EAT further considers “organised grouping of employees”

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Where there is a change of identity of the person carrying out activities on behalf of another person (either subcontracting out for the first time, changing subcontractor, or bring activities back in-house), a service provision change has potentially taken place. "Potentially" because r3(3) Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") requires that, for there to be a service provision change, there is an "organised grouping of employees" whose principal purpose is carrying out the activities.

The EAT has considered the meaning of "organised grouping of employees" in the recent case of *Mach Recruitment Ltd v Oliveira* [2025] EAT 107. There, C was an agency worker for G-Staff Ltd. However, by virtue of the fact that G-Staff wished to exercise the Swedish derogation (i.e. the exception to agency worker's right to be treated in certain respects in the same way as if they had been employed direct by the end-user), C had a contract of employment. Thus, she was potentially protected by TUPE, should there be a service provision change by which she was affected, which is what happened. G-Staff ceased providing workers to Butcher's Pet Care Ltd ("Butcher's"), of which C was one. R took over the provision of workers. R offered C work with Butcher's and "recruited" her afresh. When she was later no longer offered work with Butcher's following a reduction in the need for workers, she claimed that she had been unfairly dismissed. R argued that she was not an employee, and therefore did not qualify. C relied on her G-Staff contract of employment being transferred to R.

At trial, there was no evidence from G-Staff as to how its workforce was organised. C's evidence was that she always worked with Butcher's alongside the same people throughout save when someone left and was replaced. The tribunal accepted that that led to the conclusion that G-Staff had an organised grouping of employees.

On appeal, R argued that the tribunal had erred in two ways:

1. The tribunal had focused on C's activities only and had not considered all activities being done by G-Staff for Butcher's (as suggested in *Ceva Freight (UK) Ltd v Seawell Ltd* [2013] CISH 59 ought to be the case); and

2. The evidence before the tribunal was that there could have been a grouping but that it was insufficient to demonstrate an "organised" grouping in light of *Eddie Stobart Ltd v Moreman and others* [2012] ICR 919.

The decision in *Moreman* was that the statutory language does not naturally apply to a situation where a combination of circumstances (shift patterns and working practices on the ground) means that a group of employees may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client.

The EAT (John Bowers KC, sitting as a Deputy High Court Judge) dismissed the appeal. The EAT concluded that there does not need to be a literally conscious decision to segregate a particular group of employees. It was found to be enough that C consistently operated with the same group of employees without more. There did not need to be anything more formal than that.

It will be interesting to see how tribunals will apply this decision in similar cases. Tribunals are used to considering whether there was deliberate intent to organise a group of employees by reference to a client's work. Employees and transferors may well refer to this decision as requiring the tribunal

to consider that the mindset of a transferor in organising its workforce is at some level less than deliberate intent, albeit what that level is remains to be seen, and there may be cases in the future that further inform the point.

Tom was instructed by Lee Stephens and David Rogers of Bridge Employment Law Ltd.

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August 2025

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