Tribunal rules that workers are protected by TUPE

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Tribunal rules that workers are protected by TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provide extensive protection for employees who work for a business that is sold or who perform activities for a service that is outsourced. But which individuals have the benefit of this protection? In Dewhurst

and ors v (1) Revisecatch Ltd t/a Ecourier and (2) City Sprint (UK) Ltd, an Employment Tribunal concluded that "workers" are covered by TUPE.

What does the law say?

The law deems different types of workers are entitled to differing levels of protection. Traditional employees are best protected, whilst workers who are not strictly employed have some, but a lower level, of protection.

The question in this case is whether only traditional employees are covered by TUPE or whether the protection extends more broadly. On its face, TUPE only protects "employees", however, the definition of employee is wider than that used in the Employment Rights Act 1996 (ERA). TUPE defines an employee as: *"any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services."* The use of the words *"or otherwise"* leaves open the question of whether other types of workers may be protected.

Of greatest interest is whether the protection extends to those who qualify as:

- "workers" under the ERA (and/or the Working Time Regulations 1998); and/or
- "employees" under the Equality Act 2010 (this is a wide definition capturing workers and potentially also certain independent contractors).

There are three hurdles to qualifying as a worker. First, there must be a contract between the parties. Second, that contract must provide for personal service by the worker. Third, the other party to the contract must not be a client or customer of the individual's profession or business undertaking.

Previous cases have confirmed that TUPE protection only applies where there is a contract in place between the parties which provides for personal service. Logically, it seemed that "workers" would, therefore, pass the "employee" test under TUPE. However, until now, there has been no explicit ruling on this point, which caused uncertainty.

What happened in this case?

The claimants worked for City Sprint as cycle couriers providing courier services for a client called HCA Healthcare. In 2016, one of the claimants brought an Employment Tribunal claim against City Sprint and was found to be a worker. Two years later, City Sprint lost the HCA Healthcare contract to a rival, Ecourier. The claimants stopped working for City Sprint on 31 January 2018 and began working for Ecourier the next day.

The claimants brought claims against both City Sprint and Ecourier, including for failure to inform and consult under TUPE. These claims could only proceed if the claimants, as workers, came within the wider definition of employee used in TUPE. A Preliminary Hearing was held to decide this point.

What was decided?

The Employment Judge decided that the words *"or otherwise"* were designed to reflect a broader class of working relationship beyond traditional employment. He concluded that the words should be construed to include both workers under the ERA and employees under the Equality Act 2010.

What are the learning points?

It should be noted that this decision is not binding on other Tribunals and, given the importance of the issue, it is quite likely that it will be appealed. In the meantime, however, this decision is helpful to workers who are working for a business or service that is to be sold or outsourced. They

can seek to rely on this decision to say that they have the right to be informed and consulted about the transfer and to transfer automatically to the new employer on their existing terms and conditions. Once transferred, they will also be protected from variations to their terms and conditions save in limited circumstances.

However, they will not acquire the all-important automatic unfair dismissal protection. The right to claim unfair dismissal is only available to those who qualify as employees under the ERA. TUPE preserves, not improves, employment rights and so a worker is not converted to an employee under the ERA just because they are within the scope of TUPE. Therefore, an employer who inherits workers under TUPE will be able to dismiss them by reason of the transfer without the risk of an unfair dismissal claim. However, they could face claims of up to 13 weeks' actual pay per worker if they fail to engage in an information and consultation process.

Employers looking to acquire a business (or take over a service contract) should conduct appropriate due diligence to identify the seller's worker population. To complicate matters, where the seller engages independent contractors, the buyer will need to scrutinise whether those contractors might, in fact, be workers. Failing to do this could result in a deficient information and consultation process and leave the buyer (and seller) exposed to claims.

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

If you would like to discuss any of the issues raised in this article, please contact Amanda Steadman or your usual BDBF contact.

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