UNIONLINE NEWS | SCOTLAND
Legal Services Newsletter for GMB and CWU Members and their Families
MAY 2020

Amendment to direction issued by employment tribunal presidents'

The Presidents of Employment Tribunals England and Wales and Scotland are conscious that it is impossible to be certain about how long special measures may need to be taken in response to the Covid-19 pandemic. In these circumstances, they have decided it is appropriate to amend the Direction they issued on 19th March 2020 so as to introduce a review mechanism and provide some clarity in connection with the timescale over which their Direction applies, in the first instance.

The Direction is therefore amended as follows:

1) After the words "all in-person hearings (hearings where the parties are expected to be in attendance at a tribunal hearing centre)" the following words are added **"listed to commence on or before Friday 26th June 2020".**

2) Before the words "The parties remain free to make any application to the tribunal at any time" the following is inserted **"In-person hearings listed to commence on or after 29th June 2020 will remain listed, in the meantime, and will be subject to further directions in due course".**

3) After the words "The parties remain free to make any application to the tribunal at any time" the following words are added **"This Direction will be subject to ongoing review and in particular will be reviewed on 29th April 2020 and 29th May 2020 to take into account the circumstances as they then stand in connection with the Covid-19 pandemic".**

For the purposes of clarity, the amended direction is set out in full below: -

In view of the rapidly changing circumstances created by the Covid-19 pandemic, the Presidents of the Employment Tribunals in England & Wales and in Scotland have directed that from Monday 23rd March 2020 all in-person hearings (hearings where the parties are expected to be in attendance at a tribunal hearing centre) listed to commence on or before Friday 26th June 2020, will be converted to a case management hearing by telephone or other electronic means which will take place (unless parties are advised otherwise) on the first day allocated for the hearing.

This will provide an opportunity to discuss how best to proceed in the light of the Presidential Guidance dated 18th March 2020, unless in the individual case the President, a Regional Employment Judge or the Vice-President directs otherwise. If the case is set down for more than one day then parties should proceed on the basis that the remainder of the days fixed have been cancelled. For the avoidance of doubt, this direction also applies to any hearing that is already in progress on Monday 23rd March 2020 and, if not already addressed before then, the parties may assume that the hearing on that day is converted to a case management hearing of the kind referred to above.

In person hearings listed to commence on or after 29th June 2020 will remain listed, in the meantime, and will be subject to further direction in due course. The parties remain free to make any application to the Tribunal.

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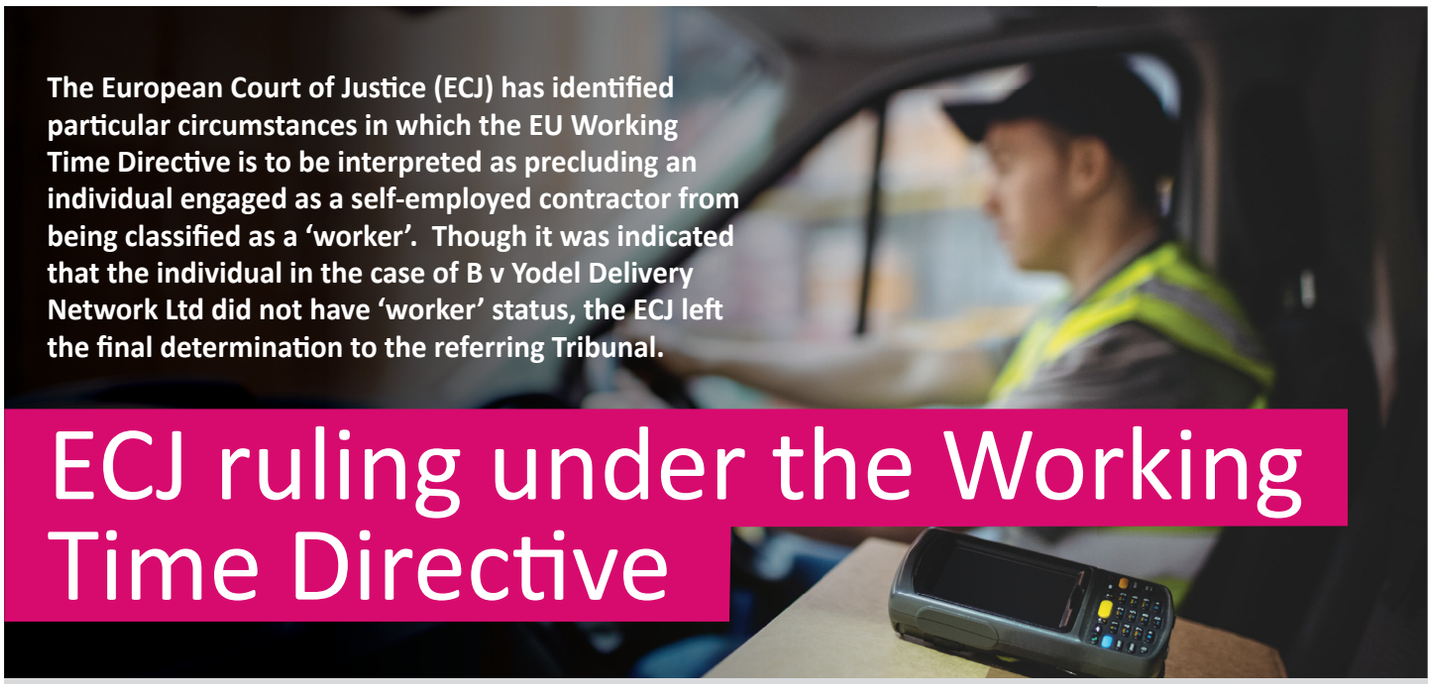

The European Court of Justice (ECJ) has identified particular circumstances in which the EU Working Time Directive is to be interpreted as precluding an individual engaged as a self-employed contractor from being classified as a 'worker'. Though it was indicated that the individual in the case of B v Yodel Delivery Network Ltd did not have 'worker' status, the ECJ left the final determination to the referring Tribunal.

ECJ ruling under the Working Time Directive

Background

The Claimant ("B") is a parcel delivery courier, engaged under a courier services agreement with the Respondent ("Yodel"). The agreement stipulates that B is a 'self-employed independent contractor' and contains a contractual right to appoint a suitably qualified substitute.
B is able to work for competitors without restrictions, and neither B nor Yodel are obliged to accept or provide any work. B largely has flexibility on when to deliver and the route which is taken, with payment being made at a fixed rate for each parcel, varying according to the place of delivery.

B brought claims under the Working Time Regulations 1998, claiming that his status was that of a 'worker'. However, the Tribunal considered the contractual right to substitute and the unrestricted right to work for several customers simultaneously, to be incompatible with the classification of a 'worker' under UK national law. The Tribunal were therefore concerned as to the compatibility of UK national law, with that of EU law under the WTD and accordingly referred a number of questions on the issue of 'worker' status to the ECJ for preliminary ruling.

The Decision

As opposed to giving a judgement, the ECJ instead made a reasoned order under Article 99 of its Rules of Procedure, on the basis that the reply to the referring Tribunal may be clearly deduced from existing case-law or admits of no reasonable doubt. The ECJ firstly noted that the WTD does not define the concept of 'worker', which has an autonomous meaning specific to EU law. Being classified as an 'independent contractor' under national law was held not to preclude classification as an employee under EU law, if such independence was merely notional.

The essential feature of an employment relationship was identified as the performance of duties under the direction of another in return for remuneration. The ECJ referred to the flexibility of the nature and execution of work, together with the existence of a hierarchical relationship as being crucial factors to consider when making an overall assessment of the circumstances, which was clearly stated to be for the national court to carry out.

In order to assist the referring Tribunal, the ECJ identified significant points for consideration when making its determination. It referenced the great deal of discretion afforded to B, including:

- **the contractual right to appoint a suitable substitute;**
- **the ability to accept, decline or set a limit on work undertaken;**
- **the ability to provide services to any third party (including competitors); and**
- **the flexibility to fix hours of work within parameters and tailor these to suit their personal convenience.**

In circumstances whereby such discretion is afforded, provided there is not a relationship of subordination and the independence of the individual is not fictitious (which the court indicated was not apparent here), it was ordered that the WTD must therefore be interpreted as precludingan individual engaged as a self-employed independent contractor from being classified as a 'worker'.

However, it was held to be for the referring Tribunal to make the final determination on the individual's professional status, taking account of all the relevant factors relating to that individual and the economic activity carried out.

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