SLAUGHTER AND MAY

Employment Bulletin

June 2020

European Court of Justice finds that an employment contract could be transferred to more than one transferee

Summary: The European Court of Justice has decided that, where there was a transfer of an undertaking to two transferees, a worker's employment contract could be transferred to each of the transferees in proportion to the tasks performed by the worker. It was for the national court to decide how this would be assessed (*ISS Facility Services NV v Govaerts*).

Key practice point: This decision raises the possibility of an employee who works across multiple parts of a business having their employment contract divided up between multiple transferees, or between the transferor and the transferee, in proportion to the time and value of their work for different parts of the business. If followed in the UK in relation to TUPE, this could cause problems for transferees of part of a business who may unexpectedly find themselves partly liable for contracts of employees even though those employees do a greater proportion of their work for other transferees.

Contents

Facts: A cleaning contract with the city of Ghent was divided into three lots and G became project manager of the three areas of work corresponding to those lots. When Ghent retendered the work, G's employer was unsuccessful and two of the three lots were awarded to T1 and the third lot to T2. G's employer informed her that she would transfer to T1, as the two lots awarded to T1 comprised 85% of the original single contract on which she worked. G brought an action against the transferor and T1 seeking compensation in lieu of notice and bonus and leave pay.

The Belgian court ruled that there had been a transfer of undertaking under the European Acquired Rights Directive (from which TUPE in the UK is derived) but asked the European Court about the effect on G's contract of employment.

Decision: The European Court held that, where a transfer of an undertaking involves more than one transferee, the rights and obligations under a worker's employment contract are transferred to each of the

transferees, in proportion to the tasks performed by the worker. A division between transferees could be made even if it involved the transfer to one of the transferees of an employment contract that covered only a few hours of work.

The Court held that it was for the national court to determine the division of the employment contract, taking into consideration the economic value of the lots to which the worker was assigned (as suggested by the transferor), or the time that the worker actually devoted to each lot, as proposed by the European Commission (who submitted comments to the Court). If a division was impossible, or would adversely affect the rights of the worker, the transferee(s) would be regarded as being responsible for any consequent termination of the employment relationship, even if initiated by the worker.

Analysis/commentary: In the UK, the Employment Appeal Tribunal (EAT), in *Kimberley Group Housing v Hambley,* had 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. This decision from the European Court suggests that an employee can be assigned to more than one transferee under TUPE.

Beneficial transfer-related changes to employees' contracts prohibited by TUPE

Summary: The EAT held that any changes to employees' contracts of employment transferred under TUPE are void if the sole or principal reason is the transfer, even if the changes are not detrimental to the transferring employees. Employee directors of a transferor company who agreed contractual enhancements prior to a TUPE transfer were unable to enforce the enhanced terms against the transferee (*Ferguson v Astrea Asset Management Ltd*).

Key practice point: TUPE prevents an employer making detrimental changes to a transferring employee's terms and conditions of employment, even if the employee has agreed to them, if the sole or principal reason for the changes is the transfer. The EAT has now decided that the same applies even if the changes are beneficial to the employee.

Facts: The claimants were directors of Lancer, an estate management company, and its holding company. Lancer lost its contract to Astrea under a TUPE transfer. Two months before the transfer was due to take place, the claimants awarded themselves substantially enhanced contractual terms with Lancer, including longer notice periods, guaranteed bonuses and golden parachutes. Astrea dismissed two of the claimants soon after the transfer, did not accept the other two and refused to honour the revised terms. The claimants brought various tribunal claims, including for termination payments based on the varied contracts. The Employment Tribunal found that the claimants could not rely on the amended terms; they were void under Regulation 4(4) of TUPE because the impending transfer was the reason for the variation. The claimants appealed to the EAT.

Decision: The EAT dismissed the appeal. Regulation 4(4) prevented all transfer-related variations, whether or not adverse to the employees. The purpose of TUPE is to safeguard employees' rights, and this suggests the prevention of negative changes rather than improvements. The EAT decided that, in the alternative, the changes would have been void under the EU "abuse of law" principle. The purpose of the Acquired Rights Directive, from which TUPE derives, is also to safeguard employees' rights, not improve them, and there was ample evidence that the directors' intention was to obtain an improper advantage by carrying out an artificial transaction. There was no legitimate commercial purpose in Lancer agreeing the new terms and the claimants were acting dishonestly in awarding themselves the enhanced contractual terms knowing that they would be paid at the expense of Astrea.

The EAT addressed briefly the possible anomalous consequences of its decision, for example where beneficial changes are made to persuade employees to stay post-transfer. The EAT suggested three possible solutions:

- Regulation 4(4) applies only if the transfer is the *sole or principal reason* for the variation and not if, as the EAT put it, the reason is "*properly categorised in some other way*".
- Regulation 4(4) does not apply where the amendments are for an economic, technical or organisational reason entailing changes in the workforce, although this is a narrow exception.
- For post-transfer changes, an employee might be able to rely on an estoppel against the transferee.

Analysis/commentary: The facts of this case were unusual, but the EAT's decision that beneficial transfer-related amendments are void, even where there is no "abuse of law", means that the ruling will apply in situations where there has not been an obvious attempt to burden a transferee with onerous terms. This is likely to lead to a fresh focus on whether changes have a legitimate commercial justification such that they can be categorised as not transfer-related.

Period of garden leave did not have to be offset against non-compete clause

Summary: The High Court upheld contractual six-month post-termination restrictions after a similar period of garden leave (*Square Global Ltd v Leonard*).

Key practice point: The decision confirms that, depending on the circumstances, a six month non-compete covenant can validly be imposed after a similar period of garden leave.

Facts: L, who was a Head of Desk at an interdealer brokerage firm, had an employment contract with a six-month notice period as well as six-month non-compete post-termination restrictions (PTRs). The contract had a provision for garden leave during the notice period but no set-off against the period of the PTRs. In November 2019, L purported to resign without notice. At the time, he had been in advanced discussions for several months with a rival financial services business about leaving his employer to join them instead.

Square Global brought a claim to enforce L's notice period and PTRs. L counterclaimed for constructive dismissal, alleging conduct by his employer over several years in breach of the implied trust and confidence term.

Decision: The High Court rejected L's argument that he had been constructively dismissed and declared that he remained an employee notwithstanding his purported resignation. It also upheld the restraints on competition during his notice period and the full period of the PTRs.

The Court found that the six-month period of the PTRs was reasonable and went no further than necessary to protect the employer's legitimate interests. L's previous employment contract with another firm contained a six-month non-compete covenant, and the evidence showed that he had negotiated his own contract with Square Global. Similarly, his new employment contract with the rival firm contained a six-month non-compete covenant.

The Court also decided that the absence of a set-off clause, which would have reduced the period of the PTRs by any time spent on garden leave, was not fatal to the enforceability of the restrictions. Although, since his resignation, L had been "off the market" for four months, the Court declined to offset this period against the six-month term of the non-compete clause.

The Court acknowledged that the existence of a garden leave clause can be taken into account in determining the validity of a restrictive covenant and that, in an exceptional case, where a long period of garden leave had already elapsed (perhaps substantially in excess of a year), a court might decline to grant any further protection. However, L's argument for a set-off was on the assumption that his relations with his employer were sufficiently harmonious to allow him to work out his notice period, following which a six-month PTR would suffice. The Court found that the garden leave clause was designed to cater for a situation where the employer had concerns about an employee's conduct and chose to restrict his duties during the notice period. If those concerns had a reasonable foundation, it would not then be unreasonable to enforce the full period of the PTRs. Although L was not placed on garden leave, having given notice to resign, he was nevertheless in a comparable position.

Analysis/commentary: The decision is a helpful confirmation that a garden leave set-off provision is not a requirement and periods of garden leave and of non-compete restrictions may be able to run consecutively. However, in order to be enforceable, the overall period of the combined restrictions on the employee must meet the test of going no further than reasonably necessary to protect the employer's legitimate business interests. In this context, it is worth noting that, in assessing whether the six-month non-compete clause was reasonable, the Court looked at the employee's previous contract and the new one he had negotiated with the competitor.

Constructive dismissal: "last straw" does not have to contribute to breach of trust and confidence

Summary: The EAT found that an employee who resigned following an "innocuous" breach of contract by his employer had been unfairly constructively dismissed. The Employment Tribunal had been wrong to conclude that, because it had found that the conduct that tipped the claimant into resigning was not sufficiently serious to contribute to a breach of the implied duty of trust and confidence, the claim had to fail. There had been prior conduct by the employer amounting to a breach, which the claimant had not affirmed, and which materially contributed to his decision to resign (*Williams v Governing Body of Alderman Davies Church in Wales Primary School*).

Key practice point: In order to succeed in a claim of constructive unfair dismissal, an employee has to show a fundamental breach of contract by the employer – typically, a breach of the implied duty of trust and confidence. The "last straw" doctrine allows the employee to rely on a series of breaches over a period; previous case law recognised that the last straw may be relatively insignificant but must not be "utterly trivial". This decision establishes that if an earlier fundamental breach contributes to the employee's decision to resign, a constructive dismissal claim may succeed notwithstanding the fact that the last straw is not in itself sufficiently serious to contribute to a breach of the trust and confidence term.

Facts: W, a teacher, resigned after having been suspended and subject to disciplinary proceedings. He had a number of complaints about the process and resigned after several months, stating that the last straw was learning that a colleague, under investigation for a connected data protection breach, had been prohibited from contacting him. The Employment Tribunal found that the school's instruction to the colleague not to contact W was not unreasonable given the ongoing disciplinary investigation and was "innocuous". Therefore, this act could not contribute to a breach of the implied duty of trust and confidence and was not a "last straw" entitling W to treat his employment contract as terminated. W appealed.

Decision: The EAT found that the Tribunal had taken the wrong approach and substituted a finding of constructive unfair dismissal. Even if the last straw in this case had been innocuous, there was prior conduct

amounting to a fundamental breach that W had not affirmed, and which contributed in a material way to his decision to resign. In any event, the Tribunal's finding that the employer's conduct in relation to the final matter was not unreasonable did not mean it was innocuous.

The EAT also held that, in withholding from W certain information in connection with the disciplinary charges, the employer was in breach of its duty to make reasonable adjustments for him as an employee with a disability. The Tribunal's approach had been that, as it was unable to determine that the school would have handled the process in the same way in all other cases, there was not a "practice" for the purposes of establishing a "provision, criterion or practice" (PCP) which put W at a substantial disadvantage. The EAT held that this set the bar too high; a "*general or habitual*" approach could suffice, even if not universally followed.

Analysis/commentary: It is now clear that seemingly innocuous acts may revive an earlier fundamental breach of contract, provided that the employee has not already affirmed that breach. This can be problematic for employers who may be tempted to take the view that, after a period of time, if an employee's grievance appears to have died down, the matter can be regarded as closed. This case shows that a potential constructive dismissal can be revived by a seemingly trivial issue.

The disability discrimination point is confirmation of the well-established point that a one-off act can amount to a PCP. Whilst the authorities show that a practice has to have an element of repetition about it, this can be found within the handling of the complainant's individual case.

Horizon scanning

What key developments in employment should be on your radar?

30 June 2020	Coronavirus Job Retention Scheme closed to new entrants
1 July 2020	New flexible form of furlough available under the CJRS
1 August 2020	Employers required to make contributions to the CJRS
31 October 2020	Expected end of the CJRS
31 December 2020	Transitional arrangements under UK-EU withdrawal agreement expected to end unless extended
6 April 2021	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies

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

- **Employment status**: *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *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)

- **Discrimination / equal pay**: *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction); *Asda Stores v Brierley* (Supreme Court: whether workers in retail stores could compare themselves with those working in distribution depots for equal pay)

- **Trade unions**: *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Unfair dismissal**: *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits).

- **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.

Padraig Cronin
T +44 (0)20 7090 3415
E Padraig.Cronin@slaughterandmay.com

Phil Linnard
T +44 (0)20 7090 3961
E Phil.Linnard@slaughterandmay.com

Lizzie Twigger
T +44 (0)20 7090 5174
E Lizzie.Twigger@slaughterandmay.com

Katherine Flower
T +44 (0)20 7090 5131
E Katherine.Flower@slaughterandmay.com

Dated June 2020