EMPLOYMENT TRIBUNALS

Claimants		Respondents
(1) Mx M Dewhurst	**V**	**(1) Revisecatch Limited t/a Ecourier**
(2) Mr D Marchant		**(2) City Sprint (UK) Ltd**
(3) Mr F McQuade		

Heard at: London Central **On**: 29 and 30 October 2019

Before: Employment Judge Joffe (sitting alone)

Representation

For the Claimant: Mr A Ohringer, counsel

For the First Respondent: Mr M Greaves, counsel

RESERVED JUDGMENT

A 'worker' within the meaning of section 230(3)(b) of the Employment Rights Act 1996 and regulation 2(1) of the Working Time Regulations 1998 is an 'employee' within the meaning of regulation 2(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

REASONS

The issues

1. This was a preliminary hearing which was listed to give a decision on a point of statutory interpretation without making any findings of fact and without reference to any agreed or assumed facts.

2. These are claims by three claimants, who are cycle couriers, for:

- holiday pay / compensation under the Working Time Regulations ('WTR') 1998;

- Failures to inform and consult under regs 13 and 14 of the Transfer of Undertakings (Protection of Employment) Regulations ('TUPE') 2006.

Mr Marchant also brings claims for detriment under s 146(1)(ba) of the Trade Union and Labour Relations (Consolidation) Act 1992 which are not relevant to this issue.

3. The first respondent is a courier company which (to use a neutral phrase) has engaged the services of each of the claimants from 1 February 2018.

4. The second respondent is a courier company which engaged the claimants' services until 31 January 2018 when it lost a contract for the provision of courier services to HCA Healthcare to the first respondent.

5. In relation to the claimant, Mx Dewhurst, an employment tribunal in earlier proceedings found that they were a worker employed by the second respondent as at November 2016. The second respondent says that it changed its contractual terms in November 2017.

6. The holiday pay claims depend on the cycle couriers being found to be 'workers' within the meaning of regulation 2(1) of the WTR 1998. For liability for such claims to have passed to the first respondent as transferee and for there to be jurisdiction to hear the claims for failure to inform and consult under TUPE 2006, the claimants would have to be 'employees' within the meaning of reg 2 (1) TUPE 2006.

7. The issue defined at the case management hearing was 'to decide the scope of the term 'employee' in reg 2 of TUPE 2006 and whether a worker under ERA 1996 230(3)(b) and/or WTR 1998 reg 2(1) fails within that as a matter of law.' The issue which I am being asked to determine is therefore whether what are often referred to (and I refer to below) as 'limb b) workers' (ie those who fall within the definition of worker found in ERA 1996 s 230(3)(b) and in other legislation such as the WTR 1998) as a matter of law fall within the

definition of 'employee' in reg 2(1) of TUPE 2006 so as to benefit from the rights and protections conferred by TUPE 2006.

8. I raised with counsel at the outset of the hearing a concern that, if I concluded that some but not all limb b) workers were protected by TUPE 2006, the determination of the issue in isolation would be futile as it would have no effect in determining any issue in these claims. It was the claimants' position that all limb b) workers are as a matter of law covered by TUPE 2006 and the first respondent's position that no such workers were covered. Ultimately, as will be clear from my conclusions, I agreed with counsel that either all or no limb b) workers are TUPE 2006 employees.

9. I did not hear any evidence. I heard submissions and received skeleton arguments from the claimants and the first respondent. The second respondent indicated prior to the preliminary hearing that it did not intend to attend or make representations on this issue. I was provided with an agreed bundle of authorities and with an agreed bundle of pleadings and orders as well as the decision in Mx Dewhurst's earlier proceedings against the second respondent.

The parties' submissions

10. I summarise the parties' respective submissions briefly in these Reasons. I make reference to particular submissions below where necessary to explain why particular authorities were considered and aspects of my conclusions, but I have taken account of all the submissions I received, whether I have expressly referred to them or not.

11. For the claimants, Mr Ohringer took me to the relevant Directives and argued that the protections provided for in the event of a transfer of a business undertaking were intended to extend to 'employment relationships' going beyond those governed by a contract of employment; essentially the intention is for employment rights, widely defined, to be preserved in the event of a transfer. His submission was that the words 'or otherwise' in reg 2 of TUPE 2006 (identical to reg 5 of TUPE 1981) are intended to cover all 'employment statuses recognised in UK law': 'employees' as defined in s 230(1)(a) ERA 1996, limb b) workers and 'employees' as defined in EU derived legislation such as the Equality Act 2010. If reg 2 cannot be read in that way purely as a matter of interpretation using domestic law principles, it must be so construed in accordance with the relevant Directives.

12. For the first respondent, Mr Greaves argued that reg 2 of TUPE 2006 reflects a fundamental dichotomy in our domestic law between a contract of service (the type of contract enjoyed by employees) and a contract for services, which dichotomy was recognised by the Supreme Court in Bates van Winkelhof v Clyde & Co [2014] ICR 730. The protection afforded by TUPE is expressly

restricted to those who work under a 'contract of service or apprenticeship or otherwise' and excludes those who provide services under 'contracts for services'. The words 'or otherwise' in TUPE 1981 were inserted because the scope of 'employment relationship' in the 1977 Directive was unclear at the time. Mr Greaves said that subsequent European case law, in particular Albron Catering BV v FNV v Bondgenoten [2011] IRLR 76, showed that 'employment relationship' also covered non-contractual employment relationships and that the words 'or otherwise' in TUPE 2006 should be construed as covering relationships of that kind, rather than a wider category such as limb b) workers. That definition was compliant with EU Law which required the protection be extended to those who are 'generally' protected as employees under domestic law. That excludes limb b) workers who have no such general protection.

The law

Domestic legislation

13. Regulation 2 (1) of TUPE 2006 is a definition section, which provides so far as relevant for present purposes:

'*"contract of employment"* means any agreement between an employee and his employer determining the terms and conditions of his employment;

"employee" means 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 and references to a person's employer shall be construed accordingly;'

14. The relevant parts of s 230 ERA 1996 are:

'(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases, "shop worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) –

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract

whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.'

15. The definition of worker in reg 2(1) WTR 1998 is materially for these purposes identical to that in s 230 ERA 1996.

Directives

16. The predecessor to TUPE 2006,TUPE 1981, was introduced to implement Council Acquired Rights Directive 77/187/EEC ('the 1977 Directive'). TUPE 2006 itself implemented Council Directive 2001/23/EC ('the Acquired Rights Directive').

17. The principal purpose of the Acquired Rights Directive is to 'provide for the protection of employees in the event of a change of employer, in particular to ensure their rights are safeguarded' (Recital (3)).

18. Article 3.1 of the Acquired Rights Directive provides that what is transferred in the case of a relevant transfer is 'the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer'. In this, it mirrors provisions of the 1977 Directive.

19. Article 2.1(d) of the Acquired Rights Directive provides that "'employee' shall mean any person who, in the Member State concerned is protected as an employee under national law." Article 2.2 says that 'This directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.'

20. The 1977 Directive had no equivalent provision to Articles 2.1(d) or Article 2.2 and no definition of 'employee' or 'employment contract'.

European case law

21. The issue of what was meant by 'employee' and 'employment contract' in the 1977 Directive was explored in Mikkelsen v Danmols Inventar A/s [1986] 1 CMLR 316. It was argued on behalf of the EC Commission as amicus curiae that 'employee' should be given a special definition in EU law and should not depend on the relevant national law. The Advocate General, Sir Gordon Slynn, said:

'What seems to me to be significant here is that there is no definition of 'employee', that this directive [1977] is an approximation rather than a full

harmonisation of the laws of the member-States as to what kind of engagement may or may not be capable of constituting a contract of employment or an employment relationship... It may be highly desirable that there should be a Community definition but none has been so far adopted for present purposes...For the Court to create a separate definition of 'employee' without a full survey of the categories of persons who are capable of, or treated as, being such in the various member-States risks excluding from the benefit of the directive persons in some member-States who under national law would be regarded as employees.

Member-States cannot, of course, create narrower definitions for the purposes of applying the directive. That would be contrary to the second paragraph of Article 4(1) of the directive.'

22. The ECJ confirmed that the 1977 Directive aimed at only a 'partial harmonisation' 'by extending for the most part the protection given to employees independently by the law of the different member-States to the situation where an undertaking is transferred. The purpose of the directive is therefore to ensure so far as possible that the contract of employment or employment relationship continues unchanged with the transferee in order to prevent the employees involved in the transfer of undertaking from being placed in a less favourable position solely by reason of the transfer. The directive does not, however, aim to establish a uniform level of protection for the entire Community by reference to common criteria.' [para 26]

23. The protection of the 1977 Directive 'can only be invoked by persons who in one way or another are protected as employees under rules of law of the member-State concerned...The reply to the second question should be that the term 'employee' for the purpose of directive 77/1987 should be understood to mean that it covers any person who, in the member-State concerned, is protected as an employee under the national legislation relating to labour law.' [para 27 – 28]

24. The part of the judgment in which 'employee' is defined was codified in Art 2.1(d) of the Acquired Rights Directive but Mikkelsen remains a useful guide to the ambit of protection under the Acquired Rights Directive: it is not intended to create uniformity of protection across Member states but to ensure that those rights which are protected are preserved in the event of a transfer of an undertaking.

25. There are various authorities which were cited to me and which assist further in the interpretation of the Acquired Rights Directive.

26. Viggosdottir v Islandspostur HF [2002] IRLR 425 is a decision of the European Free Trade Area Court of Justice which considered whether a manager of a post office would retain the more advantageous terms relating to termination of employment which she had enjoyed, after transfer of her employment from a state entity to a limited liability company owned by the state. The EFTA concluded that this depended on whether she enjoyed

special protections from dismissal granted to civil servants for reasons associated with the public law function or character of her employment or whether her protection from dismissal was governed by national employment law. The issue as to whether the rights were protected and preserved under the Directive was held to depend on whether they were derived from public law or from 'national general employment law':

'The Court notes that the Directive is intended to achieve partial harmonisation in the area of employment law, mainly by ensuring that the transferee maintains the protection guaranteed to employees under national employment law. Its aim is therefore to ensure, as far as possible, that the acquired rights protected by national employment law remain unchanged with the transferee, so that the persons affected by the transfer of the undertaking are not placed in a less favourable position solely as a result of the transfer. It is not, however, intended to establish a uniform level of protection throughout the Community on the basis of common criteria...' [para 26]

'The national court's examination must be based on all legal instruments that may be relevant to the plaintiff's situation, ie statutes, collective agreements and any contractual relationship between the plaintiff and the Post and Telecommunications Administration. It cannot be ruled out that the status of the plaintiff must be regarded as being partly governed by public law and partly by national employment law. In that event, a situation may arise where different sets of rules may apply to different aspects of her legal situation. It is for the national court to undertake this examination, on the basis of national law, with regard to the distinction between public law and national general employment law. If the national court finds that issues relating to protection against dismissal in the plaintiff's case are primarily subject to rules of public law, it will proceed on the basis that the Directive does not apply. If, however, the national court finds that those issues are primarily subject to the rules of Icelandic general employment law, it is bound to proceed on the basis that the Directive applies.' [para 31]

27. In Albron, the ECJ considered a situation where employees were employed under contracts of employment with one company in a group but actually worked on a permanent basis in an undertaking run by another company within the group. The question was whether the company running the undertaking could be regarded as the 'transferor' despite the lack of an employment contract between that company and the employees. It was held that the relationship between the company running the undertaking and the employees could be covered by the expression 'employment relationship' within Article 3(1) despite the absence of a contract between the parties. I note at this stage that Albron does not suggest that 'employment relationship' only covers such scenarios where there is no contract between the parties.

28. O'Brien v Ministry of Justice Case C - 393/10 [2012] ICR 955 concerned the issue of whether fee-paid judges were workers who have rights under the Part-time Workers (Prevention of Less favourable Treatment) Regulations 2000 ('the PTW Regulations'). The PTW Regulations gave effect to the

Framework Agreement on Part-time Work annexed to Council Directive 97/81/EC ('the Framework Agreement').

29. The ECJ considered the question of whether it was for national law or EU law to determine the question of who was a worker for the purposes of the Framework Agreement, i.e. whether there was a 'Community norm' by which the issue should be determined.

30. The Framework Agreement at clause 2.1 provides that 'This agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each member state.' I note that that is a similar provision to that contained in Article 2.1(d) of the Acquired Rights Directive and also that the use of language across Directives and the European case law makes it apparent that there is not a clear distinction between 'employee' and 'worker' such as is found in parts of our domestic law and that the terms are at times used interchangeably. The PTW Regulations themselves contain a definition of worker which is materially the same as the limb b) definition in the ERA 1996 and WTR 1998 but the PTW Regulations expressly excluded fee-paid part-time judicial office holders.

31. Like the Acquired Rights Directive, the Framework Agreement was not intended to harmonise all national laws on the particular issue.

32. The ECJ concluded that, although the definition of 'worker' is in the discretion of the member state and the definition varied according to the area in which the definition was to be applied, that discretion is not unfettered; it must respect the effectiveness of the relevant directive and the general principles of EU law. Member states may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and therefore deprive it of its effectiveness:

'In those circumstances, the answer to the first question referred is that European Union law must be interpreted as meaning that it is for the member states to define the concept of "workers who have an employment contract or an employment relationship" in clause 2.1 of the Framework Agreement on Part-time Work and, in particular, to determine whether judges fall within that concept, subject to the condition that that does not lead to the arbitrary exclusion of that category of persons from the protection offered by Directive 97/81 and that framework agreement. An exclusion from that protection may be permitted only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, within the category of workers.' [para 51]

33. In Catia Correia Moreira v Municipio de Portimao (C – 317/18), the Court considered the meaning of 'employee' under the Acquired Rights Directive in relation to an individual who held a special position under Portuguese national

law - a 'position of trust'. Within domestic law a person in position of trust had different protection from that of employees not employed in a position of trust. The CJEU considered that once a person is an employee under national law 'Article 2(1)(d) of [the ARD] merely requires a person to be protected as an employee under the national legislation concerned, without, however, insisting on the protection having a particular content or a particular quality. Indeed, making differences between employees relevant, depending on the content or quality of their protection under national legislation, would deprive [the ARD] of part of its effectiveness.' [paras 46 – 47]

34. My reading of Correia Moreira is that, like Mikkelsen, it envisages that Member states may have different types and levels of employment rights and protections. The purpose of the Acquired Rights Directive is to preserve these, whatever they may be.

Interpretation: relationship between TUPE and the Acquired Rights Directive

35. In Litster v Forth Dry Dock & Engineering Co Ltd [1990] 1 AC 546, the House of Lords held that it is the duty of a court (or tribunal) to give to TUPE a construction which accords with decisions of the European Court on the corresponding provisions of the directive to which TUPE was intended by Parliament to give effect. This may be done by implying necessary words. 'If the legislation can reasonably be construed so as to conform with those obligation [obligations arising under the EEC Treaty] – obligations which are to be ascertained not only from the wording of the relevant Directive but from the interpretation of it by the European court of Justice at Luxembourg – such a purposive construction will be applied even though, perhaps, it may involve some departure from the strict and literal application of the words which the legislature has elected to use.' [Per Lord Oliver at 559 D – f]

36. Sir Andrew Morritt C summarised the interpretive obligations on courts and tribunals in Vodafone 2 v Revenue and Customs Comrs [2009] EWCA Civ 446, [2010] Ch 77:
'In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
(a) It is not constrained by conventional rules of construction (per Lord Oliver in *Pickstone* at 126B)
(b) It does not require ambiguity in the legislative language (per Lord Oliver in *Pickstone* at 126B; Lord Nicholls in *Ghaidan* at 32)
(c) It is not an exercise in semantics or linguistics (see *Ghaidan* per Lord Nicholls at 31 and 35; Lord Steyn at 48–49; Lord Rodger at 110–115)
(d) It permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in *Litster* at 577A; Lord Nicholls in *Ghaidan* at 31)

(e) It permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in *Pickstone* at 120H–121A; Lord Oliver in *Litster* at 577A)
(f) The precise form of the words to be implied does not matter (per Lord Keith in *Pickstone* at 112D; Lord Rodger in *Ghaidan* at para 122; Arden LJ in [*R (IDT Card Services Ireland Ltd) v Customs and Excise Commissioners [2006] STC 1252*] at 114).' [para 37]

37. He added, at para 38:
'The only constraints on the broad and far-reaching nature of the interpretative obligation are that:
(a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." (per Lord Nicholls in *Ghaidan* at 33; Dyson LJ in [*Her Majesty's Commissioners of Revenue and Customs v EB Central Services Ltd [2008] EWCA Civ 486*] at 81). An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (see *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 110–113; Arden LJ in *IDT Card Services* at 82 and 113) and
(b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 115; Arden LJ in *IDT Card Services* at 113)'.

Domestic case law on reg 2 of TUPE

38. I was taken to some authorities on how the definition of 'employee' had been construed in TUPE 1981.

39. In Governing Body of Clifton Middle School v Askew [2000] ICR 286, the Court of Appeal considered whether the words 'or otherwise' in regulation 2 were capable of encompassing the relationship of a teacher with a school governing body in circumstances where the employment contract was between the teacher and the local authority and not between the teacher and the governing body. Peter Gibson LJ said that 'employment relationship' in the 1977 Directive 'must go wider' than a contract of employment. The Court of Appeal however concluded that for TUPE 1981 to apply there had to be a contractual relationship and 'or otherwise' encompassed working under some other type of contractual relationship than under a contract of service or apprenticeship but did not attempt to define what that might be. However, the ECJ in Albron has subsequently held that there need not be a contractual relationship between two parties for an employment relationship to arise.

40. I was also referred to Cowell v Quilter Goodison Co Ltd [1989] IRLR 392, which I refer to below when considering the distinction in domestic law between 'contract of service' and 'contract for services'.

Domestic case law on "contract of service" / contract for services

41. Mr Greaves took me to some authorities on the 'contract of service' and 'contract for services' distinction or, as he put it, 'dichotomy', which he submitted was reflected in the natural and ordinary language of reg 2(1) of TUPE 2006. A 'contract of service' in our domestic law is an employment contract and a 'contract for services' is traditionally the type of contract which a self-employed person has with the recipient of those services. Limb b) workers, Mr Greaves submitted, have contracts for services, and therefore inevitably fall within the exclusion in reg 2(1) of TUPE 2006.

42. In Bates van Winkelhof, the Supreme Court considered the definition of worker in limb b). In doing so, Baroness Hale reviewed the distinction between employment under a contract of service and 'those who are self-employed but enter into contracts to perform work or services for others'. Within the latter class, she said 'the law now draws a distinction between two different kinds of self-employed people.' There are self-employed people who carry on a profession or business on their own account and enter into contracts with clients or customers to provides work or services for them and there are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. These latter are limb b) workers: 'As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and *an intermediate class of workers who are self-employed but do not fall within the second class*.' [Paras 25 and 31, emphasis added]. In other words there are three categories of working person.

43. I was also referred to some earlier authorities which described the traditional dichotomy, in particular Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173. This was a case about whether a marker researcher was an employee for the purposes of the National Insurance Acts 1946 and 1965 and the National Insurance (Industrial Injuries) Acts 1946 and 1965. Cooke J said that 'the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service.' [184 G – H]

44. I was also directed to Cowell v Quilter Goodison Co Ltd [1989] IRLR 392 where the Court of Appeal considered whether an equity partner was an 'employee' within the meaning of TUPE 1981. It concluded that he was not because he was not in an employment relationship with his firm: 'His relationship with the other partners was governed by the concept to which the Partnership Act applies, namely of people who are carrying on business in common with a view to a profit, a very well known and well understood relationship in law, and one which is wholly different from an employment relationship.'. Glidewell LJ at para 9 considered Mr Cowell to be a person

'who provides services under a contract for services' and hence excluded expressly from the definition of employee under TUPE. I note that this was a case which predates both the ERA 1996 and the WTR 1998 and the Court of Appeal therefore proceeded on the basis of what appears to have been a binary distinction between the self-employed and employees without consideration of the 'intermediate class' recognised in Bates van Winkelhof.

Other definitions of "employment" in domestic law

45. The ERA 1996 definition of "employee" is not the only definition in our domestic legislation. Equality Act 2010, s 83: Interpretations and exceptions, provides:
'(1) This section applies for the purposes of this Part.
(2) "Employment" means –
(a) Employment under a contract of employment, a contract of apprenticeship or a contract personally to do work...
(4) A reference to an employer or an employee or to employing being employed is (subject to subsection 212(11)) to be read with subsection (2) and (3);...'

46. In Pimlico Plumbers Ltd v Smith [2018] UKSC 29, the Supreme Court proceeded on the basis that differences in the wording between section 230(3) of ERA 1996 and the section 83(2)(a) Equality Act 2010 definition of employment were a distinction without a difference, per Bates van Winkelhof. [para 15 of Pimlico Plumbers] In other words, limb b) 'workers' are Equality Act 'employees'.

47. As Lord Wilson commented at paragraph 7 of Pimlico Plumbers: 'It is regrettable that in this branch of the law the same word can have different meanings in different contexts. But it gets worse... different words can have the same meaning.'

48. Mr Ohringer also drew my attention to s 235 of the Trade Union and Labour Relations (Consolidation) Act 1992: Constructions of references to contract of employment: 'In sections 226 to 234A (requirement of ballot before action by trade union) references to a contract of employment include any contract under which one person personally does work or performs services for another and "employer" and other related expressions shall be construed accordingly.'

49. I was not provided with a comprehensive account of definitions of 'employment contract' and 'employee' in domestic legislation and there may be others not identified by counsel. What is apparent is that the statutory definitions do not themselves universally maintain a bright line distinction between contracts of service and contracts for services in the way the common law traditionally did.

Discussion and conclusions

Construction of the Acquired Rights Directive

50. The starting point for interpretation of TUPE 2006 is the Acquired Rights Directive. It is clear from Mikkelsen and Viggosdottir, that one of the purposes of the Acquired Rights Directive is that rights should be preserved provided they arise from national employment / labour law. In looking at national general employment law, it is relevant to look at all relevant statutes, per Viggosdottir.

51. At first sight there is an apparent circularity in the exercise of resorting to the Directive to construe the TUPE 2006 definition of employee in accordance with EU law because Article 2.1(d) tells us that an 'employee' is 'anyone protected as an employee under national law'. However, the European case law cited above also makes clear that Member states do not have an unfettered discretion as to who is deemed to be protected. See O'Brien in particular. Viggosdottir and Correia Moreira suggest that the intention is to protect and preserve what one might call labour law rights at the level those existed prior to the transfer. I observe that that may, as under UK law, be a sliding scale.

52. Who then does our 'national legislation relating to labour law' protect 'as an employee'? Is it merely those who are defined as 'employees' under various statutes (and, if so, which, given for example the different definitions in the Employment Rights Act 1996 and the Equality Act 2010?) or does it also encompass those who are provided with a lower level of 'employment rights' under the label 'worker'?

53. A related question is what effect on the overall question it has that our domestic legislation appears to be inconsistent in its categorisation of 'workers' and 'employees'. The section 83 (2) Equality Act 2010 'employee' is the ERA 1996 limb b) 'worker'.

54. In conducting this exercise, it is relevant to note that overlying or overlapping with the categories of 'contract of service' and 'contract for services', our domestic law has long recognised an intermediate category between those who work as employees under a contract of service and those who work as independent contractors in business on their own account, as described by Lord Wilson at paras 8 - 11 of Pimlico Plumbers. As Lord Wilson points out, the expanded definition of 'employment' contained in the Equality Act 2010 dates back to the Equal Pay Act 1970 and the limb b) worker dates back to the Industrial Relations Act 1971 where the definition is in a substantially similar form to that found in s 230 ERA 1996.

55. The Acquired Rights Directive protects those whom our domestic employment law recognises as employees. It may be that it should properly be construed

as encompassing all of those whom Mr Ohringer described as falling within 'all the employment statuses which receive legal recognition' but it does not seem to me that I need go so far in resolving this point. It seems to me to be sufficient to identify that our domestic law uses 'employee' and cognate expressions in at least two different ways. First the term encompasses those who are employees in the traditional sense of having a contract of service and those incidents of a contract of service identified in a venerable body of case law such as Market Investigations Ltd. Employees of this sort benefit in particular from such rights, if they otherwise qualify under the relevant statutory provisions, as the rights not to be unfairly dismissed and to receive redundancy payments. However, our domestic law has also long recognised 'employees' of a different sort, although these individuals are sometimes identified as 'workers' (eg in the ERA 1996 and in the WTR 1998) and sometimes as 'employees' (in the Equality Act 2010). These are persons who fall into the 'intermediate class'. These workers / employees benefit from employment rights substantially derived from EU law, such as, but not limited to, the right to equal pay, rights not to be subjected to discrimination on the basis of protected characteristics and rights to restrictions on their working hours and to annual leave.

56. I find that 'employment relationship' in the Acquired Rights Directive is properly to be read as embracing this class of working person. These are individuals whom our domestic law protects under the label 'employees' under the Equality Act 2010 and as 'workers' under other legislation.

57. This is not simply a semantic or labelling issue – had the Equality Act 2010 called those who are protected from discrimination 'workers', this would not, in my view, have taken them outside them outside the protection of the Acquired Rights Directive. This is because the discretion of a member state in defining a concept such as 'employment contract' or 'employment relationship' is not an unfettered discretion. If 'employment relationship' were to be so narrowly defined that a Member state could exclude limb b) workers / Equality Act employees, the Acquired Rights Directive would not operate, for example, to transfer liability against an insolvent transferor to a solvent transferee in the case of a limb b) worker who had been discriminated against by the transferor. It is difficult to see how it can be in accordance with the Acquired Rights Directive and the Framework Directive, read as parts of a cohesive whole, for a group of workers who are entitled to protection from discrimination not also to be entitled to have liabilities for infringement of their EU derived employment rights transferred and preserved. I have regard in particular to Recital (3) which emphasises the purpose of the Acquired Rights Directive to ensure rights are safeguarded.

Construction of reg 2(1) TUPE 2006

58. It is clear from its wording that reg 2(1) of TUPE 2006 is intended to confer rights and protections on a broader class of employees than those employed under a contract of employment or apprenticeship as reflected in the words 'or otherwise'. I find that those words in both TUPE 1981 and TUPE 2006 are designed to reflect the words 'employment relationship' in Art 3.1 of the Acquired Rights Directive.

59. In interpreting regulation 2(1) of TUPE 2006, I should give effect to the Acquired Rights Directive in accordance with the principles summarised by Sir Andrew Morritt in Vodafone.

60. Applying those principles, I can properly give effect to the Acquired Rights Directive by concluding that the words 'or otherwise' are to be construed so as to embrace limb b) workers / Equality Act employees.

61. Not interpreting reg 2(1) so as to embrace limb b) workers leads to absurdity. Take the example of the individual who qualifies as an Equality Act 2010 'employee' but is an ERA 1996 limb b) 'worker'. It is difficult to see how the Equality Act employee could be said not to be 'protected as an employee under national law' within Art 2.1(d) of the Acquired Rights Directive. If such an employee's rights under the Equality Act 2010 are preserved by a transfer, it is equally difficult to see how it could be the intention of Parliament that such rights that same worker has by virtue of being a limb b) worker should not be preserved.

62. I must also grapple with Mr Greaves' submission that limb b) workers are expressly excluded in reg 2(1) TUPE 2006 as persons providing services under 'contracts for services'. It seems to me that, as a matter of domestic interpretation, the exclusion is intended to catch only those independent contractors who are genuinely in business on their own account and do not have any employment / labour law rights to be preserved in the event of a transfer. The decision of the Court of Appeal in Cowell v Quilter Goodison does not appear to me to preclude such a conclusion since the Court of Appeal was not there considering the application of TUPE to the 'intermediate class' of limb b) workers / Equality Act employees.

63. If I am wrong about that and interpreting the exclusion of those who 'provide work under a contract for services' so as to confine that exclusion to those who are excluded from the definition of limb b) worker because they 'perform...work or services for another party to the contract whose status is...by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual', involves a departure from the strict and literal application of the words, that construction seems to me to be necessary to give effect to the Acquired Rights Directive and in particular Recital (3). Alternatively, and if necessary, I find that those words from s

230(3)(b) should be implied into the reg 2 TUPE 2006 exclusion so as to give effect to the Acquired Rights Directive.

64. This interpretation does not 'go against the grain' of TUPE 2006, the purpose of which, in accordance with the Acquired Rights Directive, is to preserve the employment / labour law rights of those who work within an undertaking when that undertaking changes hands. Our 'general employment law' protects both limb b) workers and traditional employees, at different levels of protection, and both of these classes have their rights preserved by TUPE 2006.

65. A preliminary hearing will now be listed for case management of these claims.

26/11/19

Employment Judge Joffe
London Central Region

Sent to the parties on:

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27/11/19

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For the Tribunals Office