SUMMARY

2020/9 Employment Tribunal finds that 'workers' transfer under TUPE (UK)

Dewhurst and others – v – (1) Revisecatch Ltd t/a Ecourier; (2) City Sprint (UK) Ltd

Summary

In a surprise decision, with potentially wide-ranging ramifications, an Employment Tribunal (ET) has found that 'workers' as well as traditional 'employees' are covered by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

Background

The ET's decision concerns, more specifically, so-called 'limb (b) workers'. This refers to the definition of worker in section 230(3)(b) of the Employment Rights Act 1996 (ERA) and other similar employment legislation. Limb (a) of the definition covers those who are also 'employees', working under a contract of employment. Limb (b) then provides that someone who undertakes to perform services personally for a third party, which is not a client or customer of a profession or business undertaking operated by them, also counts as a 'worker'.

TUPE itself has a different definition of an 'employee': "any individual who works for another person whether under a contract of service … or otherwise but does not include anyone who provides services under a contract for services".

In the decision, the ET considered the question of who was protected under the EU Directive 2001/23/EC – the Acquired Rights Directive (ARD), which is implemented in the UK by TUPE. The case concerned cycle couriers who claimed they automatically transferred from City Sprint to Revisecatch when the former lost and the latter won a contract with a client.

Employment Tribunal's decision

The ET noted that the ARD was intended to protect anyone in an 'employment relationship' – it refers to a transfer of rights and obligations "arising from a contract of employment or from an employment relationship existing on the date of a transfer". This implied that the protected class was not limited to those with a contract of employment, but how exactly should that be defined?

Referring extensively to case law from the European Court of Justice, the ET concluded that it was open to EU Member States to have different types and levels of employment rights and protections, but the purpose of the ARD was to preserve these, whatever they may be.

The ET looked at some other areas of UK statutory employment law. It noted that limb (b) workers were also 'employees' within the meaning of the Equality Act 2010, and that the Trade Union and Labour Relations (Consolidation) Act 1992 used the phrase 'employer' when describing the person who provided work to a limb (b) worker. The ET also referred to a Supreme Court judgment (*Clyde & Co LLP – v – Bates van Winkelhof* [2014] UKSC 32) which drew a distinction between:

self-employed persons who carry on a profession or business on their own account and enter into contracts with clients and customers, who are not protected as whistleblowers; and those who provide their services as part of a profession or business undertaking carried on by someone else, who do have whistleblowing protection.

Relying on this, the ET concluded that the ARD should be construed as encompassing not just those with a 'traditional' contract of employment, but also those in the 'intermediate class' who are recognised as limb (b) workers, and whose rights substantially derive from EU law. This class of working person – the wider UK law concept of a 'worker' under the ERA – was covered by the ARD.

How, then, to meet the challenge of interpreting the TUPE definition of an 'employee' (above) consistently with the ARD? The ET noted the "broad and far-reaching" obligation to interpret legislation in a manner consistent with EU law obligations, the only restriction being that the meaning must go with the grain of the legislation and be compatible with its underlying thrust.

The ET concluded that the words "or otherwise" in the TUPE definition were to be construed as embracing limb (b) workers (and Equality Act 'employees'). The exclusion for those providing services under 'contracts for services' was intended to catch only those independent contractors who were genuinely in business on their own account, who did not have any

employment or labour law rights to be preserved in the event of a transfer.

Commentary

The decision is only ET level, so has no binding precedent weight, and it may be appealed. It nonetheless raises some immediate practical considerations, while leaving some unanswered questions.

Parties engaged in TUPE transfers, whether as transferor or transferee, often give 'workers' considerably less thought than employees when undertaking due diligence and negotiating employment provisions in sale and purchase and services agreements – the assumption being that they will not transfer. That may now need to change.

The same is true of TUPE information and consultation obligations. If this decision is right, transferors now need to ensure that limb (b) workers are covered, for example by being included in elections for employee representatives. Otherwise, they may face claims for protective awards of up to 13 weeks' pay (which is one of the claims being pursued in this case). Importantly, limb (b) workers are not necessarily just low-paid individuals: many highly paid consultants and contractors also potentially meet the definition. In their case, however, there may be more of a question as to whether they are in business on their own account, and the question of whether personal service is required (left unexplored by the ET in this case) may also be relevant.

What of the restrictions on making changes to terms and conditions and the sanction of automatic unfair dismissal, which form the core of the protection for employees under TUPE? That is not in issue in this case, which is about unpaid holiday and an alleged failure to inform and consult, but there must now be a question as to how (if at all) other TUPE rights should be applied in the 'worker' context. Most worker contracts tend to be flexible and terminable on short notice, and often – to the extent that the transferee wishes to retain workers – the transferor will terminate their existing contract and the transferee will offer re-engagement on its standard terms. To do this in the context of a TUPE transfer could be automatic unfair dismissal for a 'traditional' employee, but workers are outside the ambit of the unfair dismissal regime.

On the face of TUPE there is no problem, because the limitation on making changes to terms and conditions is expressly limited to those with 'contracts of employment', not those with a wider 'employment relationship', and the protection against dismissal is also limited to 'employees' as defined by the ERA. But this raises the tantalising question as to whether that is

consistent with the ARD which makes no such distinction:

Article 3 of the ARD states that the transferor's rights and obligations arising from a contract of employment "or from an employment relationship existing on the date of transfer" transfer to the transferee.
Article 4 of the ARD provides that if the contract of employment "or the employment relationship" is terminated because the transfer involves a substantial change in working conditions to the employee's detriment, the employer shall be treated as responsible.

This case clearly has potentially far-reaching implications.

Comment from other jurisdiction

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): The issue of whether employment relationships are transferred to another service provider when the original employer and service provider 'loses' a contract to the other service provider comes up from time to time in Germany. However, the question of whether it is a transfer of undertaking does not really depend on what kind of staff is affected, but whether the transfer of contracts or their loss to a competitor constitutes merely a succession of assignments. Because, according to the case law of the Federal Labour Court (*Bundesarbeitsgericht* – the 'BAG'), a simple succession of assignments does not constitute a transfer of undertaking. However, in the event of a transfer of undertaking, under German law all employment relationships are covered, including blue-collar workers, white-collar workers and trainees, as well as executives.

Usually, an identical customer, a nearly identical continuation of the assignment and a very similar kind of business imply a succession of assignments. In accordance with the case law of the BAG, if a transfer of an undertaking or a simple functional/ contractual succession exists depends on the fact whether only the service is continued (without takeover of operating resources or the employees) or whether – in addition to the takeover of the service – there is also a takeover of operating resources and/or parts of the workforce (BAG, judgment of 19 March 2015 – 8 AZR 150/14).

In conclusion, the (new) contractor can potentially influence the existence of a succession of assignments or a transfer of undertakings by taking over a substantial part of the previous staff in addition to their tasks or not. However, it should be noted that the transfer of employees is only one criterion for determining whether there is a transfer of undertaking or a succession of assignments.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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Parties: Dewhurst and others – v – (1) Revisecatch Ltd t/a Ecourier; (2) City Sprint (UK) Ltd

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