BT to Ericsson fell within regulation 3 of TUPE.

Edwards' team was considered an "organised grouping of employees...which has as its principal purpose the carrying out of specific activities on behalf of the client" in terms of regulation 3 of TUPE. According to BT, despite Edwards' absence, he was part of the section of BT that dealt with DNO works, resulting in his employment being transferred under TUPE. According to Ericsson, however, he was not assigned to the DNO contract division at the time of his service provision change due to his long-term absence.

Employment Tribunal's take on the Edwards case

The Employment Tribunal held that one must consider whether the employee was assigned to the relevant organised grouping prior to the transfer.

In this regard, it was held that Edwards was not assigned to that organised grouping immediately prior to 1 June 2013. There was merely a historical link between him and the grouping, which remained due to administrative purposes. There was no intention of him carrying out any of the specific activities under the contract. A specific decision was assigned to him, not to pursue a return to work, but rather to keep him at home in receipt of PHI payments. The Tribunal concluded that Edwards was not assigned to the organised grouping in respect of the transfer to Ericsson.

Appeal

The decision went on appeal to the Employment Appeal Tribunal, where it was held that whether an employee is assigned to a particular grouping within Regulation 4(3) of TUPE is a question of fact. According to the Tribunal, there has to be more than a mere administrative or historical connection. In other words, there would have to be some level of participation in carrying out the specific activities, which was the main purpose of the organised grouping.

The Tribunal held that an organised grouping is partly defined by the work it carries out. A person who thus plays no part in performing the work of the organised grouping cannot be said to be a member of the group and would thus not be assigned to the grouping.

The Tribunal also held that a permanent inability to work had to be distinguished from a temporary inability to work. The fact that an employee, not working at the time of the service provision change, may be required to work if he is able to, would

only apply to those employees who are temporarily absent from work and not to those permanently unable to return to work. The appeal was thus dismissed.

Thus, for an employee to be considered part of an organised grouping that is subject to a transfer under TUPE, such an employee would have to carry out at least some part of the activities that are performed by the assigned group. It is for this reason that an employee that is permanently absent with no prospects of returning to work will not be considered assigned to the group.

Section 197 of the Labour Relations Act, No 66 of 1995 (LRA) is similar to TUPE in that it provides that when a business is transferred as going concern, the new employer is substituted in the place of the old employer in respect of all contracts of employment that existed immediately before the date of the transfer. The Edwards judgment thus holds significance in a South African context, as the same reasoning may be applied by our courts if they asked to consider decide a similar set of facts.

Courts' propensity to look to European law in s197 matters

Our courts' propensity to take heed of European law in the context of s197 of the LRA was demonstrated in TMS Group Industrial Services (Pty) t/a Vericon v Unitrans Supply Chain Solutions and Others. The case saw the Labour Appeal Court look at the requirements under European law for there to be a service provision change, which includes that of an organised grouping of employees that are principally dedicated to a specific contract.

The court a quo held that in determining an employment relationship, courts should look beyond the label to the substantial relationship that exists between the parties. In determining whether the warehousing service was transferred in terms of s197, the court a quo held that the warehousing service was an economic entity, which can also be referred to as an organised group of resources.

The Labour Appeal Court upheld the decision of the Labour Court, ruling that a transfer of business had taken place. The court took into consideration the submission of the First Respondent that the effected employees had worked exclusively on a contract in respect of the warehousing services that was initially provided by the First Respondent to the Third Respondent and that they were not assigned to any other contract. Based on this, the Labour Appeal Court held that the First Respondent was the employer of these employees. When the agreement between the Third Respondent ended and a new one was concluded with the Appellant, a transfer had taken place, with the employees being transferred from the First Respondent to the Appellant.

While this case did not deal specifically with the issue of whether an employee was considered assigned to an organised grouping, it shows that in determining whether s197 of the LRA applies, our courts do take into account the concepts relating to service provision change as set out in European law.

Conclusion

By virtue of the above, it is likely that the Edwards case would be applicable to a similar situation in South Africa, requiring the determination of whether an employee who has been on long-term sick leave would be eligible for transfer in terms of s197 of the LRA, especially since our courts take into account the substance and not the form of employment relationships.

ABOUT LAUREN SALT

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