



TUPE 'reaches the parts' of a group

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A recent decision of the European Court of Justice ("ECJ") concerning the Heineken group of companies confirms that groups may not avoid the effects of TUPE by employing employees through service companies and assigning them to a subsidiary.

The TUPE Regulations (the Transfer of Undertakings (Protection of Employment) Regulations 2006) implement into UK law the European Acquired Rights Directive ("ARD"), the purpose of which is to safeguard employees' rights on the transfer of a business by an asset sale. The effect is that following the sale, the rights and liabilities of the initial owner of the business (the "transferor") transfer automatically to the incoming owner, and the rights of the employees are preserved as if they originally entered into employment contracts with the new owner, rather than the original owner, or transferor.

As with the TUPE Regulations which apply in the UK, Dutch law requires that for the statutory protection to apply, the original employer, or transferor, must actually employ the employees.

This requirement was challenged in the case of *Albron Catering v FNV Bondgenoten*. The circumstances were that catering employees were employed by, and entered into employment contracts with, a service company within the Heineken group and were assigned to an operating company within the group which provided catering services at various locations. When that operating company subsequently outsourced catering work to Albron, the question arose whether the catering employees transferred automatically to Albron although they had entered into employment contracts with the service company within the group and not the operating company.

The ECJ applied a purposive interpretation to the ARD, which the domestic legislation was intended to implement, and held that to apply, the Directive requires a transferor to have an employment contract with an employee or for there to be an employment relationship between the parties. One should therefore not exclude the possibility that there might be an employment relationship simply because there is no direct contractual relationship, and this is a matter to be determined by domestic law.

It was held that an employment relationship may exist where an employee is permanently assigned from one group company to another, although there may be no direct contractual relationship between them. Accordingly, in this case, the employees of the service company which were permanently assigned to the operating company in the same group were deemed to transfer under the ARD to Albron. The effect was to save Heineken potentially substantial termination costs and burden Albron with the significant costs of continuing employment on the same terms they enjoyed with the transferor or making unlawful dismissals.

This case offers a welcome clarification of the law, and confirms that groups which employ employees

through service companies may avoid redundancy costs by transferring employees permanently assigned to parts of the business which are sold or outsourced. On the other hand, the doctrine of "buyer beware" has never been truer for potential purchasers of businesses, who are advised to make careful enquiries about any persons engaged in the target business but who may not be directly employed by it.

If you would like to discuss any of the issues raised in this article please contact either Peter McRoberts or Sarah Rushton on 020 7465 4300.

This publication is not intended to provide a comprehensive statement of the law. It is intended to highlight some issues current at the date of its preparation. Specific advice should always be taken.