Joint employer status:
Implications for outsourcing in the FM sector

A white paper from the experts at International Workplace
Joint employer status: Implications for outsourcing in the FM sector

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Outsourcing a service, be it FM, HR, IT or any other, is an established approach used by organisations of all sizes, and in all industry sectors. As a concept, outsourcing grew in popularity during the 1990s when companies across the UK began to outsource their non-core activities. As the well-known business consultant and author Peter Drucker is often quoted as saying in 1973, "Do what you do best and outsource the rest!"

The approach is built upon the logic that organisations should focus on their core sector competence and contract out other business services that they need to function. This means that they can reduce the necessity for hiring and training for roles that are not part of the core function of the business but enabling them to have the flexibility of such services as and when they need them.

However, the issue of outsourcing has received negative press attention in recent years, not least due to the collapse of Carillion, and, more recently, due to the employment law issues it raises.

This white paper details the employment law issues that FMs should be aware of, focusing in detail on a recent case involving Cordant and the University of London, and the issue of joint employer status, where 75 outsourced workers raised a legal challenge to gain the same favourable employment terms as directly employed staff.

Employment law and its impact on outsourcing

Whilst outsourcing is seen as a valuable business tool for organisations, legal restrictions do apply to the service provider, specifically in the form of employment legislation. The key points are as detailed below.

TUPE

Staff who transfer into the service provider, either from another service provider (such as when the client changes the provider post a tender exercise) or from the client itself (when the service is originally undertaken internally by the client but is then outsourced) are legally protected from having their original employment terms and conditions changed. This protection is known as Transfer of Undertakings (Protection of Employment) Regulations or TUPE.

The protection means the service provider cannot change the pay, terms or conditions of the staff who transfer to it. Therefore, the transferred staff could be on higher pay and terms than staff directly employed by the service provider, causing unrest and a 'them and us' divide.

This can create pressure for the service provider to 'harmonise' the terms and conditions of all staff, including those protected by TUPE, which poses significant legal risk.

Furthermore, for the client, a key reason to outsource the service will be to reduce cost. This demand for lower cost services is then passed onto the successful service provider who has to provide the required quality service within the agreed contract price, and ensure they remain profitable. They may do this through a number of routes, including attempted harmonisation of terms if the TUPE staff have more generous terms, or using less staff (if possible) to deliver the same service.

Therefore, TUPE has a significant practical impact on outsourcing.

Commercial obligations

As part of the commercial contract between client and service provider, the contract will usually provide for the client to 'control' which of the service provider's staff work on the client site. This means that if the client has a genuine performance related
reason, or any other reason, to ask for the employee to be removed, the service provider generally has to honour this, and replace them with another member of staff.

This poses a risk to the service provider because if there is no justifiable reason for the removal, the employee can action a tribunal claim against the service provider for unfair dismissal (legal criteria permitting). In discrimination claims, the employee can raise a claim against both the service provider, as the direct employer, and the client, so the risk can extend outside the direct employment relationship.

This risk can be limited by ensuring the commercial contract contains relevant warranties and indemnities from both parties and by following a reasonable dismissal process where an employee has to exit the business as a result of a client request.

**Employment status**

Understanding the employment status of the people working for the business is a critical part of resource and risk management. Legally there are three types of employment status:

1. Employees – directly employed by the business and have access to all benefits and employment rights;
2. Workers – perform work for the business but are not directly employed by it, although they qualify for certain employment rights. Typical examples are people provided by a service provider or agency; and
3. Self-employed contractors – contracted to provide a specified service over a set time period on agreed terms.

The growth in the ‘gig economy’ has meant the lines are blurring and recent tribunal case decisions have caused further confusion. Uber drivers have been classified as workers rather than self-employed contractors, and therefore now attract worker related employment rights.

City Sprint, Pimlico Plumbers and Hermes have all lost cases at Tribunal, with the judgment confirming worker status rather than self-employed status. The net result of these judgments is that organisations that believe they are engaging self-employed staff may be engaging workers, or even employees, depending on the amount of control exerted over the working relationship.

Deliveroo settled a case with 50 of its workers who were taking the company to an Employment Tribunal on the grounds of their employment status. Whilst

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**Key benefits of outsourcing**

**Benefits for clients:**

- **Reduced costs:** the client receives a complete service for a set price, allowing them to budget effectively. By agreeing what the service will provide to the organisation at the outset, the client can feel secure that service costs won’t creep up during the financial year. However, to reap these cost savings, the client needs to be clear on the actual costs involved in the first place.

- **Increased efficiency:** the client can focus its resources on core business activities without distraction from the non-core elements, thereby driving efficiency. Again, this only works when there are clear lines of demarcation realistically setting out where the outsourced provision ends, and where internal activity starts.

- **Increased resource flexibility:** the client can increase or decrease their workforce output by flexing the outsourced service according to business needs – all without taking on the employment liabilities for the staff providing the outsourced service, who remain employed by the outsourced service provider.

**For the outsourcing company,** there are also several benefits:

- Clear business case for the service offering, as long as both the client and service provider agree what the expectations are of each other and are realistic about these.

- Defined revenue stream – if you provide a good service and meet expectations, the client should stay with you – finances permitting.

- Good reputation as being a credible and professional service provider.
the implication is that Deliveroo took the commercial decision to not test its current ‘self-employed’ model at Tribunal for fear that the reality of the situation would be anything but ‘self-employment’, it also has not subsequently changed its business model in this respect. Indeed, a later challenge through the CAC for trade union recognition status, which would bring the employment status issue to light again, failed. The trade union involved is the Independent Workers Union of Great Britain (IWGB), and it has successfully persuaded the High Court to consider this matter for a judicial review; therefore the issue is not yet closed for Deliveroo.

The Government has commissioned a review of employment practices in the UK and has opened consultation on key areas. Notably the Government is consulting on employment status – whether this should change from the current three-tier system, outlined above, and how to make it simpler to understand and apply.

The net effect of employment status on outsourcing situations is that the service provider supplies the client with workers, but depending on who and how the individual, and their workload is controlled in reality, will help determine the actual employment status involved.

A recent disagreement involving the University of London and outsourced staff provided by FM company, Cordant Security, has raised even more questions about employment rights and where the employment relationships lie. This disagreement involved a subsection of workers, namely outsourced workers, pushing for recognised entitlement to employment rights. Had their case succeeded in the High Court, the ramifications would be huge for the 3.3 million outsourced workers currently in the UK.
Cordant and the University of London – High Court case involving 75 outsourced workers and the IWGB union

A group of 75 outsourced workers supplied to the client, the University of London, by the service provider, Cordant Security, raised a legal challenge to access the same terms and conditions as staff employed directly by the University.

The group, which included receptionists, security guards, post room staff and porters, were represented by the Independent Workers Union of Great Britain (IWGB), who originally filed an application with the Central Arbitration Committee (CAC) in November 2017. The application was to be recognised as the union who could bargain on behalf of the staff directly with the University as well as with Cordant Security.

The IWGB argued that although Cordant was the direct employer of the outsourced staff, the University, as the client being serviced by the staff, was the actual party controlling not only what the workers did day-to-day, but also the pay, terms and conditions they were receiving, whilst avoiding the legal responsibilities of being an employer. IWGB further argued that it was unfair that the outsourced staff worked alongside staff directly employed by the University on significantly lesser terms and conditions but in the same working environment.

The union alleged the University was the ‘de-facto’ employer and applied to represent the staff in order to collectively bargain with the University on employment terms. IWGB General Secretary, Dr Jason Moyer-Lee is cited as saying “low paid outsourced workers across the UK routinely have their pay and terms and conditions decided by their de-facto employers, whose premises they clean or maintain. In this set-up, the contractors are often little more than glorified middle men. For the collective bargaining rights of these low paid workers to mean anything, they must be able to negotiate with the actual decision makers.”

This is the basic premise of the ‘joint-employer’ concept, which has been widely recognised in the US for decades. The notion is that employees can compel client companies, evidenced as having ‘sufficient control’ over them, to enter into collective bargaining agreements alongside the actual employer. The UK has never recognised the joint employer concept for the purpose of negotiating terms and conditions.

The University had clearly stated that it is the client in this situation, and had outsourced the service provision to Cordant, who employed and supplied the staff on the basis of a normal outsourcing arrangement. The University did not directly employ the staff; ‘controlled’ them only insofar as a client normally would in an outsourcing arrangement; and referred back to Cordant if and when service issues arose, leaving Cordant to maintain the employer relationship with the staff. The University also argued that extending union rights to outsourced workers would ‘remove the benefits of outsourcing’.

To emphasise their point, the staff organised the biggest strike in UK higher education history in April 2018, resulting in the University committing to review the service and taking some elements back in-house.
The CAC then decided not to hear the IWGB’s application because the University had effectively argued the outsourced staff could join the University’s existing trade union, Unison, if they wanted representation. The IWGB argued the staff would not join Unison, perceived as having a ‘cosy’ relationship with the University and therefore unlikely to push the agenda for change. The CAC also found that the University was not the de-facto employer in this case.

IWGB then raised the issue at the High Court, claiming the CAC had breached the outsourced workers’ human rights under Article 11 of the European Convention on Human Rights.

In August 2018, the IWGB confirmed the High Court had granted permission for a judicial review of the CAC decision. The IWGB claimed this a minor victory at the time, despite the High Court increasing the number of parties who could object at the review. The CAC, Cordant and the University of London were invited to defend their position that the employment liabilities remain solely with Cordant as the employing party. The High Court also allowed the Department for Business, Energy and Industrial Strategy (BEIS) to argue against the IWGB, given the Government indirectly employs thousands of outsourced workers and would have a clear interest in maintaining status quo.

The High Court denied the IWGB cost protection; therefore if the IWGB lost the case, it would have to pay the legal costs of the other four parties. The IWGB subsequently launched a crowdfunding campaign to help it cover such an eventuality. The Good Law Project, an organisation established to ‘hold the Government to account’ publicly supported this cause.

The case was heard at the High Court on 26 February 2019. The IWGB’s barrister argued that Article 11 of the European Convention on Human Rights required “that all workers, via their trade union, have a practical and effective right to collective bargaining”.

The University’s legal team argued that the IWGB members’ Article 11 rights were not engaged as the Article does not confer rights to bargain collectively with anyone who is not the workers’ employer. The BEIS argued the same.

Mr Justice Supperstone, who heard the case at the High Court, reserved his judgment at the time, but on 25 March 2019, he rejected the IWGB’s arguments and effectively closed down the joint-employer concept.

Mr Justice Supperstone agreed with the CAC’s original decisions, namely:

- there was already a collective agreement in force for the workers, through Unison, who could conduct collective bargaining on their behalf with their employer, Cordant. Therefore the IWGB did not need to be recognised for this purpose; and
- the University did not ‘employ’ the 75 outsourced staff and therefore did not need to enter into collective bargaining about their employment terms.

Mr Justice Supperstone stated:

“There is, in my view relevant and sufficient reasons for limiting the right to compulsory collective bargaining to workers and their employers.”

Given his agreement with the CAC that the University did not employ the workers, this would negate the need for the University to enter into any bargaining arrangements with a union on their behalf.

Given the IWGB has been campaigning steadily for this cause since 2017, it is very disappointed with the outcome. However, its general secretary Jason Moyer-Lee has been quoted as stating that “when it comes to the exploitative, discriminatory and fundamentally unfair practice of outsourcing it is the war that the IWGB is fighting to win”.

Similarities to agency worker case law

Similar claims have been brought in the UK previously by agency workers claiming they are, in fact, employees of the end user client. There is considerable case law on the tripartite relationship between an agency worker, the agency and the client. In most instances, the question for the Tribunal to answer is whether the agency worker is entitled to the same terms and conditions that direct employees of the client receive, once they have been in the same placement for 12 weeks (as set out in the Agency Worker Regulations). Such claims have been successful in the main, as the Tribunals have had to consider the Agency Worker Regulations, which set out this very protection.
However, in cases where Tribunals are asked to consider if the agency worker is an employee of the client, Tribunals have generally been very reluctant to find an employment relationship between the worker and the client, if there is already an existing employment contract between the agency and the agency worker.

Bringing this back to the joint employment case, clearly the IWGB was unable to highlight that employment relationship existed between Cordant, the University of London and the outsourced staff.

**Joint employer status in the US**

The concept of joint employment has existed in the US for decades. There is no single definition of joint employment; instead, various employment laws define situations in which joint employment may occur. Where the status is established, long-standing federal and state protections apply to those staff covered. Therefore, a hotel receptionist who is working through a temping agency may be employed by both the hotel and the agency. A cable installer working for a subcontractor to a cable company could be employed by both the subcontractor and the cable company.

There are a few key points that help determine joint employment:

- whether two different employers clearly employ the same person and this is inferred in the employee’s contracts with both;
- the level to which both employers are associated with each other; and
- the extent the employers have the right to control, or actually exercise control, on the employee.

The latter point is a key consideration because the more control both employers have on the individual (directly or indirectly), the greater the chance the courts will claim the employee is jointly employed. There are several cases evidencing this ruling in the US legal system. However, under the current Presidential regime, joint employment is being heavily scrutinised and there are concerns that the scope and definition of a ‘joint employer’ will be drastically narrowed to benefit corporations rather than workers.

Until such time that changes are made, US lawyers continue to advise corporations to ensure they clearly set out their responsibilities in an agreement to avoid any future uncertainty about where the employment relationship lies. Critical elements including setting out who is liable for:

- tax payments – state and federal tax laws apply;
- worker compensation insurance payments;
- unemployment insurance tax and disability payments; and
- employee stock purchase plans – ‘common law employees’ are eligible for these after 12 months’ service in the organisation. Client (end user) businesses can be caught up if the length of service goes into years of work.

Written agreements covering the above are essential in the US but they offer no absolute panacea especially in outsourcing arrangements because the courts defer to common law and statutory employment tests, and these focus on who controls the worker in real life. Something that seems to be mirrored in the UK.

**Impact of the case on FM employers and employees**

We are now aware that the joint employer case, heard in the High Court on 26 February 2019, has been rejected. The potential implications on FM employers and employees, had the court found in favour of the IWGB and the joint employer concept, as well as the implications of the reality are as set out below.

**What could have been**

Had the High Court found in favour of the IWGB appeal to be recognised as the union to undertake collective bargaining for the 75 outsourced workers, the CAC would have to re-hear the IWGB’s union application. If this had then been successful, the IWGB would negotiate the terms and conditions of the outsourced workers with both Cordant, as the direct employer, and the University, as the de-facto employer.

There would be several implications of this:

- The end client (joint employer) would have to take a much more significant role in managing the outsourced worker, and both companies would be jointly responsible for someone who is potentially outside at least one party’s day-to-day control;
- If established in the UK, unions could collectively bargain the pay, terms and conditions of
outsourced workers with the client (joint employer) who would then find it difficult to justify inferior terms and conditions for its outsourced workers. This could mean that terms offered to the client’s direct employees would be weakened, because the client would need to reach a ‘middle ground’ for all workers – direct and outsourced. The financial impact for the client could potentially be enormous:

- 3.3 million outsourced workers would then be on the same terms and conditions as the people they work alongside everyday but are directly employed by the client; and
- If joint employment was established, this would create complexities for both employers in terms of applying employment rights. Although there is protection against discrimination for workers already, certain employment claims can only be made against ‘employers’. So, if an individual was dismissed unfairly by one of the employers, would both be liable for any tribunal claim arising from the dismissal? Would the client also be subject to potential claims of unfair deductions, unpaid holidays, redundancy claims and so on, by the outsourced worker?

Creating such complexity would not only be highly unpopular with organisations but would also undoubtedly erode the benefits of outsourcing in the UK.

Rather than being able to access a suitable and flexible workforce and avoid the direct costs and risks associated with an employment relationship with those workers, the client would instead be exposed to the exact risks that the outsourcing arrangements are intended to protect it from. This would make outsourcing pointless and negate the benefits that organisations have benefitted from in the past.

Further, for every large organisation that can exert significant control over its outsourced workforce, there will be hundreds of smaller or medium-sized organisations that can not. For these smaller businesses, outsourcing is the only way they can efficiently obtain the workforce to deliver their business objectives. A UK joint employer status could lead such businesses trying to work an ultra-lean model, with the potential detrimental effect of reducing staff numbers to reduce their outgoings and squeezing the remaining employees to carry out more tasks and take on more responsibilities.

**Reality**

The High Court has not found the University to be a de-facto employer, therefore the employee liabilities remain with Cordant, as the employer. There is no employment impact on the University – other than the press and media coverage of this situation. The University has already committed to reviewing services and taking some back in-house so this is likely to progress regardless.

The IWGB could still appeal to the Court of Appeal, or in rare circumstances, directly to the Supreme Court for further review of the joint employment concept. This action will in part be dependent on the financial situation, given IWGB will need to pay the legal costs of the CAC and the Department for Business, Energy and Industrial Strategy. Cordant Security did not partake as an ‘interested party’ in the legal case.

Therefore whilst the ‘outward’ impact on outsourcing would be minimal, both clients and outsourced providers would be wise to review the ‘real-life’ outsourcing arrangements in order to mitigate and minimise the likelihood of a claim being raised against them in the future. The IWGB has already committed to continuing this fight for equal terms.
How can you mitigate the risks?

The IWGB will continue its equal rights for outsourced workers campaign, and whilst the High Court has ruled against the joint employer concept for now, the matter is far from over. There are several points FM service providers can consider to limit the risk of a similar claim being made against them.

Relationship between the FM service provider and client

The service provider should:

- ensure that salary payment of your outsourced staff is not contingent upon the client paying your invoices;
- ensure the client directs all worker performance/other issues to the FM Manager onsite and does not manage these themselves;
- working hours, overtime and holiday records should be maintained only by the FM company, not the client. In the same way, overtime and holiday authorisations should only come from the FM provider;
- performance assessments/appraisals and any disciplinary issues should be the FM company’s responsibility, and their internal procedures should be used. The client should not have any direct or indirect control on recruitment or dismissal decisions – notwithstanding the client’s ability to have outsourced staff removed, as per the commercial contract;
- the commercial contract for outsourced services between the FM company and the client should contain appropriate and enforceable employment indemnities and warranties relating to the outsourcing service provision. This step does not prevent a claim for joint employment status being made but evidences the intention of where the employment relationship lies;
- the client should also ensure that the FM service provider complies with minimum employment standards (such as the National Living Wage, modern slavery commitments, pensions etc.) – this would be part of the due diligence process before the commercial contract is agreed; and
- best practice would recommend the client and FM provider discussing whether the client will help fund the provider to provide more generous terms and conditions to the outsourced staff as a proactive way to discourage discontent.

Relationship between the FM service provider, client and the outsourced staff

The client should not:

- manage the record-keeping or reporting of hours worked by the outsourced staff – this should be managed through the service provider;
- maintain any employment records for the outsourced staff, apart from emergency information (if deemed necessary and in compliance with GDPR legislation, as set out in the Worker Privacy Notice);
- carry out performance assessments or take any action on this basis – any performance or other issues should be communicated to the service provider;
- claim the right to recruit or dismiss the outsourced staff – this decision lies only with the employing organisation;
- provide the outsourced staff with the client handbook or policies – the service provider should provide and manage the staff according to its own policies; and/or
- treat the outsourced staff as its own.

The client should ensure they:

- direct all internal and external communications relating to issues with the onsite service representative, specifically where there is
dissatisfaction with the performance. Such issues should not be directed to the client’s internal operational or HR management.

The service provider should:

- ensure the client understands the levels of responsibility and control they can exercise over the outsourced staff on a day-to-day basis in order to deliver the required output. All other issues should be communicated to the onsite service manager;
- communicate and implement an employee handbook that covers relevant policies such as timekeeping, conduct standards, disciplinary and grievance processes, health and safety protocols and other relevant employment and benefit policies;
- ensure onsite managers are provided with relevant people management training;
- establish and communicate appropriate processes for expenses and travel arrangements rather than referring to the client for such matters;
- undertake all background checks and eligibility checks and provide assurance to the client that these have been actioned. The client should not perform any of these checks themselves; and
- carefully review the employment terms of any staff transferring in under a TUPE transfer – are there any employment conditions that are TUPE protected but may contradict the outsourcing arrangement?

Whilst these steps do not guarantee protection from jointemployer claims, they can evidence the intention of both the client and the service provider and where the control over staff lies.

We will continue to follow developments in this case as they occur - see www.workplacelaw.co.uk for updates.

About the author

Tar is Director of Employee Relations at International Workplace Law. She is a Chartered Member of the CIPD, and a Member of the British Psychological Society with over 20 years’ experience working in Human Resources.

Tar has extensive experience in advising facilities management services providers and organisations in the manufacturing, investment banking, charity, healthcare, and local authority sectors. This has been at both strategic and operational level covering a broad range of HR issues spanning the entire employment relationship.

Tar worked as an HR Consultant with a large consultancy firm for several years, as well as an internal HR Business Partner for a large healthcare organisation. She joined International Workplace as an HR Consultant, utilising her employment law knowledge and pragmatic approach to advise clients on a wide range of legal issues. She now leads the HR Consultancy part of the business.

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