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EUROPEAN COURT RULING ON MULTIPLE TRANSFEREES APPLIES TO TUPE SERVICE PROVISION CHANGES

Summary: The Employment Appeal Tribunal (EAT) has held that the pre-Brexit ruling of the Court of Justice of the EU in *ISS Facility Services v Govaerts* applies to UK law, including to "service provision changes" (SPCs) under TUPE. The contract of employment of an employee who transfers under a SPC can, in principle, be split between multiple transferees (*McTear Contracts Ltd v Bennett*).

Key practice point: This decision means that, on a transfer or re-tendering, an employee who works across different parts of a business might have their employment contract divided up between multiple transferees. This is likely to cause uncertainty for transferees of part of a business as to whether they may be partly liable for contracts of employees.

Background: In the UK, the established authority on fragmented transfers has been *Kimberley Group Housing v Hambley*. The EAT in that case found that where there were two transferees of the parts of the business in which the employee worked, the rights and liabilities for that employee could not be split between them. The transfer had to be to the transferee receiving the greater volume of work. However, in *Govaerts*, the Court of Justice of the EU (CJEU) decided that an individual's employment contract could be transferred to each of the transferees in proportion to the tasks performed (see our Employment Bulletin June 2020).

Facts: A local Council re-tendered the work for replacement of kitchens within its social housing stock. All the work under the previous contract had been carried out by a single contractor (Amey). A group of Amey's employees had worked exclusively on the contract. Latterly those employees worked in two teams, each of which was capable of working independently of the other. When the work was re-tendered, it was split by the Council on north/south geographical lines into two separate contracts that were awarded to two new contractors.

The Employment Tribunal found that there were SPCs under Regulation 3 of TUPE between Amey and the incoming contractors and, applying *Kimberley*, that employment contracts transferred to the incoming contractors as allocated by Amey. The transferees appealed on the allocation of employees. Between the date of the Tribunal's judgment and the hearing of the appeal, the CJEU issued its decision in *Govaerts*.

Decision: The EAT allowed the appeal and sent the case back to the Tribunal to consider the application of *Govaerts*. The *Govaerts* decision was issued prior to 31 December 2020, the end of the transition period for the UK's exit from the EU. It is therefore "retained" EU law and must be applied to cases involving TUPE transfers. Whilst there is no requirement to apply *Govaerts* to the purely domestic provisions of TUPE, including the provisions on SPCs, the EAT said that it would be undesirable for there to be a difference in the approach taken to the application of TUPE dependent upon whether the transfer was an SPC or a regular TUPE transfer.

The EAT explained that, although there is well-established authority that an employee cannot have "two masters" at the same time on the same work, this does not prevent the employee from having different employers on different jobs. Issues of allocation of time are not necessarily insurmountable. The EAT concluded that there is no reason in principle why an employee may not, following a transfer, hold two or more contracts of employment with different employers at the same time, provided that the work attributable to each contract is clearly separate from the work on the other(s) and is identifiable as such. The division on geographical lines of work previously carried out under a single contract into two new contracts is a situation where there could be different employers on different jobs.

Analysis/commentary: Employment Tribunals and the EAT have to follow *Govaerts* - only the Court of Appeal or higher courts are not obliged to do this. Therefore, unless this or another case goes to the Court of Appeal, or the Government makes amendments to TUPE, *Govaerts* will remain the law. In the meantime, it is unclear how it will be applied in practice; for example, whether Tribunals will make findings on the split of contracts of employment in every case where there are fragmented transfers and what the mechanism will be used for determining how contracts should be split between employers.

SUPREME COURT CONFIRMS DRIVERS WERE WORKERS NOT SELF-EMPLOYED

Summary: The Supreme Court has unanimously dismissed Uber's appeal against the Court of Appeal's decision that its drivers were "workers" under the Employment Rights Act 1996 rather than self-employed. It was wrong to treat the written agreements as a starting point, as the rights asserted by the claimants were not contractual but created by legislation. The Supreme Court also held that time spent "working" for Uber was not limited to periods when drivers were driving passengers, but included any period when the driver was logged into the Uber app and was ready and willing to accept trips (*Uber BV v Aslam*).

Key practice point: The key finding of the Supreme Court was that the determination of worker status should take into account the purpose of the legislation and focus on the reality of the situation rather than the written agreements. There is no suggestion that these principles do not also apply to claims about "employee" status.

Facts: The written documentation issued to Uber drivers indicated that they were self-employed. However, the Employment Tribunal ruled that a group of drivers were "workers" rather than self-employed and as such were entitled to paid holiday, the minimum wage, and whistleblower protections. The EAT and Court of Appeal upheld that decision, the Court of Appeal confirming that the Employment Tribunal was entitled, under the principle established by the *Autoclenz* case, to look beyond the contractual documentation describing drivers as self-employed contractors, which it found did not accord with the actual working arrangements (see our Employment Bulletin January 2019).

Decision: The Supreme Court confirmed the Court of Appeal's decision. In line with *Autoclenz*, it was wrong to treat the written agreements between the drivers and Uber as a starting point. The rights asserted by the claimants were not contractual but created by legislation which was intended to give protection to vulnerable individuals in a weak bargaining position.

As the written agreements were not the appropriate starting point, the true agreement had to be gleaned from the circumstances. The Tribunal had found that the service performed by drivers was very tightly defined and controlled by Uber; drivers were in a position of subordination and dependency such that they had little or no ability to improve their economic position through professional or entrepreneurial skill. In practice, the only way in which they could increase their earnings was by working longer hours while constantly meeting Uber's measures of performance.

The Supreme Court picked out five aspects as justifying this conclusion:

1. As Uber set the fare, it dictated how much drivers were paid.
2. The contract terms on which drivers performed their services were imposed by Uber.
3. Once a driver had logged onto the app, the driver's choice about whether to accept requests for rides was constrained by Uber, for example by imposing a penalty if too many trip requests were declined or cancelled (by automatically logging the driver off the app for 10 minutes).
4. Uber exercised significant control over the way in which drivers delivered their services, for example by the use of a ratings system.

5. Uber took active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride.

For the purposes of the meaning of "working time" in the Working Time Regulations, and "unmeasured work" for the minimum wage, time spent by the drivers working for Uber was not limited to periods when they were driving passengers, but included any period when the driver was logged into the app (within the territory in which the driver was licensed to operate) and was ready and willing to accept trips.

Analysis/commentary: The decision confirms that the emphasis in worker status cases will be on considering the facts of the relationship between the workers and the "employer". The point about the drivers being economically dependent on Uber was significant; there are other cases in the pipeline which may consider factors such as this in the assessment of the degree of control exercised by the employer. In the meantime, there is no indication that the Government is considering legislative reform of worker status in the near future.

EMPLOYMENT TRIBUNAL MISAPPLIED PUBLIC INTEREST TEST IN WHISTLEBLOWING DETRIMENT CASE

Summary: The EAT has provided further guidance on the requirement for whistleblowers to have a reasonable belief that their disclosures are made in the "public interest" in order to be protected from detrimental treatment. The EAT found that a solicitor's disclosures that his firm had overcharged one client were capable of being in the public interest (*Dobbie v Felton*).

Key practice point: This decision confirms that "public interest" has a broad scope and that even relatively narrow complaints can qualify as protected disclosures. In a regulatory environment, a disclosure may raise matters of public interest simply because it relates to rules in place to protect the public. In addition, public interest need not be the whistleblower's only motivation.

Facts: D worked for a firm of solicitors as a consultant. He alleged that the firm had overcharged one client and claimed that he had been subject to detriments as a result of his disclosures, including the termination of his consultancy agreement. The Employment Tribunal found that D had not made disclosures qualifying for protection under Section 43 of the Employment Rights Act 1996 because he did not reasonably believe that the disclosures were in the public interest. D appealed.

Decision: The EAT allowed the appeal and returned the case to a fresh tribunal. The Employment Tribunal had not considered properly the relevant factors on public interest set out by the Court of Appeal in *Chesterton Global Ltd v Nurmohamed* (see our Employment Bulletin October 2019):

1. The number in the group whose interests the disclosure served - the Tribunal had not considered whether the protection of one client alone could in fact have served the wider interests of a section of the public.
2. The nature of interests affected and the extent to which they were affected by the alleged wrongdoing.
3. The nature of the wrongdoing – in this case, there were potential regulatory breaches.
4. The identity of the alleged wrongdoer – the employer, as a firm of solicitors, was subject to specific requirements of honesty and integrity.

The EAT pointed out that the disclosures could have advanced a general public interest in solicitors' clients not being overcharged and in solicitors complying with their regulatory requirements. Even if D's primary motivation had been his own personal situation (such as the fact that some of his time had been written off), that would not have prevented the disclosure from being made in the public interest. The public interest requirement in the whistleblowing legislation was intended to exclude matters that are purely of personal interest to the individual making the disclosure.

Analysis/commentary: The EAT commented that disclosures can be in the public interest even if they are about a specific incident without any likelihood of repetition, or contain information relevant to one person only, or will not come to the attention of the public.

GENDER PAY GAP REPORTING DEADLINE SUSPENDED UNTIL OCTOBER 2021

The Government Equalities Office (GEO) has announced that employers will have an additional six months to report their gender pay gap (GPG) information for 2020/2021. The deadline for private employers under the GPG Regulations would normally be 4 April 2021, but all employers now have until 5 October 2021 to report their GPG information.

"Snapshot" dates for calculating the GPG figures are unchanged, so for this year's reporting the snapshot date is 5 April 2020, and for next year it will be 5 April 2021.

The GEO has also confirmed that employers are not expected to report data for 2019/20 (when reporting was suspended entirely) but if they wish to report, they can do so using the Gender pay gap service.

EMPLOYER'S "ALL REASONABLE STEPS" DEFENCE TO HARASSMENT CLAIM REJECTED

Summary: The EAT confirmed that an Employment Tribunal was entitled to reject an employer's defence, to a claim of harassment on grounds of race, that it had taken "all reasonable steps" to prevent the harassment. The Tribunal had found that, although the employer had provided equality and diversity training, this had become "stale and ineffective". A further reasonable step would have been to provide refresher training (*Allay (UK) Ltd v Gehlen*).

Key practice point: This decision suggests that the existence of equality and diversity policies and procedures and training may not be sufficient to establish an "all reasonable steps" defence if they are not reviewed and updated on a regular basis and enforced in the workplace.

Facts: After being dismissed in September 2017, G complained of harassment on the grounds of race by another employee (P). An investigation was carried out and P was found to have made discriminatory comments on a regular basis during G's 11 months of employment. The employer's latest equal opportunity policy and anti-bullying and harassment procedure dated from February 2016 and P had undergone bullying and harassment training (under a predecessor policy) in 2015. Following G's complaint, he underwent further training.

G brought a harassment claim. The employer sought to rely on the defence under Section 109 of the Equality Act 2010: that it took "all reasonable steps" to prevent P from committing discriminatory acts. The Tribunal rejected the defence, finding that the equality and diversity training was "stale and ineffective" and that a reasonable employer would have provided refresher training.

Decision: The EAT rejected the employer's appeal and confirmed that it was unable to rely on the defence. It is not sufficient merely to show that there has been training; consideration has to be given to the extent to which it was likely to be effective. "Brief and superficial training" is unlikely to have a substantial effect in preventing harassment. In addition, if there are any other steps that should reasonably have been taken to prevent harassment (such as further training), the defence will fail even if that step would not have prevented the harassment that occurred.

The EAT pointed out that the Tribunal did not conclude that the training was stale merely from the fact that P had made discriminatory comments. Incidents of comments by P were witnessed and reported to managers and other employees but not followed up. The employer, through their managers, knew that harassment was taking place but did not take action to prevent it. That was sufficient evidence for the Tribunal to conclude that, although less than two years old, the training was no longer effective.

Analysis/commentary: It appears that the problems for the employer stemmed from a lack of enforcement of their policies. The EAT concluded that training had not been effective, relying on the fact that managers had become aware that, despite the training, incidents of harassment continued and that employees' behaviour demonstrated that they did not understand the importance of preventing and reporting it. This should have served as notification to the employer that they needed to renew or refresh the training, even if refresher training would not usually have been provided within such a timescale.

HORIZON SCANNING

What key developments in employment should be on your radar?

6 April 2021	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies
6 April 2021	Changes to income tax treatment of some post-employment notice payments on termination
1 July 2021	Employers to contribute to the Coronavirus Job Retention Scheme
30 September 2021	Scheduled end of the Coronavirus Job Retention Scheme
5 October 2021	Deadline for reporting 2020 gender pay gap data

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status:** *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers); *IWGB v CAC* (Court of Appeal: whether couriers are workers for trade union recognition purposes); *Smith v Pimlico Plumbers Ltd* (Employment Appeal Tribunal: claim for arrears of holiday pay following Supreme Court decision on worker status)
- **Discrimination / equal pay:** *Asda Stores v Brierley* (Supreme Court: whether workers in retail stores could compare themselves with those working in distribution depots for equal pay); *Efobi v Royal Mail Group* (Supreme Court: test for shift of burden of proof); *Forstater v CGD Europe* (Employment Appeal Tribunal: whether views on transgender women were protected as a philosophical belief); *City of London Police v Geldart* (Court of Appeal: whether sex discrimination claim based on pay during maternity leave requires a male comparator); *Lee v Ashers Baking Co* (European Court of Human Rights: whether refusal to provide cake supporting gay marriage is discrimination in provision of goods and services)
- **Redundancy:** *Gwynedd Council v Barratt* (Court of Appeal: whether restructuring selection procedure was fair)
- **Working time:** *Chief Constable of the Police Service of Northern Ireland v Agnew* (Supreme Court: backdated holiday pay claims); *East of England Ambulance Service v Flowers* (Supreme Court: whether holiday pay must include regular voluntary overtime).

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