EUROPEAN COURT OF JUSTICE CLARIFIES EMPLOYMENT STATUS OF ‘WORKERS’

In B v Yodel Delivery Network Ltd, the European Court of Justice (ECJ) has provided clarity on the factors relevant to determining the ‘worker’ status of an individual, following a referral from the Watford Employment Tribunal, which considered that the UK definition of a ‘worker’ might be incompatible with EU law.

In this case, a Yodel parcel courier had brought claims under the Working Time Regulations 1998 (WTR), which apply to ‘workers’ but not to the self-employed. B’s agreement with Yodel stated that he was a self-employed independent contractor. Other terms of his engagement included that:

- he was required to use his own vehicle and mobile phone to make deliveries;
- payment was a fixed rate for each parcel;
- he could appoint a substitute, although Yodel could veto his choice of substitute if they did not have an adequate level of skills and qualification;
- he was personally liable for any acts or omissions of a substitute;
- Yodel was under no obligation to offer him work, and he could reject jobs or fix a maximum number of deliveries;
- he could also set his own delivery times and routes, within parameters set by Yodel; and
- he could work for other delivery companies, including Yodel’s competitors.

When B brought claims under the WTR, the Employment Tribunal referred the question of whether he was a ‘worker’ or a self-employed contractor to the ECJ. The Tribunal noted that the WTR define a ‘worker’ as someone who undertakes to perform work personally. This meant that the right of substitution in B’s contract would be fatal to his claim of ‘worker’ status. The Tribunal also asked the ECJ for a ruling on whether this requirement for personal service in the WTR was compatible with the EU Working Time Directive.

Rather than issue a full judgment, the ECJ made a ‘reasoned order’, a procedure used where it considers that the answer to a question referred to it may be clearly deduced from existing case law or where there is no reasonable doubt.
The ECJ noted that the Working Time Directive does not define the term ‘worker’, but case law has established that the essential feature of an employment relationship is a person performing services for and under the direction of another in return for remuneration. It was up to national courts to determine whether this was the case based on the circumstances. This means that being classed as an ‘independent contractor’ under national law does not stop someone from being classed as a ‘worker’ under EU law, particularly if their independence is only notional. The definition of ‘worker’ in the WTR was therefore not incompatible with EU law.

The ECJ identified the significant factors relevant to determining worker status, including being able to choose work and how it is performed, and having the freedom to recruit staff. Applying these factors to B’s case, the ECJ noted that he had a great deal of latitude and did not appear to have a relationship of subordination with Yodel, and that this independence did not appear to be fictitious. He was free to accept or reject work, had the right to work for Yodel’s competitors, and there were very few limitations on his right to provide a substitute.

Whilst this is a relatively straightforward gig economy case, the ECJ’s confirmation of the factors to be taken into account when assessing worker status is useful. Although it will ultimately be for the Employment Tribunal to decide the final outcome of B’s case in the UK, the ECJ has clearly suggested that he is a self-employed contractor, rather than a ‘worker’. The government has indicated that it will legislate to improve the clarity and certainty of employment status tests, but no timescale has yet been set.

...THE GOVERNMENT HAS INDICATED THAT IT WILL LEGISLATE TO IMPROVE THE CLARITY AND CERTAINTY OF EMPLOYMENT STATUS TESTS...
ECJ CLARIFIES WHETHER A RELEVANT TRANSFER CAN OCCUR WHERE NO SIGNIFICANT TANGIBLE ASSETS ARE TRANSFERRED

In Grafe and Pohle v Sudbrandenburger Nahverkehrs GmbH, the European Court of Justice (ECJ) has followed the Advocate-General’s opinion in a case which looked at whether a change in the provider of a German public bus service was a relevant transfer under the Acquired Rights Directive (ARD), the EU legislation underlying the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) in the UK.

In this case, KD, the new provider of a German public bus service, argued that the ARD did not apply to the transfer of the service from the previous provider, SBN, because it had not taken on any buses, depots, workshops or operating facilities. This was due to new technical and environmental standards requiring more environmentally-friendly and accessible buses. SBN had ceased trading and terminated the employment of its employees. KD recruited the majority of SBN’s staff except for Mr Pohle and Mr Grafe, who argued that their employment should have automatically transferred to KD under the ARD.

The ECJ noted that SBN would have been forced to replace its buses and other operating resources in the near future anyway in order to comply with the new standards, and if KD had taken over the bus fleet, it would have had to be scrapped. It was therefore clear that KD’s decision not to take on the buses was dictated by legal, environmental and technical constraints, rather than being a matter of choice. Looking at the factual circumstances, the bus service had continued to operate on most of the same routes, for many of the same passengers, with many of the same experienced bus drivers. The ECJ ruled that even where there is a transfer of a function that is asset-focused, the fact that significant tangible assets are not transferred due to legal, technical or environmental constraints does not necessarily preclude a transfer. The ECJ held that this was sufficient for the transferred entity to have retained its identity.

In an earlier case, Oy Liikenne AB v Liskojarvi, also involving the transfer of a bus service, the ECJ ruled that there was no relevant transfer under the ARD since the key assets, the buses, did not transfer and the business had therefore lost its identity. The crucial difference in this case was that KD could not use the existing buses due to the higher technical and environmental requirements.

This decision may therefore be useful for TUPE purposes, to help argue that a business transfer has taken place where no tangible assets have transferred due to external constraints such as legal, environmental or technical concerns.
BRITISH EMBASSY EMPLOYEE RECRUITED IN EGYPT NOT PROTECTED BY UK EMPLOYMENT LAW

The Employment Rights Act 1996 and the Equality Act 2010 do not specify whether they apply to employees working outside Great Britain, leaving the courts to decide the question of jurisdiction. Case law has established that the main test is whether an employee working abroad has a much stronger connection with Great Britain and British employment law than with any other system of law, weighing up factors such as where they were recruited, how they were paid, and whether they were managed from the UK. In Hamam v Foreign and Commonwealth Office, the EAT has held that a British Embassy employee in Egypt was not protected by UK employment law.

Ms Hamam, an Egyptian citizen, was employed from 2008 to 2017 at the British Embassy in Cairo. Following her dismissal for redundancy, she brought Employment Tribunal claims in the UK for unfair dismissal, race discrimination and detrimental treatment arising from whistleblowing. At a preliminary hearing to decide jurisdiction, the Tribunal held that it could not hear Ms Hamam’s claims because her employment was not sufficiently connected to Great Britain. Relevant factors included:

• she was recruited in Egypt;
• she worked predominantly and permanently in Cairo and her line management and HR support services were local;
• she was not entitled to join the Civil Service Pension Scheme or to join the UK Civil Service union;
• her contract was governed by Egyptian law and contained no mobility clause;
• she was paid and taxed locally; and
• her employment was terminated following local legal processes.

Ms Hamam appealed this decision on various grounds, including that the Tribunal had not given sufficient weight to her argument that the British Embassy in Cairo was a ‘British enclave’. Employees working in a British political or social enclave were one of the categories of employee identified in the case of Lawson v Serco who could potentially come within the scope of British employment law.
The EAT dismissed Ms Hamam’s appeal, noting that there is no definition of a ‘British enclave’ and that the example given in Lawson v Serco referred to an expatriate employee of a British employer working in what amounted for all practical purposes to a British enclave in a foreign country, such as a military base. This was not applicable to the British Embassy in Cairo or Ms Hamam. Crucially, she was not a British national, nor a British worker posted abroad, and she was recruited and worked in Cairo under local labour laws. The EAT concluded that the Employment Tribunal had looked at all the factors relevant to the ‘sufficient connection’ test, including the nature of the British Embassy, and had applied the law correctly.

The decision in this case is not surprising, but it is a useful reminder that Tribunals will take a number of factors into account when considering jurisdiction. It is worth noting that employees who are not protected by UK legislation will usually come within the legislation applicable locally, but this is not a factor that has to be considered by the Employment Tribunal.

...EMPLOYEES WHO ARE NOT PROTECTED BY UK LEGISATION WILL USUALLY COME WITHIN THE LEGISLATION APPLICABLE LOCALLY...
CONSTRUCTIVE DISMISSAL CLAIM COULD SUCCEED EVEN THOUGH THE ‘LAST STRAW’ WAS TRIVIAL

Constructive dismissal arises where an employee resigns in response to a fundamental breach of contract by their employer. Under the ‘last straw’ doctrine, an employee can resign in response to the last in a series of breaches of contract by their employer which, taken cumulatively, amount to a breach of the implied term of trust and confidence.

Usually the last straw will be sufficiently serious to justify the employee’s immediate resignation. However, in Williams v Alderman Davies Church in Wales Primary School, the EAT has confirmed that an employee can still succeed in a constructive dismissal claim if this ‘last straw’ is trivial and not in itself a breach of contract.

Mr Williams was employed as a primary school teacher. He resigned after a long and complicated series of events which included his suspension due to an alleged child protection matter in April 2015 and disciplinary proceedings for an alleged breach of the school’s data protection policy in February 2016. Part of the data protection concern related to Mr Williams sharing a document with his colleague, Mrs Sydenham, who was also the school’s trade union representative. In June 2016, Mr Williams resigned, after complaining about various procedural irregularities and asserting that he had lost all faith that he would be treated properly. He stated that the last straw was learning that Mrs Sydenham had been instructed not to contact him.

Mr Williams brought various claims in the Employment Tribunal, including a claim of constructive dismissal. The Tribunal was highly critical of the school’s actions and procedures but concluded that he had not been constructively dismissed because preventing contact with Mrs Sydenham as part of the school’s investigation was entirely innocuous and reasonable, given the ongoing disciplinary proceedings. This meant that Mr Williams could not rely on this as the last straw entitling him to resign.

...MR WILLIAMS BROUGHT VARIOUS CLAIMS IN THE EMPLOYMENT TRIBUNAL, INCLUDING A CLAIM OF CONSTRUCTIVE DISMISSAL...

The EAT disagreed with this analysis and upheld Mr Williams’ appeal. It was wrong to reject a constructive dismissal claim simply by looking at the alleged ‘last straw’ and concluding that it was not of itself a breach of contract. In this situation, constructive dismissal can arise where the employer’s previous course of conduct was serious enough to amount to a fundamental breach as long as the employee has not affirmed
the breach and has resigned at least partly in response to it. Regardless of the ‘last straw’, the school’s handling of the disciplinary and grievance process had been a fundamental breach which had subsequently contributed to Mr Williams’ decision to resign, and he had not affirmed this breach. The EAT therefore substituted a finding of constructive dismissal.

This case illustrates that constructive dismissal claims can be factually and legally complex. It is also an important reminder that employees may succeed in a constructive dismissal claim where there has been an earlier fundamental breach of contract even if the last straw that finally triggers their resignation seems trivial.

PRE-TRANSFER IMPROVEMENTS TO DIRECTORS’ CONTRACTUAL BENEFITS WERE VOID UNDER TUPE

Under TUPE, changes to contracts of employment are void where the sole or main reason for the change is the transfer (Regulation 4(4)). In Ferguson and others v Astrea Asset Management Ltd, the EAT had to consider whether this provision applies to changes which are beneficial to employees, as well as detrimental changes.

The four claimants in this case were employees of their own company, which provided estate management services to a single client. When the client terminated its contract and moved to Astrea Asset Management Ltd, this amounted to a service provision change under TUPE. Two months before the transfer, the claimants awarded themselves substantially enhanced ‘golden parachute’ terms, including guaranteed bonuses of 50% of salary, generous new contractual termination payments, and enhanced notice periods. They were subsequently dismissed by Astrea for gross misconduct in relation to these new contracts and brought various claims, including a claim for their contractual termination payments.

The Employment Tribunal found that the amendments to the claimants’ terms of employment had been made by reason of the anticipated transfer and had no legitimate commercial purpose. The changes had been designed to compensate them for the loss of their business, knowing this would be paid at Astrea’s expense. As TUPE provided that ‘any’ change due to a transfer is void, their claim failed.

The claimants appealed to the EAT, arguing that TUPE only...

...THE CLAIMANTS AWARDED THEMSELVES SUBSTANTIALLY ENHANCED ‘GOLDEN PARACHUTE’ TERMS...
applied to changes which were detrimental to employees. The EAT rejected this argument on two separate grounds. First, the relevant wording in TUPE refers to ‘any’ change, which on a literal interpretation includes both detrimental and beneficial changes. Second, the purpose of the EU Directive underlying TUPE is to safeguard the existing rights of employees, not to improve them. The claimants had acted dishonestly in seeking an improper advantage and this amounted to an abuse of the TUPE legislation.

Most business sale agreements contain a provision that the seller will not change employees’ terms and conditions for a specified time prior to the transfer without the buyer’s consent. Outsourcing agreements also usually include a similar restriction on the contractor making any pre-transfer changes. Whilst the facts of this case are somewhat extreme, the decision confirms that even without contractual protection, any changes made by reason of the transfer will be unenforceable, whether they are adverse or beneficial. This gives additional protection to buyers and incoming contractors where contractual benefits and notice periods have been enhanced by senior employees who suspect they may be dismissed after the transfer. However, it may also have anomalous consequences where incentives or other contractual changes are agreed with employees to persuade them to remain with the business.
COURT CONSIDERS VALIDITY OF BENEFICIAL CONTRACTUAL CHANGES UNDER TUPE

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), changes to contracts of employment are void where the sole or main reason for the change is the TUPE transfer itself (Regulation 4(4)). In Ferguson and others v Astrea Asset Management Ltd, the Employment Appeal Tribunal (EAT) had to consider whether this provision applies to changes which are beneficial to employees, as well as those which are detrimental.

The four claimants in this case were employees of their own company, which provided estate management services to a single client. When the client terminated its contract and moved to Astrea Asset Management Ltd, this amounted to a service provision change under TUPE. Two months before the transfer, the claimants awarded themselves substantially enhanced ‘golden parachute’ terms, including guaranteed bonuses of 50% of salary, generous new contractual termination payments and enhanced notice periods. They were subsequently dismissed by Astrea for gross misconduct in relation to these new contracts and brought various claims, including a claim for their contractual termination payments.

The Employment Tribunal found that the amendments to the claimants’ terms of employment had been made by reason of the anticipated transfer and had no legitimate commercial purpose. The changes had been designed to compensate them for the loss of their business, knowing this would be paid at Astrea’s expense. Since TUPE provided that ‘any’ change due to the transfer was void, their claim failed.

The claimants appealed to the EAT, arguing that TUPE only applied to changes which were detrimental to employees. The EAT rejected this argument on two separate grounds. First, the relevant wording in TUPE refers to ‘any’ change, which on a literal interpretation includes both detrimental and beneficial changes. Second, the purpose of the underlying EU Directive to TUPE is to safeguard the existing rights of employees, not to improve them. The claimants had acted dishonestly in seeking an improper advantage and this amounted to an abuse of the TUPE provisions.

Most asset purchase agreements contain a provision that the seller will not change employees’ terms and conditions for a specified time prior to the transfer without the buyer’s consent. Outsourcing agreements also usually include a similar restriction on the contractor making any pre-transfer changes. Whilst the facts of this case are somewhat extreme, the decision confirms that even without such contractual protection, any changes made by reason of a TUPE transfer will be unenforceable, whether they are adverse or beneficial. This gives additional protection to buyers and incoming contractors where contractual benefits and notice periods have been enhanced by senior employees who suspect they may be dismissed after the transfer. Interestingly, it may also have anomalous consequences where incentives or other contractual changes are agreed with employees to persuade them to remain with the business.
AND FINALLY...

The Equality and Human Rights Commission (EHRC) has published guidance for employers on how to avoid discrimination in the workplace during the current crisis. This emphasises that even when making quick and difficult decisions, employers must not directly or indirectly discriminate against employees with protected characteristics under the Equality Act 2010, particularly female, disabled and older employees. The EHRC gives practical advice on how to avoid discrimination, such as involving employees in decision-making processes in a way which considers their protected characteristics; selecting individuals chosen for home working, reduced hours or furlough based only on business requirements; and setting up working arrangements in a way that does not disadvantage employees with protected characteristics.

Marking the 50th anniversary of equal pay law, Acas has published new guidance to help employers and employees understand the law around equal pay, which should be read in conjunction with the Equality and Human Rights Commission statutory code of practice. The guidance covers three main areas: an overview of the equal pay provisions of the Equality Act 2010, including an explanation of the difference between equal pay and the gender pay gap; preventing equal pay issues; and advice for employees who feel they are not getting equal pay. In order to minimise the risk of equal pay claims, Acas advises having an equal pay policy, up-to-date job descriptions that accurately reflect the work done, making sure men and women do not have different job titles where they do the same work, and ensuring consistency on pay and contractual terms. The equal pay policy should also explain how complaints will be dealt with.

Acas has published a guide dealing with grievance and disciplinary procedures during the coronavirus pandemic. This confirms that existing employment law and the usual Acas Code of Practice on Disciplinary and Grievance Procedures continue to apply. The guidance advises employers to consider whether it is fair and reasonable to carry on or start a disciplinary or grievance procedure while an employee is furloughed, following social distancing, or working from home. Given the stressful circumstances employees may be facing currently, employers should also consider their health and well-being. Acas suggests practical measures that employers can take if they do go ahead with a video meeting, such as ensuring that necessary evidence can be obtained from records kept in the office, witness statements can be seen clearly by everyone involved, interviews can be conducted fairly, and any necessary reasonable adjustments are made to allow anyone involved to use video technology. The guidance also confirms that the right to be accompanied at a disciplinary...
or grievance hearing still applies to a video meeting.

The Information Commissioner’s Office (ICO) has published a set of FAQs setting out the key data protection issues which must be addressed by employers before implementing any workplace testing procedures. Topics covered include advice on the lawful basis for testing; transparency in providing information to staff; exercise of data subject rights; security and confidentiality; demonstrating compliance and accountability; and data sharing and retention. The ICO confirms that as long as employers are not collecting or sharing unnecessary data, most of the data processing activities involved in workplace testing should be justified since they have a legitimate interest and legal obligation to ensure health and safety. However, what amounts to relevant and necessary data may alter as government guidance changes. The ICO stresses the need for transparency when using temperature checks and thermal cameras and reminds employers that any monitoring must be proportionate and necessary. Employers should also consider whether there are other less intrusive means that could be used. It is also important to note that failing to acknowledge changes in health could lead to unfair treatment, so testing data should be recorded on a system which employees can update confidentially and securely.

On 11 June 2020, regulations came into force introducing a temporary NICs and income tax exemption in respect of expenses reimbursed to employees for equipment purchased to enable homeworking, which would normally be taxable. The exemption is only available if the employee bought the equipment for the sole purpose of enabling them to work from home as a result of the coronavirus pandemic, and if the cost would have been tax exempt if provided directly by the employer. Private use of the reimbursed equipment should not be significant, and the exemption must also be available to all employees on similar terms. Although the regulations apply to reimbursements made during the 2020-2021 tax year, a discretionary exemption will apply for the period 16 March to 5 April 2020 when most homeworking will have started. Acas has published guidance for employers and employees on dealing with mental health during the pandemic. This reminds employers that they have a duty of care to support employees’ health, safety and well-being and should be in regular contact with staff to try and check on their mental health, remembering to approach any concerns sensitively and confidentially. Acas also suggests that employers might consider appointing a mental health ‘champion’ or setting up a mental health support group or mental health network with other businesses. Other options for improving mental health include workplace counselling, such as employee assistance programmes, or using a wellness action plan from the mental health charity, Mind.

...PRIVATE USE OF THE REIMBURSED EQUIPMENT SHOULD NOT BE SIGNIFICANT, AND THE EXEMPTION MUST ALSO BE AVAILABLE TO ALL EMPLOYEES...

and the report focuses on the widespread practice of underpaying apprentices. Currently around one in five apprentices earn less than their legal entitlement and the LPC suggests this could stem from a lack of clarity around the requirement to pay apprentices for their training hours. The report makes several recommendations to government for improving the minimum wage enforcement regime, including better evaluation of data collected from non-compliance investigations; monitoring the effect of increasing the threshold for naming employers found to have underpaid workers (from £100 to £500); and reviewing the regulations on records that must be kept by employers.