WRIGLEYS
SOLICITORS

EMPLOYMENT LAW BULLETIN

MARCH 2021

Welcome to the Wrigleys Employment Law Bulletin, March 2021.

We hope a few days of warmer weather and the (very slow) beginning of lockdown restrictions have brought a more Spring-like feel to our readers. However, the Spring budget announced at the beginning of March suggested that the impact of Covid on the economy will continue to be felt for many months. In our first article we review the extension of the furlough scheme and other key budget announcements for employers.

Postponed last year because of the pandemic, many organisations have been preparing for April's changes to the off-payroll working rules (often known as "IR35") for some considerable time. In our second article we highlight the changes, but also the broader considerations of engaging consultants and other individuals under a contract for services.

There seems to have been a rash of important employment law cases of late. Although it does not set a precedent, we cover the interesting employment tribunal case of ***Kubilius v Kent Foods Limited*** which involved an employee who refused to wear a face mask despite clear instructions from a client.

In ***Page v NHS Trust Development Authority*** and ***Page v The Lord Chancellor and The Lord Chief Justice***, we consider two Court of Appeal judgments concerning complaints raised by the same individual about alleged discrimination on the ground of religion or belief following expressing his views on same sex couples adopting children.

We also report on the potentially far-reaching EAT judgment in ***McTear Contracts Ltd and others v Bennett and others*** which suggests that employees can transfer to two different employers on a TUPE service provision change.

We will be talking through the implications of this last case, other recent TUPE case law and reminding delegates of some key TUPE basics in our upcoming webinar on 13 April. We hope you can join us – please see the link below to book your free place.

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

Forthcoming webinars:

- **13 April 2021, Webinar**
  Employment Brunch Briefing
  TUPE Update
  Speakers: *Sue King, partner & Alacoque Marvin, solicitor at Wrigleys Solicitors*
  Click here for more information or to book

Recorded employment law webinars:

- **Employment law update series: Flexible working: Part I - building a balanced society**
  16 June 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Flexible working: Part II - re-organisation and flexible working**
  7 July 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - transgender discrimination**
  4 August 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - disability and reasonable adjustments**
  1 September 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - atypical working, zero hours and ethical issues**
  6 October 2020, Webinar
  Click here for more information or to view webinar

- **Employment Brunch Briefing: What's new in employment law?**
  1 December 2020, Webinar
  Click here for more information or to view webinar

- **Employment Brunch Briefing: Data protection update for employers**
  2 February 2021, Webinar
  Click here for more information or to view webinar

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

Contents

Overview of employment aspects of the Spring 2021 Budget

Article published on 11 March 2021

Budget announcement signals more of the same for 2021.

Chancellor Rishi Sunak's statement on 3rd March 2021 contained a number of announcements on key matters concerning employment, largely around the ongoing Coronavirus Job Retention Scheme (CJRS) and its further extension into 2021. Below we have highlighted some of the key takeaways for employers.

Continuation of the CJRS

The Chancellor announced that the CJRS will be extended for a further five months from the end of April to the end of September 2021. Employees will continue to receive at least 80% of their current salary for hours not worked and there will be no employer contributions beyond national insurance contributions and pension contributions in April, May, and June. However, from July the government will introduce employer contributions to top up wages for unworked hours to at least 80%. The CJRS grant will cover 70% of furloughed wages from July onwards with employers paying at least a 10% top up. From August until the end of the scheme, the grant will cover 60% of furloughed wages and employers will pay at least a 20% top up. Employees will continue to be able to work some hours and to be furloughed for others on a flexible basis.

Statutory Sick Pay Rebate Scheme

At this time, employers with fewer than 250 employees can apply to HMRC for reimbursement of two weeks' SSP per eligible employee for sickness absence due to Covid-19.

Employers with fewer than 250 employees on 28 February 2020 across all their PAYE payroll schemes will continue to be able to reclaim up to two weeks of eligible SSP costs per employee. The scheme is intended as a temporary Covid-19 measure to support employers while levels of sickness absence are high. The government will set out steps for closing this scheme in due course.

Covid-19 Fraud

The chancellor announced that the government will invest over £100 million into a Tax Payer Protection task force at HMRC, who will be charged with combatting fraud within the Covid-19 support packages, including the CJRS and self-employed schemes. This represents one of the largest responses by HMRC to a fraud risk. In addition, the government will raise awareness of enforcement action in order to deter fraud.

Traineeships and Apprenticeships

On 28 January 2021, the government announced that employers who created new traineeship opportunities could apply for a cash payment of £1,000 for each trainee they take on up to a maximum of 10 trainees. The scheme will be available until 31 July 2021 and employers can claim the cash incentive for all work placements that have been completed since 1 September 2020.

The Chancellor announced that the government will provide an additional £126 million in England for high quality work placements and training for 16 to 24 year olds in the 2021-2022 academic year. Employers who provide trainees with work experience will continue to be funded at a rate of £1,000 per trainee.

As part of its Plan for Jobs, the government had previously announced that apprenticeships would be supported by bonuses, with employers entitled to a payment of £2,000 for each young apprentice they take on under the age of 25 and £1,500 for each apprentice aged 25 or over. The

Chancellor announced that payments made to employers in England who hire new apprentices will be extended and increased. Employers who hire a new apprentice between 1 April 2021 and 30 September 2021 will receive £3,000 per new hire. This is in addition to the existing £1,000 payment that the government provides for all the new 16 to 18 year old apprentices and those aged under 25 with an education, health and care plan, where that applies.

The government will also introduce a £7 million fund from July 2021 to help employers in England set up and expand portable apprenticeships. This aims to enable people who need to work across multiple projects with different employers to benefit from the high-quality, long-term training that apprenticeship provides. The aim is also for employers to benefit from access to a diverse pool of apprenticeship talent. Employers will be invited to bring forward proposals as will the Creative Industries Council in recognition of the potential benefits of this new approach for the creative sector.

Comments

The Chancellor's latest budget statement did not contain any radical new proposals for employment in the UK. At this time, the emphasis is still on guiding the UK economy through the difficulties posed by the ongoing pandemic and trying where possible to keep people in work and keep business viable so that they are in place once the lockdown is over.

Cautiously, the key announcements on continuing support maintain the idea that the government expects 2021 to be the year in which the UK emerges from lockdown into more familiar working practices.

IR35, off-payroll working and the tricky question of employment status

Article published on 26 March 2021

Upcoming rule changes and what organisations should know.

On 6 April 2021, changes are being made to the off-payroll working tax rules (often referred to as "IR35"). These changes will impact on medium and large-sized organisations in the private and third sectors if they engage an individual through an "intermediary". We give a brief summary of the changes below. We recommend that organisations which may be caught by these rules take prompt legal, accountancy and/or tax advice to ensure they are ready to comply. HMRC guidance on the new rules is available at https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10000.

A key point to highlight is that the new rules will not be relevant for organisations contracting directly with self-employed individuals rather than through intermediaries. However, there are other important tax and employment law risks to be aware of if this is the case. These are explored further below.

The off-payroll working rules

These rules are designed to ensure that income tax and National Insurance contributions (NICs) are deducted at source from payments where an individual would be the employee of the end user organisation if their services were not provided to the organisation through a contract with a company or other legal entity (an "intermediary"). This is called being in "deemed employment".

An intermediary is, very broadly speaking, a company or partnership in which the individual has an interest (for example more than 5% of the ordinary share capital). It can also be another individual, such as a gangmaster. An agency in which the individual has no interest will not be an intermediary

under the off-payroll working rules, although other employment tax rules apply in that case. Commonly, the intermediary will be the individual's own personal services company.

The rules look through the contractual arrangements and apply broadly equivalent deductions to those made for direct employees of the end user. If the individual is assessed to be in deemed employment, income tax and NICs must be deducted at source and the employers' NICs must be paid. The question is, who must carry out this assessment or "status determination" and make the deductions?

Public sector organisations which use the services of individuals provided by intermediaries are already responsible for this employment status assessment and for making deductions at source. These organisations will, however, be subject to some additional obligations from 6 April onwards, including a requirement to issue a Status Determination Statement (SDS).

Up until 6 April 2021, where an intermediary contracts with an end user in the private and third sector, it is always the intermediary which is responsible for determining the employment status of the individual for tax purposes and making any necessary deductions. From 6 April onwards, this responsibility will pass to the end user unless it is classified as "small".

Which organisations will be caught by the new off-payroll working rules?

From 6 April 2021, medium and large-sized organisations in the private and third sectors with a UK connection will have to determine employment status, issue a SDS and deduct PAYE and NICs at source before making payments to the intermediary.

An organisation will be caught by these new rules if it is medium or large-sized. Details of what this means for different legal entities can be found at https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10006.

A company will be medium or large-sized if it meets at least two of the following criteria for two consecutive financial years:

- turnover of more than £10.2 million;

- a balance sheet of more than £5.1 million;

- an average of more than 50 employees.

If the parent of a group is medium or large-sized, their subsidiaries will also have to apply the off-payroll working rules, no matter the size of the subsidiary.

Some entities are assessed on turnover alone, such as unincorporated entities and general partnerships. Charities do not need to include donations in the calculation of turnover.

Small entities will not have to issue a SDS, but they will have to confirm their size when asked by the contractor or individual.

Checking employment status for tax

HMRC has a useful employment status checking tool (CEST) which is available at https://www.gov.uk/guidance/check-employment-status-for-tax. The output from CEST can be used to form the SDS, although other formats can also be used.

Organisations must take reasonable care when determining the employment status of a worker. Failure to do so will result in the organisation taking on responsibility for paying the individual's income tax and NICs.

Contracting with a "self-employed" individual: are they really an employee or worker?

Employment status for tax purposes

If an individual is determined to be in "deemed employment" by the end user organisation, this does not mean that they are employed by that organisation and the end user will not become liable for employees' or workers' rights for the individual.

However, IR35 and the off-payroll working rules are by no means the whole story. The upcoming changes are part of an on-going drive by HMRC to ensure that employment taxes are collected where there is an employment relationship between the parties. HMRC is also keen to ensure that deductions are properly applied where directly engaged individuals are labelled as self-employed but in reality they are in employment for tax purposes.

Separate to the IR35 issue, there is a risk that "self-employed" individuals engaged directly under a contract for services could be found to be employed for tax purposes. This could give rise to HMRC demands for tax / NICs arrears, interest and penalties. Because of this, even though the off-payroll working rules do not apply, organisations should consider whether their self-employed consultants or similar may be employees for tax purposes.

There is also a risk that an employment tribunal could find that an individual supplied by an intermediary is the worker or employee of the end user organisation for employment law purposes, no matter whether the off-payroll working rules apply for tax purposes. We reported on such a case in a previous article: Can someone who is paid through their own limited company be a worker or employee?

Employment status under employment law

If the reality of the working arrangement suggests an employment or worker relationship (no matter what the contract says), there is a risk that an individual could be found to be an employee or a worker for employment law purposes.

Workers are entitled under employment law to such rights as the National Minimum Wage, pension auto-enrolment, sick pay and statutory paid holiday.

Employees have additional rights, including the right not to be unfairly dismissed, to statutory minimum notice and redundancy pay.

Employment status is not a straight-forward area of the law and different cases turn on their particular facts. There has however been a recent line of cases in which individuals were initially happy to be treated as self-employed but subsequently have been found to be workers or employees. This usually happens after the relationship sours, when the individual becomes ill and/or their contract is terminated. The Supreme Court's recent decision that Uber drivers are workers confirms the recent trend (for further details see our case report: Supreme Court confirms that Uber drivers are workers after denying appeal).

Employment tribunals, HMRC and the tax tribunal take a similar approach to this question. HMRC makes no distinction however between workers and employees – both categories are in employment for tax purposes. It is also important to note that a decision by HMRC or the tax tribunal will not automatically lead to the same decision in the employment tribunal, and vice versa.

We set out below the key factors which tribunals will consider when deciding on employment status.

When will someone be genuinely self-employed?

- The individual can and does in reality arrange for and pay a substitute to carry out the work when they are unwilling or unable to carry it out;

- There is equal bargaining power between the parties – for example because of the individual's specialist skills;

- The individual is clearly in business on their own account – for example, they might be engaged by many others and market their services broadly;

- The individual takes a financial risk in the arrangement – for example payment only on satisfactory completion of the project;

- The individual decides how and when the work is done – there is little day to day control or line management by the end user;

- There are no or few restrictionson the business of the individual outside the arrangement, such as restrictive covenants applying after the contract ends;

- The individual is not integrated into the client organisation – for example, they do not represent the business or have to comply with company procedures.

When will someone be a worker?

- The individual must do the work themselves – providing personal service rather than sending a substitute to carry it out;

- The individual is controlled and managed by the end user in terms of how and when the work is done;

- The individual is part of the organisation and has to comply with rules, policies etc;

- They are not in business on their own account;

- The individual is subordinate to the end user organisation.

When will someone be an employee?

- The factors above applying to a worker are in place to a high degree;

- The end user is obliged to provide the individual with regular work and they must accept that work when it is offered (known as "mutuality of obligation").

What should organisations do now?

Many organisations have planned for the change to the off-payroll working rules for some time, as they were originally due to come in last year and postponed because of the Covid pandemic.

Those organisations which have not considered this issue should begin by reviewing their arrangements with consultants and other individuals who are not on the payroll as a matter of urgency. The CEST tool is a good place to start to assess whether this is an issue for the organisation.

We recommend that organisations take professional advice on the impact of the new tax rules where individuals are provided through an intermediary. However, it is also important to consider

and take advice on the broader risk of contractual arrangements with individuals which may in reality be employment relationships.

Tribunal finds that dismissal of driver for refusing to wear a mask was fair

Article published on 3 March 2021

Employer was entitled to dismiss in circumstances surrounding the refusal.

The Covid-19 pandemic has seen many working practices change, with a variety of measures brought in to lessen the perceived risks of staff infecting one another whilst at work.

Employers are subject to a raft of health and safety obligations which impose minimum standards and expectations in respect of the steps they take to ensure the safety of their staff and anyone else who works on, or visits, their worksites.

A recent employment tribunal case considered whether it was fair for an employer to dismiss an employee who refused to wear a mask when asked to do so on a customer's site.

Case: ***Kubilius v Kent Foods Limited***

In May 2020 Mr Kubilius's work as a driver for KFL took him to Tate & Lyle's Thames refinery site, a major customer of KFL. Upon entry to the site, Mr Kubilius was given a health and safety information sheet covering the site and a mask.

Whilst parked up, another employee on the site motioned to Mr Kubilius to put his mask on whilst he sat in his lorry cabin. Mr Kubilius refused, and he refused again when a site manager also asked him to put his mask on, despite the site manager setting out that this was T&L's policy. Mr Kubilius's refusal was on the grounds that wearing his mask was not on the health and safety information sheet he was given when he entered the site and he considered his lorry cabin to be his workplace and, at the time, government guidance did not force workers to wear face coverings whilst at work. Mr Kubilius was warned that if he refused to comply he would be banned from the site, but he continued to refuse before he eventually left.

T&L contacted KFL and informed them that Mr Kubilius had been banned from their Thames refinery for refusing to follow health and safety protocol while on site. It was a requirement of KFL's employee handbook that staff were expected to be courteous to customers and to comply with customer requirements regarding health and safety. The handbook made it clear that customer relationships were key to the business's success. KFL decided the matter was a conduct issue and began disciplinary proceedings.

At his disciplinary, Mr Kubilius made the same arguments to KFL that he had to T&L staff - that the health and safety information provided to him by T&L did not state he had to wear a mask in his lorry cabin, and that he, in effect, did not need to comply because his lorry cabin was his workplace and it was not the law that workers had to wear face coverings whilst in their workplace.

KFL decided to dismiss Mr Kubilius on the grounds that he failed to comply with a customer health and safety requirement. The dismissing manager considered that Mr Kubilius had potentially damaged the customer relationship by his refusal. The manager also decided that this type of behaviour may happen again because of Mr Kubilius' refusal to apologise and the fact that he had shown no remorse or reflection. Because T&L had refused to rescind the site ban, it was effectively impossible for Mr Kubilius to perform his role and no other roles were available.

Mr Kubilius did not appeal the decision and brought an unfair dismissal claim.

Tribunal decision

The employment tribunal considered that KFL's decision to dismiss Mr Kubilius was reasonable. Although another employer might have stopped short of dismissal and issued a warning, the tribunal held that dismissal was within the range of reasonable responses.

The Tribunal considered that KFL had a genuine belief that Mr Kubilius was guilty of misconduct, that it had carried out a reasonable investigation and there were reasonable grounds to conclude that Mr Kubilius had committed an act of misconduct because his actions specifically went against the staff handbook. The overall disciplinary procedure had been fair and given all the circumstances, including the customer relationship, the fact that Mr Kubilius was banned from the customer's site, and his lack of remorse, it was reasonable to decide to dismiss him.

Conclusion

Despite the headline-grabbing aspects of this case it does not set a precedent about the use of masks at work but it is an interesting example of how misconduct dismissals relating to Covid-19 health and safety procedures might be approached by a tribunal. The key takeaway here is that an employer will in some circumstances have grounds to treat refusal to follow health and safety guidance as a misconduct issue. However, such rules must be clearly communicated and management instructions will need to be reasonable and take individual circumstances into account (such as medical issues).

KFL relied on broad obligations imposed on staff to be courteous to customers and to follow customer health and safety instructions to justify Mr Kubilius's dismissal. However, it is worth noting that the decision to dismiss Mr Kubilius may not have been found to be fair had T&L agreed to rescind the site ban and/or Mr Kubilius had shown remorse for his actions.

This case may provide some comfort to employers who are faced with instances of staff refusing to comply with health and safety requirements on the grounds that they are not compelled to do something by the law. In this case, Mr Kubilius's insistence that he could not be forced to wear a mask in his cabin unfortunately ran counter to his obligations to his employer and, taking into account all the circumstances surrounding his refusal, ultimately put his employer's decision to dismiss him within the range of reasonable responses to his actions.

Non-executive director removed from NHS Trust for expressing views on adoption was not discriminated against

Article published on 22 March 2021

Court of Appeal decision highlights careful balance between freedoms and limitations of expression.

In 2019 we highlighted a decision of the EAT that a former magistrate, Mr Page, had not been discriminated against for his views about same-sex marriage and adoption issues in relation to his loss of his role as an NHS Trust director.

Mr Page subsequently appealed the decision and this matter has now been heard alongside his parallel appeal against the EAT decision in respect of him losing his position as a magistrate.

Case: *Page v NHS Trust Development Authority*

An outline of the facts in the case is available from our 2019 article '*Was a Christian NHS Trust Director discriminated against for expressing his views on same-sex couple adoption?*'. Mr Page appealed the EAT's decision on broad grounds, contending that the EAT had been wrong to uphold the original tribunal's decision that the actions of the Trust had not been directly or indirectly

discriminatory or amounted to harassment or victimisation. In addition, he appealed against the findings that his rights under the European Convention on Human Rights (ECHR) were not infringed.

The Court of Appeal concluded that the EAT and original tribunal had been right to find that there was a non-discriminatory reason for the Trust to suspend and then not reinstate Mr Page as a non-executive director. The issue was not Mr Page's particular beliefs but the way in which he engaged with the media, particularly because Mr Page had failed to notify the Trust of the loss of his role as a magistrate and the subsequent media exposure which followed. This was compounded by the fact that Mr Page failed to discuss proposed media appearances with the Trust after the Trust had asked him to do so. The decision was also based on the Trust's concern that Mr Page's views could impact on the Trust's ability to engage with the local LGBTQ community, in contravention of its equality duty.

On the issue of whether the actions against Mr Page had infringed his Article 9 (freedom of thought, conscience and religion) and 10 (freedom of expression and information) rights under the ECHR, the court highlighted the important difference between the freedom to hold these beliefs and the freedom to manifest them. The Articles themselves are clear that the extent to which beliefs could be manifested was limited.

In this case, the court determined that the issue of whether Mr Page had in fact manifested his beliefs by giving interviews was moot because Mr Page's right to do so was clearly subject to limitations in the interests of health or morals, as was established in this case due to his role as a non-executive director in an NHS Trust with obligations to engage the LGBTQ community.

All grounds of appeal were dismissed.

Comment

Possibly out of concern for how its decision may be seized by certain groups, the lead decision in this case took time to set aside the legal issues at hand and address the broad argument put forward by Mr Page's barrister.

The court was keen to highlight that by denying this appeal, it did not follow that it would become impossible or more difficult for Christians holding traditional views about sexual identify and morality to hold any kind of public office, as had been argued, and that this case was not about Mr Page's beliefs but the limits on his public expression of them in the specific context of his case.

The court opined that it was true that Christians should not be expected to remain silent about their beliefs simply because they may be unpopular or offensive to others, and therefore potentially embarrassing to their employer. However, the court stressed that it is clearly the case that the freedom to manifest those beliefs was not unlimited and there will be circumstances in which it is right to expect those with genuinely held beliefs to accept some limitations on how they express them, particularly on sensitive matters. This will be especially so for those who work in public institutions and/or in senior positions because of the impact expressing those views may have on the public perception of the institution.

For this reason, such cases will continue to be determined on their specific facts and, where ECHR rights to freedom of manifesting beliefs and religion are concerned, there will always be the need to properly weigh and assess the degree to which those rights are engaged and the associated freedoms are restricted.

Magistrate was not victimised on grounds of his religious belief

Article published on 22 March 2021

Court of Appeal dismisses latest in series of cases brought by former magistrate.

In 2019 we highlighted a decision of the EAT that a former magistrate, Mr Page, had not been discriminated against for his views about same-sex marriage and adoption issues in relation to his loss of his role as an NHS Trust director. Mr Page's claims against the NHS Trust have now been dealt with in the Court of Appeal – see our article '*Non-executive director removed from NHS Trust for expressing views on adoption was not discriminated against*' for more on this.

That case formed part of a parallel challenge Mr Page has pursued through the employment tribunals against the NHS Trust in question and, separately, against the Lord Chancellor (LC) and Lord Chief Justice of England and Wales (LCJ) in respect of him losing his role as a magistrate.

As well as denying his claim against the NHS Trust, the EAT separately denied Mr Page's appeal against an employment tribunal's decision that he had not been discriminated against by the LC and LCJ when they decided to remove him from the magistracy. In this matter, Mr Page was granted leave to appeal on the issue of his claimed victimisation for expressing his religious beliefs.

Case: ***Page v The Lord Chancellor and The Lord Chief Justice [2021]***

The key question before the Court of Appeal was whether the employment tribunal and EAT were correct in their treatment of a televised interview Mr Page had engaged in with the BBC in 2015. Mr Page argued that the tribunal and EAT had failed to properly characterise his words in the BBC piece as a 'protected statement' in which he was, in effect, stating he had been discriminated against for being a Christian. Importantly, during this interview, Mr Page expressed that he felt his duty as a magistrate was to act in the best interests of a child and that meant, in his view, avoiding placing a child with a single parent or parents of the same sex unless there was no other option.

Specifically, the Equality Act 2010 (EA2010) provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act. A 'protected act' for these purposes includes making an allegation that A has contravened the EA2010 (for instance by alleging that A has acted in a discriminatory manner towards them).

'Because' in this context refers to the reason why the alleged victimiser acted in the way complained of, and it will be enough that the protected act was one of the reasons for the action taken by the victimiser.

The court found that Mr Page's appeal on victimisation was not, in fact, made against a decision the EAT and tribunal had made because the tribunal had accepted that Mr Page made a protected statement in the wider context of the BBC piece. For this reason, the court dismissed the appeal as it found that the tribunal and EAT were right to find that Mr Page's dismissal was because he had expressed personal biases which brought his impartiality into question which in turn caused concern that he was undermining public trust and confidence in the judicial system, and not because he had been subject to victimisation as a result of his interview on the BBC.

Comment

The full judgment gives a clear sense of the court's frustration in respect of how Mr Page and his representatives went about making their claims and subsequently in how they had gone about particularising the grounds of appeal. The appeal was so fundamentally flawed that the panel of

judges hearing the case did not ask the barrister acting for the LC and LCJ to appear before them.

Nonetheless, the comprehensive judgment of the court underlines the key to understanding whether or not an individual is victimised for having a protected characteristic.

As had been clearly established in this case by the tribunal and reinforced by the EAT, the decision to discipline and ultimately remove Mr Page from his role as a magistrate was not 'because' he had claimed he had been discriminated against. Rather, actions were taken because Mr Page had expressed views which brought into question his ability to uphold his oath to fairly apply the law based on the facts in the case before him and disapply his own biases or beliefs.

This further underlines the importance of employers being clear about the grounds on which they take action against staff and being clear that this is non-discriminatory to protect themselves against discrimination claims.

TUPE: a tale of one man two guvnors?

Article published on 23 March 2021

EAT decides employees can transfer to more than one employer in a service provision change.

TUPE can be complicated. Particularly so where a service is fragmented between multiple contractors on retendering. An employment tribunal judge recently described the process of working out how a fragmented service impacted on employees as being "like trying to disentangle a bowl of spaghetti". When a service becomes so split after a provision change that it is impossible to trace where an employee should transfer, a tribunal will usually find that no service provision change TUPE transfer (SPC) has taken place.

On the other hand, if the tribunal can track the transfer of an employee's activity to a new provider, they will usually find employment has transferred to that provider (or at least the liability for the employee's dismissal). In an important recent case, the EAT has changed the way tribunals should approach this tracking exercise and made it more likely that an employee will find themselves the servant of two masters after a transfer.

What is a service provision change?

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), a SPC will occur where one of the following takes place:

1. Outsourcing: activities cease to be carried out by a client on its own behalf and are carried out instead by a contractor on the client's behalf;
2. Re-contracting: activities cease to be carried out by a contractor on a client's behalf and are carried out instead by a subsequent contractor on the client's behalf; or
3. Insourcing: activities cease to be carried out by a contractor on a client's behalf and are carried out instead by the client on its own behalf (often known as "taking the service back in house").

Additionally, a SPC will only take place if:

- The client is the same before and after the transfer;

- Activities are fundamentally the same before and after the transfer; and

- There is an "organised grouping of employees" specifically dedicated to carrying out the activities for the client (and employees will transfer if they are assigned to that organised grouping).

In some re-contracting scenarios, the organisation of the service after the transfer is so fragmented between new providers that the tribunal will decide that the activities before and after the transfer are not fundamentally the same and that a SPC has therefore not taken place.

Can an employee transfer under TUPE to more than one employer?

Until recently, the case of *Kimberley Group Housing Ltd v Hambley (2008)* established that it was not possible to split employment (or liability) between two transferee contractors in proportion to the way work was split between them under the contracts. Instead, the EAT made clear that the correct approach was to work out which organised grouping each employee was assigned to, looking at the link between each employee and the activities performed by the new service providers. In this case, the contractor which took the majority of the work to which the claimants were assigned was found to have taken on the whole of the liability for the claimants' unfair dismissals.

In an important ruling, the EAT has now changed this approach, applying last year's decision of the European Court of Justice in *ISS Facility Services v Govaerts* to SPCs.

Case details: *McTear Contracts Ltd and others v Bennett and others*

North Lanarkshire Council (the Council) contracted with Amey Services Ltd (Amey) for the provision of a service replacing kitchens in its social housing. The contract was run with two parallel teams of tradespeople who worked across the region. An operations manager and a project surveyor also worked on the contract.

On retendering, the Council decided to split the contract into North and South regions and to award these contracts to two separate contractors, Mitie Property Services Ltd (Mitie) and McTear Contracts Ltd (McTear).

Amey undertook an analysis of the work each team had carried out in the North and South regions in the last 12 months to identify which contractor the employees assigned to those teams should transfer to under TUPE. It also allocated the operations manager to one team and the project surveyor to the other.

Mitie and McTear did not agree that TUPE applied to transfer any of the employees. They did ultimately take on some of the employees, but under new contracts of employment.

The employees brought claims including for unfair dismissal, redundancy pay, notice pay, holiday pay, arrears of pay and protective awards under TUPE.

The employment tribunal followed the decision in *Kimberley* and agreed with Amey's allocation of employees to transferring teams. The team which was identified as spending more time in the region awarded to Mitie was found to have transferred to Mitie. And similarly, the team which spent most time working in the region awarded to McTear was found to have transferred to McTear.

Employees can TUPE transfer to more than one employer

However, by the time the case reached the EAT, the ECJ had determined in Govaerts that it was possible for employment to transfer to more than one employer for the purposes of the Acquired Rights Directive (the European legislation which TUPE implements in the UK). Govaerts was decided before the end of the Brexit transition period and is therefore part of EU "retained" law which must be applied in UK courts. The Acquired Rights Directive and *Govaerts* concern only business transfers and not SPCs (which are a creation of UK law under TUPE). However, the EAT made clear that it would be "undesirable" for there to be a difference in the approach taken to business transfers and SPCs, particularly as some transactions will meet both definitions.

The EAT concluded that: "There is no reason in principle why an employee may not, following

such 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, in principle, a situation where there could properly be found to be different employers on different jobs."

The EAT remitted the cases to the employment tribunal to reconsider whether particular claimants had in fact transferred to one or both of the new contractors.

What are the practical implications of the judgment?

The process of working out which new contractor an employee will transfer to can be very convoluted where there are multiple transferees. However, this case confirms that where there is a fairly clear split of work between two new contractors (for example by geographical area), it is possible for the employees to transfer to more than one transferee contractor.

In practice, this decision may create more problems than it solves. In *Govaerts*, the ECJ stated that in cases where the split of employment contracts was impossible to achieve in practice or where it would adversely affect the rights of the employee, the transferees would be regarded as being responsible for any consequent termination of the employment relationship, even if that termination was initiated by the employee. This may mean that contractors take on unexpected liabilities for part time employees where the parties had expected the employee to transfer wholesale to another contractor.

Where pragmatic solutions are found in an SPC and employees are content to transfer to a new provider, it is unlikely that a tribunal will ever need to decide whether their contract should rightly have split between different contractors. It will be in those situations where employees fall between the gaps, are made redundant, or are asked to accept less favourable terms that this ruling will have its significant impact.

Organisations which may be taking on part of a service following a SPC should be alert to the possibility that they could take on liability for employees for part of their employment contract, including redundancy and notice payments where applicable. The risks of this should ideally be factored into negotiations on the contract or the tender response. Where a contract is being entered into, consideration should be given to including indemnities to apportion this potential liability.

If you would like to contact us please email
alacoque.marvin@wrigleys.co.uk

www.wrigleys.co.uk