Is your ‘temp’ your employee?

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Most employers are familiar with the term ‘ TUPE’. It is shorthand for the Transfer of Undertakings (Protection of Employment) Regulations, which protect the rights of employees when their employer changes as a result of a transfer of a business.

TUPE was introduced into the UK 25 years ago and has remained largely unchanged, despite the huge changes in industry since that time. Now, at last, there has been an overhaul of the Regulations and the ageing 1981 version of TUPE has been replaced with a shiny 2006 version.

The basic concepts of TUPE remain the same. However, the protection of the Regulations has been broadened and detail has been inserted that, in part, reflects the outcome of the plethora of litigation on the subject over the years. The main changes are:

- TUPE now expressly covers most cases where services are contracted out, re-contracted or contracted in (called ‘service provision changes’)
- for the first time, there is a duty on the transferor employer to provide the transferee employer (before the transfer) with basic details of the transferring employees (called ‘employee liability information’)
- new provisions clarify the circumstances in which the transferring employees’ contracts of employment can be changed
- special provisions have been inserted to make it easier for insolvent businesses to be transferred to new employers.

In principle, new TUPE should make life easier for employers. Only time will tell whether it makes a difference in practice.

Can employees working wholly or mainly outside Great Britain bring claims here for unfair dismissal? In the recent decision of Serco v Lawson and others, the House of Lords endeavoured to settle this long-standing dispute.

The general principle is that employees who work abroad will, in some circumstances, have the right to bring a claim for unfair dismissal where the claim relates to ‘employment in Great Britain’. An employee working in Great Britain at the time of his dismissal would fall into this category.

Their Lordships held that tribunals should consider where the employee is based by looking at the conduct of the parties and the way they have been operating the contract of employment. Even if the employee spent time abroad and was employed abroad, if he was based in Great Britain he could bring a claim of unfair dismissal.

In exceptional circumstances, an employee not based in Great Britain might also be entitled to bring an unfair dismissal claim, if he had a sufficiently strong connection to Great Britain. Lord Hoffman gave two examples of such an expatriate employee:

- an employee, posted abroad, who worked for a business conducted in Britain. For example, the foreign correspondent of a British newspaper living abroad
- an employee working in a British ‘political or social’ enclave abroad, such as someone working on a British military base in Germany.

The future

Their Lordships left open the question as to whether there might be other categories of employees who could bring claims for unfair dismissal but did stress that there would have to be strong connections with Britain and British employment law for them to do so.

Despite this decision there is still ample scope for further litigation in the future to clarify whether different employees are based in Britain or have strong connections to Britain and British employment laws.

It used to be thought unikely that an agency worker would ever be found to be an employee of the client. Dacas v Brook Street Bureau (UK) Ltd and Wandsworth LBC was the first case to indicate that, in appropriate circumstances, an agency worker could become an employee of the client even if there was a document in place stating the contrary.

The Court of Appeal has now confirmed, in Cable & Wireless plc v Muscat, that the Dacas decision is well-founded. Muscat adds a slight twist because there were four parties involved: the client (C&W), the agency (Abraxus), the agency worker (Mr Muscat), and the personal service company though which Abraxus engaged Mr Muscat. The introduction of this additional level of complexity still did not prevent the Court deciding that there was an implied contract of employment between Mr Muscat and C&W.

The practical consequences of the Dacas and Muscat decisions are limited, provided clients use agency staff for short-term assignments only. This

is because employees, unlike 'workers', normally have the right not to be unfairly dismissed once they have been employed continuously for a year. All agency staff (whether they are employees or not) are protected by (amongst other laws) the Working Time Regulations and the anti-discrimination legislation.