



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

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### INTRODUCTION

1. This memo is being published to inform DMs of the removal of the Genuine Prospect of Work (GPOW) 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 (UT) in the case of KH<sup>1</sup> and has effect from 14.02.2020.

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

### BACKGROUND

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

**Note** – for guidance on how the Immigration (EEA) Regulations 2016 are applied at the end of the EU Exit Transition period please refer to the memos on



the Withdrawal Agreement Act (Memo DMG 30/20), Home Office Consequential Amendments (Memo DMG 25/20) and the Grace Period (Memo DMG 26/20).

4. Currently, claimants who have retained their status as a “worker” or “self-employed” under either Regs 6(2)(b), 6(2)(c), 6(4)(b) or 6(4)(c) of the Imm (EEA) Regs 2016 (or Regs 6(2)(b) or 6(2)(ba) of the Imm (EEA) Regs) are invited to a GPOW interview after a 6-month period. Claimants who are deemed to have passed the GPOW test (by showing they have a genuine chance of being engaged as required by the Imm (EEA) Regs 2016 (6(4C), 6(6) and 6(7)) (and also see Regs 6(6), 6(7) of the Imm (EEA) Regs 2006))) can have their retained status extended for a short period, as determined by the DM. Claimants who are not deemed to have passed the GPOW test have their status changed to that of a Jobseeker.

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

5. This case was a Housing Benefit (HB) appeal that DWP became a party to. The HB office had determined that the claimant was not entitled to HB 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 DWP as her JSA 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 FtT 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 Reg 6(2)(b) of the Imm (EEA) Regs. 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 UT, having accepted that the claimant retained her status as a worker, went on to look at the claimant’s argument that the GPOW 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 JSA). Ultimately the UT agreed with the claimant. At para 36 the UTJ 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(1)(b) of the Directive.”
7. The UT Judge carried out an in depth analysis of the Directive and Imm (EEA) Regs. The Directive treats those classified as pure work-seekers differently to



those who had engaged in the labour market of their new MS, but were now involuntarily unemployed, retaining their status as a worker/self-employed.

8. The UT determined (at para 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 Art 7(3)(c) of the Directive. However, in regards to those who have worked for more than 12 months, Art 7(3)(b) sets no time limits.
9. However, the UT stated that this does not mean that all claimants falling within this article retain their status indefinitely. The UT 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 DMS

11. What this means in practice is that DMs should no longer carry out GPOW tests on claimants retaining their status as a worker (or self-employed) due to involuntary unemployment. GPOW tests should only be carried out for those EU national claimants who are jobseekers under Reg 6(1)(a) of the Imm (EEA) Regs (Reg 6(1)(a) of the Imm (EEA) Regs 2016) as per paragraphs 38 and 39 of the decision. In reality this will only apply to claimants in receipt of JSA.
12. The 2006 and 2016 Immigration (EEA) 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, DM's should disregard the words 'a genuine chance of being engaged' when reading Regs 6(6), 6(7) of the Imm (EEA) Regs and 6(4C), 6(6) and 6(7) of the Imm (EEA) Regs 2016, so far as they relate to workers and the self-employed.



**Note** – for guidance on how the Immigration (EEA) Regulations 2016 are being altered at the end of the EU Exit Transition period please refer to the memo on the Grace Period (Memo DMG 26/20).

13. For claimants falling under Reg. 6(2)(ba) of the Imm (EEA) Regs or either Reg. 6(2)(c) or 6(4)(c) of the Imm (EEA) Regs 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 Reg. 6(2)(b) of the Imm (EEA) Regs or either Reg. 6(2)(b) or Reg. 6(4)(b) of the Imm (EEA) Regs 2016, they retain their status as a worker/self-employed for as long as the DM is satisfied they are ‘available for’ and ‘able to’ work, as per paras 9. And 10. above. It will be for DMs to look at the evidence before them and decide whether claimants satisfy these criteria. The UT judge in KH makes no recommendations as to the frequency of checking.
15. Guidance on how DMs will actually carry out the reviews for these two cohorts is still being finalised. In the meantime, DMs should stockpile any cases where the claimant is due a GPOW interview; no new GPOW 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 (Memo DMG 27/20) against DMG chapters;

072822, 072823, 072828, 072864, 073080-073180 (Head)

## **CONTACTS**

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 3E zone E, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in – Memo [4/19](#) Requesting case guidance from DMA Leeds for all benefits.

**DMA Leeds: December 2020**

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