

## RETAINING WORKER STATUS AND THE GENUINE PROSPECT OF WORK TEST

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### INTRODUCTION

- 1 This memo is being published to inform decision makers of the removal of the genuine prospect of work test in regards to claimants who have retained their status as a worker due to being involuntarily unemployed. This also includes those who are retaining their status as a self-employed worker.
- 2 The removal has been brought about by the decision of the Upper Tribunal in the case of KH<sup>1</sup> and has effect from 14.2.20.

*1 KH v Bury MBC and SSWP [2020] UKUT 50 (AAC)*

### BACKGROUND

- 3 The Immigration (European Economic Area) Regulations 2016, and before them the Immigration (European Economic Area) Regulations 2006, brought into domestic legislation the way by which European Economic Area national claimants should be treated in certain circumstances as per Directive 2004/38/EC.

**Note:** For guidance on how the Immigration (European Economic Area) Regulations 2016 are applied at the end of the European Union Exit Transition period please refer to the memos on the Withdrawal Agreement Act, Home Office Consequential Amendments and the Grace Period.

- 4 Currently, claimants who have retained their status as a “worker” or “self-employed” under either regulations 6(2)(b), 6(2)(c), 6(4)(b) or 6(4)(c) of the Immigration (European Economic Area) Regulations 2016 (or regulations 6(2)(b) or 6(2)(ba) of the Immigration (European Economic Area) Regulations 2006) are invited to a genuine prospect of work interview after a 6-month period. Claimants who are deemed to have passed the genuine prospect of work test (by showing they have a genuine chance of being engaged as required by the Immigration (European Economic Area) Regulations 2016 (6(4C), 6(6) and 6(7)) (and also see regulations 6(6), 6(7) of the Immigration (European Economic Area) Regulations 2006)) can have their retained status extended for a short period, as determined by the decision maker. Claimants who are not deemed to have passed the genuine prospect of work test have their status changed to that of a jobseeker and are unable to access Universal Credit.

#### **KH V BURY MBC AND SSWP**

- 5 This case was a Housing Benefit appeal that the Department for Work and Pensions became a party to. The Housing Benefit office had determined that the claimant was not entitled to Housing Benefit due to the fact that she was determined to be a jobseeker, and therefore did not have a qualifying right to reside. The claimant had been determined to be a jobseeker by the Department for Work and Pensions as her Jobseeker’s Allowance claim has ended due to her failing to attend appointments - she no longer retained her status as a worker once her claim came to an end. The First-tier Tribunal had determined that the claimant had good reason for failing to attend her appointments and that therefore she could continue to retain her status as a worker for six months as per regulation 6(2)(b) of the Immigration (European Economic Area) Regulations 2006. However, it stated that it did not have the evidence before it regarding her prospect of work, and was therefore unable to extend the period for retaining the status of a worker past 6 months as it was bound by the domestic legislation in that regard.
- 6 The Upper Tribunal, having accepted that the claimant retained her status as a worker, went on to look at the claimant’s argument that the genuine prospect of work test was unlawful in connection to those who retained their worker status - and that it only applied to those who were determined to be jobseekers (and receiving their benefit through Jobseeker’s Allowance). Ultimately the Upper Tribunal agreed with the claimant. At paragraph 36 the Upper Tribunal Judge stated “*[a]s a matter of EU law, when it is properly understood, having a genuine chance of being engaged in employment is no part of the test for retained worker status found in Article [7(3)(b)] of the Directive*”.
- 7 The Upper Tribunal Judge carried out an in depth analysis of the Directive 2004/38/EC and the Immigration (European Economic Area) Regulations 2006. The Directive 2004/38/EC treats those classified as pure work-seekers differently to those who had engaged in the labour market of their new Member State, but were now involuntarily unemployed, retaining their status as a worker/self-employed.

- 8 The Upper Tribunal determined (at paragraph 39) that those retaining their status as a worker, having become involuntarily unemployed after less than a year's employment, do so for no less than 6 months, as per Article 7(3)(c) of the Directive 2004/38/EC. However, in regards to those who have worked for more than 12 months, Article 7(3)(b) sets no time limits.
- 9 However, the Upper Tribunal stated that this does not mean that all claimants falling within this article retain their status indefinitely. The Upper Tribunal refers to *MM*<sup>1</sup>, *Tarola*<sup>2</sup> and *Prefeta*<sup>3</sup> in his analysis, along with *Antonissen*<sup>4</sup>, *Elmi*<sup>5</sup> and *Saint Prix*<sup>6</sup>.

1 *SSWP v MM (IS) [2015] UKUT 128 (AAC)*; 2 *Tarola v Minister of Social Protection (Case C-483/17)*

3 *Prefeta v SSWP (Case C-618/16) [2019] 1 WLR 2040*;

4 *R v Immigration Appeal Tribunal ex parte Antonissen (Case C-292/89) [1991] ECR I-00745*;

5 *SSWP v Elmi [2011] EWCA Civ 1403*; [2012] AACR 22;

6 *Saint Prix v DWP (Case C-507-12) [2014] All ER (EC) 987*

- 10 The running themes for someone to retain their status is that they register with an employment office and are available (there is no impediment such as immigration status or education) and able (actual capability) to re-enter the labour market in a reasonable amount of time. It is not contingent on them actually doing so, and therefore they continue to retain their status "*in the absence of some intervening event which indicates that the person has withdrawn from the labour market entirely*".<sup>1</sup>

1 Para 54, *SSWP v MM (IS) [2015] UKUT 128 (AAC)*

## GUIDANCE TO DECISION MAKERS

- 11 What this means in practice is that decision makers should no longer carry out genuine prospect of work tests on claimants retaining their status as a worker (or self-employed) due to involuntary unemployment. Genuine prospect of work tests should only be carried out for those European Union national claimants who are jobseekers under regulation 6(1)(a) of the Immigration (European Economic Area) Regulations 2006 (regulation 6(1)(a) of the Immigration (European Economic Area) Regulations 2016) as per paragraphs 38 and 39 of the decision. In reality this will only apply to claimants in receipt of Jobseeker's Allowance.
- 12 The 2006 and 2016 Immigration (European Economic Area) Regulations will not be changed to reflect this, although there will be some alterations made to savings provisions being incorporated into post-transition period legislation. Therefore, decision makers should disregard the words 'a genuine chance of being engaged' when reading regulations 6(6), 6(7) of the Immigration (European Economic Area) Regulations 2006 and 6(4C), 6(6) and 6(7) of the Immigration (European Economic Area) Regulations 2016, so far as they relate to workers and the self-employed.

**Note:** For guidance on how the Immigration (European Economic Area) Regulations 2016 are being altered at the end of the European Union Exit Transition period please refer to the memo on the Grace Period.

- 13 For claimants falling under regulation 6(2)(ba) of the Immigration (European Economic Area) Regulations 2006 or either regulation 6(2)(c) or 6(4)(c) of the Immigration (European Economic Area) Regulations 2016, the period for which they can retain their status as a worker/self-employed is 6 months - at the end of this period they will need a different right to reside, be that as a jobseeker, worker/self-employed or retaining their status as a worker/self-employed for a different reason.
- 14 For claimants falling under regulation 6(2)(b) of the Immigration (European Economic Area) Regulations 2006 or either regulation 6(2)(b) or regulation 6(4)(b) of the Immigration (European Economic Area) Regulations 2016, they retain their status as a worker/self-employed for as long as the decision maker is satisfied they are 'available for' and 'able to' work, as per paragraphs 9 and 10 above. It will be for decision makers to look at the evidence before them and decide whether claimants satisfy these criteria. The Upper Tribunal judge in KH makes no recommendations as to the frequency of checking.
- 15 Guidance on how decision makers will actually carry out the reviews for these two cohorts is still being finalised. In the meantime, decision makers should stockpile any cases where the claimant is due a genuine prospect of work interview; no new genuine prospect of work interviews should be carried out for claimants retaining their status as a worker or self-employed worker.

## **ANNOTATIONS**

Please annotate the number of this memo against ADM paragraphs:

C1392, C1393, C1403 - C1437, C1475 - C1478 (heading)

## **CONTACTS**

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