

EAT consider when a TUPE transfer takes place in a ‘series of transactions’ case and find that (i) it does not necessarily take place at the end of the series and (ii) the tribunal can take into account matters which occur outside the UK

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[Rajput v Commerzbank and Société Générale \[2023\] EAT](#)

Summary

1. In a judgment handed down by Mr Justice Kerr this week in a case in which I represented the Appellant, the EAT found that in a ‘series of transactions’ case under Regulation 3(6) TUPE, the transfer did not necessarily take place at the end of the series, and that the tribunal should not focus merely on transactions which occurred within the UK.

The Facts

2. The Claimant commenced employment with Commerzbank in 2012 as a senior compliance officer in the Equity Markets and Commodities Division [EMC] based in London. In 2017 she brought claims of sex and maternity discrimination which were successful. On her return to work following the trial, she alleged that she was subject to victimisation, culminating in her dismissal in March 2021.
3. Meanwhile in 2018 Commerzbank entered into negotiations with Société Générale for the sale of the EMC Division of their business and a Business Purchase Agreement [BPA] was signed in November 2018. This provided that the EMC was made up of:
 - The Flow Trading Business [Flow]
 - The Asset Management Business [AM]
 - Exotics, Vanilla and Funds [EVF]
4. The BPA provided that these 3 divisions would be transferred over in 3 main batches, which were then sub-divided into further batches. Each division was given its own

purchase price. It was an agreed fact that the EMC constituted one organised grouping of resources. The Respondents identified 365 employees worldwide who would be transferring, who were spread across London, Germany, France, Hong Kong, Luxembourg and Switzerland. It was further accepted that the Claimant was assigned to the EMC business and that this business was situated in the UK prior to the transfer.

5. The EVF division transferred over in 6 batches from March to October 2019, with AM transferring over from May to November 2019. The last part of the EMC business to transfer over was Flow. It was based mainly in Germany, with only a small presence in London consisting of 5 employees. Most of Flow had transferred over by March 2020, with the remainder transferring in May 2020.
6. The Respondent's evidence was that 95% of AM and EVF had transferred over by the end of September 2019. On this basis the Respondent argued that the TUPE transfer took place on 1 October 2019, relying also on the fact that 87% of the London based employees had transferred by this date. Implicit in this argument was the suggestion that the transfer of the Flow business ought to be disregarded because it was based outside the UK. The Claimant argued that the transfer took place around 10 May 2020, when the last batch of Flow transferred over. It was argued that, applying the judgment of the House of Lords in CELTEC v Astley [2006] UKHL 29, 'responsibility for carrying on the business' would not pass over to the transferee until the end of the 'series of transactions'.

The ET decision

7. The matter came before EJ Hodgson in October 2021. He found that the transfer took place on 1 October 2019. He concluded that:
 - in a series of transaction cases, a TUPE transfer could take place at any point during those transactions;
 - as Regulation 3 TUPE was concerned with a business or undertaking which was situated immediately before the transfer in the UK, his focus must be on the London operation. As such, he focussed on the transfer of the EVF and AM batches and as 95% of the UK operation had transferred by 1 October 2019, he found that this was the date of the TUPE transfer.

8. The Claimant appealed, arguing *inter alia* that (i) the transfer would take effect at the end of the series of transactions, which here was when Flow transferred and (ii) the judge erred in focussing solely on the London operation, and the proper focus was the entirety of the EMC business.

The EAT decision

9. The matter came before Mr Justice Kerr in May 2023. As to the argument put forward by the Appellant that a transfer is not effected until 'full and final responsibility' for the carrying on of the business is moved to the transferee, which generally would be at the end of the series, he did not agree. He found that [paras 61 and 62]:

I agree with the respondents that there is no presumption or rule that a transfer effected by a series of transactions occurs at the end of the series. Completion may be artificially delayed. The last transaction in the series may be a minor detail, putting the last piece of the jigsaw in place long after the transferee has started running the business to the exclusion of the transferor. An example arises in this very case, where "residual notes" relating to the Flow business might be expected to remain in being up to as late as 31 December 2021, and "Old Perpetuals" even after that date.

By similar reasoning, the gloss "full and final" should not be added to the concept of responsibility for running the business. A transferor might retain minor responsibilities for mopping up work long after responsibility has shifted to the transferee in substance. Nothing in the reasoning of the then President in Longden v. Ferrari Ltd is authority to the contrary. Ingenious devices to defeat employees' TUPE rights may lie in seeking to delay transfer or in seeking to accelerate it. No rule or presumption about the date of a transfer assists in discouraging that.

10. However Mr Justice Kerr agreed that the judge had erred in excluding from his consideration the Flow part of the business. It was an agreed fact that this formed 'part of the organised grouping of resources' which comprised the EMC business. There was reason why an "organised grouping of resources" [in the words of Regulation 3(2)] could not be located across several countries at once. It was accepted that the EMC was "situated immediately before the transfer in the UK". A business or part of a business can be "situated" in the UK without its entire operation being located in the UK.
11. Further, regulation 3(4)(b) and (c) make clear that the involvement of foreign law and legal systems does not prevent the Regulations applying to a transfer, provided it is a business which is situated in the UK immediately before the transfer. He concluded that:

At paragraph 43, the judge then reasoned that because regulation 3 is concerned with a business or part thereof situated immediately before the transfer in the UK, "it is clear that I must focus on the London operation". I think that was, with respect, a non sequitur

and a misdirection of law. There is nothing in the TUPE Regulations that required the tribunal to confine its consideration to the part of the organised grouping of resources based in this country....The Celtec ruling requires that the transfer date is “the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee” (my italics). The unit transferred here was the EMC business, not just the London based or mainly London based part of it.

12. It was thus concluded that the judge had erred in excluding the Flow part of the business from his consideration when determining when the transfer had taken place, and the matter was referred back to a different judge for a rehearing.

Commentary

13. This case appears to be the first appellate authority which deals with the issue as to when a transfer takes place within a ‘series of transactions’ cases under regulation 3(6). The author considers that, in the vast majority of cases, a transfer will take place at the end of the series. As a matter of logic, if a particular event is ‘effected’ by a series of transactions, it cannot be until the last of those transactions that the event is complete. Otherwise those later transactions could not be said to have ‘effected’ the event, as a matter which occurs after the event clearly could have no causal connection to the completion of that event [applying the principle in Longden v Ferrari Ltd [1994] IRLR 157 in which the EAT made it clear that for a transaction to ‘effect’ a transfer, it needed to be a causative effect, as opposed to merely being transactions linked by a chain of events]. Whilst Mr Justice Kerr was no doubt acutely aware to the risk of unscrupulous employers seeking to construct ingenious devices to manipulate the date of a TUPE transfer [such as by deliberately delaying the transfer of some minor part of the business], this author considers that such arguments could be easily defeated on the basis that such minor matters did not in fact ‘effect’ the transfer, and as such, did not constitute the last transaction in the series. It is not every single act which can constitute a ‘transaction’ within the meaning of regulation 3(6) and the mere fact that some later ‘mopping up’ work is required does not delay the date of the transfer. Arguably this decision opens the gateway for arguments that the potential period over which a TUPE transfer could take place is extremely wide, and can take place at any point within the series from the beginning to the end. However it is difficult to envisage an example in which a transfer could be said to be complete at the start of the series of transactions.
14. In relation to the situation of the business, this case rightly makes it clear that a tribunal’s focus ought not to be solely on those matters which occur in the UK. In this day and age of multi-national companies operating throughout the world, in which sales of businesses

may be spread across numerous countries, arbitrarily excluding any acts which took place outside the UK would lead to unsustainable and unfair results. Nothing within the Regulations advocates such an approach, and the relevance of geography to TUPE is simply that the business must be situated in the UK immediately before the transfer takes place, which does not exclude the business from also having other geographical locations. Once that hurdle has been surmounted, a tribunal must consider the entire economic entity as a whole, which may well involve considering events which take place worldwide.

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