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Employment Brief

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EAT finds against Uber on "worker" status but Uber appeals

In *Uber v Aslam, Farrar and ors,* the Employment Appeal Tribunal has held that Uber drivers are "workers" and therefore benefit from various statutory rights not available to self-employed contractors.

Facts

Nineteen drivers (two of whom were selected as lead claimants) were engaged under "Partner" agreements to provide driving services to customers obtained through the Uber smartphone app. The Partner agreements described the drivers as self-employed independent contractors and expressly stated that nothing in the agreement was to create an employment relationship with the driver.

However, the claimants alleged that they were "workers" for the purposes of the Employment Rights Act 1996 and the national minimum wage legislation and brought claims for holiday pay, failure to pay the national minimum wage and unlawful deductions from wages.

Employment Appeal Tribunal (EAT) decision

The EAT agreed with the Employment Tribunal (ET) that the drivers are in fact workers, and so benefit from all associated rights such as the right to the national minimum wage, holiday pay and sick pay.

Crucially, the EAT agreed with the ET that Uber could not rely on terminology in the written contractual documentation because it did not bear any relation to the reality of the employment relationship. The true agreement between the parties was not a relationship of principal and agent as was purported to be the case. The suggestion that there could be a contract between the drivers and their passengers was a "pure fiction" when the drivers were never given passenger details and could not establish business relationships with their passengers or negotiate terms with them. The drivers could not, therefore, be said to be working on their own behalf.

The EAT then considered a second issue of what would constitute working time. This is crucial for national minimum wage and holiday pay calculations.

The heart of the argument was the significant degree of control that Uber had over their drivers and the arrangements in place when they were "on duty", such as penalties for cancelling trips once accepted; a requirement to be in the relevant territory when switching on the app; and being able and willing to accept assignments. Further, even though drivers were able to reject jobs, they were expected to accept at least 80% of trip requests and faced penalties for not accepting a number of bookings whilst signed into the app.

The EAT agreed with the ET that all of the time Uber drivers spent logged into the Uber app (and being willing and able to accept assignments) was working time, not just the time that they were carrying passengers.

What does this mean for employers?

The assessment carried out by the EAT is fact and context specific. This is borne out by the recent decision by the Central Arbitration Committee regarding Deliveroo riders who, despite a number of similarities with Uber drivers, were held to be self-employed (a significant factor being the right of substitution).

Nevertheless, it is clear that the courts will look at the reality of any employment relationship and enforce employment rights accordingly. Organisations with similar business models to Uber may be susceptible to similar claims. It would be wise to keep a written record of potential working time and consider the realities of the relationship with workers, notwithstanding any contractual documentation to the contrary.

Uber has indicated its intention to appeal and indeed sought permission to "leapfrog" the Court of Appeal and go straight to the Supreme Court. Permission was refused and so the appeal will be heard by the Court of Appeal in 2018. Until then, the EAT's decision is likely to be a catalyst for even further scrutiny and continued uncertainty for the gig economy.

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Unfair dismissal: Does failure to provide right to work documentation constitute illegality?

In *Baker v Abellio London Limited*, the Employment Appeal Tribunal held that the Employment Tribunal was wrong to conclude that an employer had acted fairly in dismissing an employee who had failed to provide evidence of his eligibility to work in the UK.

Background

In an unfair dismissal claim, the employer must establish a potentially fair reason for dismissal. Potentially fair reasons include contravention of an enactment (often referred to as illegality) and some other substantial reason (SOSR). An employer's genuine but mistaken belief that it would be illegal to continue to employ an employee cannot constitute illegality.

The Claimant, Mr Baker, was a Jamaican national who had lived in the UK since he was a child. He had been employed as a bus driver by Abellio London Limited (Abellio) for more than two years. In 2015, Abellio conducted an audit of all its employees' eligibility to work in the UK. It asked Mr Baker to provide documentation, including his passport. He did not have a UK passport and his Jamaican passport had expired in 2000. However, Mr Baker had the right to reside and work in the UK. This was not in dispute and was confirmed to Abellio by the Home Office.

However, when Mr Baker failed to provide the documentation that would give Abellio a statutory excuse from penalties under the Immigration, Asylum and Nationality Act 2006, it dismissed him for reason of illegality.

Decisions of the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT)

The ET held that Abellio's decision to terminate for illegality fell within the range of reasonable responses and was therefore fair. In any event, the ET believed Mr Baker had been fairly dismissed for some other substantial reason because of his refusal to provide relevant evidence of his eligibility to work for Abellio. Mr Baker appealed the ET's decision and was successful.

The EAT held that the ET had been wrong to find that Abellio had demonstrated a fair reason for dismissal. Under current immigration law, an employer may be subject to a penalty if it employs an adult:

- who has not been granted leave to remain in the UK; or
- whose leave to remain in the UK is invalid, ceased to be effective or is subject to a condition preventing him from accepting employment.

Under the Immigration Act 1971, Mr Baker did not need leave to enter or remain in the UK and so his employment did not contravene any obligation on the employer under the current immigration legislation. The EAT also held that the current immigration legislation did not impose a requirement on Abellio to obtain specific documentation from Mr Baker. Properly conducted right to work checks simply excuse the employer from paying a penalty if it transpires that the employee did not have the right to work. Not undertaking the checks is not an offence.

Nevertheless, the EAT agreed with the ET that, if Abellio genuinely believed it would be in breach of the law by employing Mr Baker without obtaining the required documentation, this could amount to some other substantial reason for the purposes of unfair dismissal law. The case was remitted to the ET to be considered on this basis.

What does this mean for your business?

Despite this ruling, employers should exercise caution before deciding not to insist that an employee provides right to work documentation. The civil penalty for breach can be up to £20,000 and this can also have negative implications for any sponsorship licence the employer holds. Employers in a similar situation will need to assess the risk of not obtaining a statutory excuse against the risks of dismissing the employee. If the employer does decide to dismiss an employee, it should plead some other substantial reason. It is also advisable for employers to consider introducing, within their contracts of employment, a requirement on employees to have the right to work in the UK and to demonstrate that right when required to do so.

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Disciplinary investigations: can you be too thorough?

In *NHS 24 v Pillar*, the Employment Appeal Tribunal held that the inclusion of past incidents, which had not been treated as disciplinary matters, did not render a disciplinary investigation too thorough.

Facts

Ms Pillar was employed as a nurse practitioner whose work involved taking telephone calls from the public and triaging them. She had to question the patient and make a decision on the most appropriate clinical outcome, ranging from giving advice over the telephone to making a 999 emergency call for an ambulance.

She was dismissed for gross misconduct following a patient safety incident (PSI) when a patient described symptoms consistent with a heart attack and Ms Pillar directed him to an out of hours GP instead of calling 999.

Ms Pillar had been involved in two previous PSIs for which she had not been subject to disciplinary action, instead being provided with a development plan and further training. The current disciplinary investigation report had included these past PSIs and Ms Pillar argued that the decision to include these in the investigation was unfair.

Employment Appeal Tribunal (EAT) decision

The EAT held that the investigation and dismissal were fair. The EAT made a number of points including:

- The investigating officer's purpose is to gather all relevant material for the decision maker, who ultimately considers the relevant weight to be given to such information. The fairness of the dismissal will ultimately depend on what the decision maker takes into account in their decision regarding previous events, not what was included at the investigative stage.
- While employers should be careful when taking a past incident into account where an employee has been given an assurance that it will not be considered after a certain date, the law does not prevent expired final warnings from being taken into account in a decision to dismiss. The specific facts of each case will determine whether an employer has acted reasonably.
- In this case, the most recent PSI alone was sufficient to be treated as gross misconduct, with the previous PSI's providing background context.

What does this mean for employers?

This case provides a useful reminder of the clear roles of the investigating officer and the decision maker in the disciplinary process. An investigation is unlikely to be unfair if too much information is provided. However, the reasonableness of an investigation will be relevant where insufficient information is provided.

This case also provides clarification on taking into account past incidents when considering dismissal. An employee's earlier misconduct can be taken into account, whether or not this was dealt with as a disciplinary matter at the time. It should not, however, be used as a primary reason for dismissal and should be used only as a relevant circumstance giving context to a later decision to dismiss.

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Tribunal fees refund scheme launched

The refund scheme for Employment Tribunal and Employment Appeal Tribunal fees has now been rolled out in full.

On 15 November 2017, the Ministry of Justice (MoJ) and HM Courts and Tribunal Service (HMCTS) launched the Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) fees refund scheme. The refund scheme applies to fees paid between 29 July 2013 and 26 July 2017.

The types of fees that can be reclaimed are: ET issue fee; ET hearing fee; EAT lodgement fee; EAT hearing fee and the following interlocutory fees: judicial mediation; reconsideration of default judgment; reconsideration of judgment following final hearing; dismissal following withdrawal; and employer contract claim.

Successful applicants should receive a full refund of the fee that they paid plus interest at the rate of 0.5%, calculated from the date of the original payment up until the refund date.

How to reclaim a fee

Applications can be made online or by post. If applying by post, the applicant must use the correct form. Details of addresses and forms can be found **here.**

Fees and costs awards

The refund scheme also covers parties who were ordered to pay a fee-related costs order. The party who paid a fee-related costs award can apply to HMCTS for reimbursement. They will have to provide evidence that a costs order was made and that they paid it. However, there is no requirement on the recipient of the costs award to repay it.

Settlement agreements

The refund scheme does not cover respondents who compensated a claimant for their tribunal fees under a settlement agreement. In the absence of clear terms to the contrary in the agreement, it is unlikely that a respondent will be able to reclaim tribunal fees paid to a claimant under a settlement agreement.

Rejected or dismissed claims

The refund scheme is silent on whether a party whose claim or counterclaim was rejected for non-payment of the issue fee or hearing fee can apply to have that claim reinstated. However, it is thought that HMCTS is writing to all such parties, asking whether they want their claim to be reinstated. It is expected that the MoJ and HMCTS will put in place administrative measures to reinstate affected claims without the need for judicial intervention.

Out of time claims

The refund scheme makes no mention of potential claimants who were dissuaded from bringing a claim because of tribunal fees but who now want to bring a claim. It is thought that such cases will not benefit from any special arrangements. Individuals would need to submit their claim in the normal way and apply for an extension of time. Clearly, they would need to do so promptly, and potentially provide evidence that they were genuinely dissuaded from bringing the claim as well as details of their financial means.

What should you do now?

- Employers should carry out an audit of past tribunal claims in order to assess whether they paid any ET or EAT fees, or made any costs orders in respect of fees, between 29 July 2013 and 26 July 2017.

- Until HMCTS confirms the position relating to claims/counterclaims rejected or dismissed for non-payment of fees, employers could write to HMCTS asking how their case will be dealt with. Alternatively, an employer may wish to protect its position by applying to have the counterclaim reinstated, i.e. by applying for reconsideration of the original decision to reject (or dismiss) the counterclaim.

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Workers wrongly refused holiday pay may claim for entire working period

Following the European Court of Justice's important judgement in *King v The Sash Window Workshop Ltd and anor*, employers who engage people on a self-employed or contractor basis may now find themselves liable for significant sums in backdated holiday pay claims.

Background

In *King*, the claimant worked as a self-employed, commission only salesman for the Sash Window Workshop Ltd (SWW) for 13 years. He received no salary and was never paid for any holidays or periods of sickness absence. After nine years, SWW offered Mr King an employment contract under which he would be entitled to paid annual leave, but Mr King refused. SWW terminated his contract when he reached 65 and Mr King subsequently brought employment tribunal claims for age discrimination and unpaid holiday pay. The age discrimination claim was successful and was not appealed.

In relation to holiday pay, Mr King argued that he had not taken his full annual leave entitlement each year because it would have been unpaid.

An employment tribunal held that Mr King was a worker under the Working Time Regulations (WTR). It awarded him holiday pay for:

- Leave accrued in the final leave year but untaken at the date of termination.
- Leave requested and taken as unpaid leave in previous years, claimed as a series of unlawful deductions from wages.
- Leave accrued but untaken in previous years.

SWW appealed against the decision to award payment in respect of leave accrued but untaken in previous years (i.e. the third bullet point above). The other points were no longer in dispute. The Employment Appeal Tribunal (EAT) upheld the appeal on the ground that Mr King had not been prevented by reasons beyond his control from taking annual leave. Mr King appealed to the Court of Appeal which referred a number of questions to the European Court of Justice (ECJ).

ECJ Decision

The ECJ made two key points:

- An employer that does not allow a worker to exercise his right to paid annual leave (for example, because it wrongly regards him as self-employed) must "bear the consequences" and pay the worker in respect of that annual leave entitlement without there being any limitation on the period for which the worker can claim. The fact that the employer wrongly considered that the worker was not entitled to paid annual leave is irrelevant.
- A worker has the right to be paid in respect of annual holiday to which he is entitled, whether or not he has actually taken that holiday. This is because it would be incompatible with Article 7 of the Working Time Directive (WTD) to force a worker to take leave without pay in the first place and then bring an action to claim payment for it.

Note that the decision applies only to the four weeks' annual leave set out in the WTD and not the additional leave under the WTR.

This case will now go back to the Court of Appeal for a ruling on the appeal from the EAT.

Comment

This decision will have significant ramifications. It confirms that an individual who has been wrongly classed as an independent contractor and therefore not paid holiday pay may bring a claim for holiday pay in respect of the whole period he has worked for his employer. This will be of concern to organisations that engage people on a self-employed or contractor basis, particularly in light of the gig economy claims currently going through the courts and tribunals, as they may find themselves exposed to many years of backdated holiday pay.

The decision also casts doubt on the lawfulness of the Deduction from Wages (Limitation) Regulations, which limit back pay claims to two years, as well as the decision in *Bear Scotland*, under which a tribunal generally does not have jurisdiction to hear an unlawful deductions claim if there is a gap of more than three months between one series of deductions and the next.

In light of this important decision, it would be sensible for organisations that engage self-employed contractors to carry out a risk assessment to identify the extent to which they could be exposed and to consider whether there are any measures which could help mitigate the risks.

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Can an employer be vicariously liable for an employee's deliberate data breach?

In *Various Claimants v WM Morrison Supermarkets plc*, the High Court considered whether an employer could be vicariously liable for the criminal actions of a rogue employee in breach of the Data Protection Act 1998.

Facts

In 2014, the personal details of almost 100,000 Morrisons employees were deliberately published on the internet and sent to three newspapers. The culprit, a senior IT manager, was aggrieved after being subject to disciplinary proceedings for an earlier, unrelated incident, which resulted in a warning. He subsequently downloaded payroll data to a USB stick and posted the personal details on a file sharing website. He was later convicted of offences under the Computer Misuse Act 1990 and the Data Protection Act 1998 (DPA).

Over 5,500 employees brought claims against Morrisons for breach of statutory duty in relation to the Data Protection Act (DPA), the misuse of private information and breach of confidence.

High Court Decision

The High Court first held that there was no primary liability on Morrisons under the DPA. Liability under the DPA attaches to the "data controller" and Morrisons was not the data controller when the information was disclosed on the internet. Mr Justice Langstaff, sitting alone, rejected various arguments as to ways in which Morrisons should have taken further steps to protect its data.

However, the Court went on to hold that Morrisons was vicariously liable for the employee's actions even though the disclosures were made much later, from home, outside working hours and using personal equipment. The test was whether the employee's actions were carried out in the course of his employment, as defined by the Supreme Court in *Mohamud v WM Morrison Supermarkets plc*, i.e. whether their wrongful conduct was closely connected to their authorised duties.

In this case, the manager had been entrusted with the data, and received it and copied it as part of his role. The court held that the breach (i.e. the later publication) was part of a continuing sequence of events, and there was sufficient connection between his employment and the wrongful conduct.

The court granted Morrisons the right to appeal on the basis that the employee's purpose had been to cause loss to his employer, and this decision could render the Court a witting accessory to his criminal actions.

What does this mean for employers?

Although it would have been difficult for Morrisons to predict and prevent such a deliberate and malicious breach of data security in this instance, there are some steps that employers can take to try to mitigate the risk of similar situations arising:

- One practical step is to ensure that no employee, however trusted, has access to data beyond what is absolutely necessary for their role.
- Businesses should also put in place a clear incident response plan to mitigate the harm in the event of a breach.

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Things to look out for in 2018

2018 is likely to be an interesting year for employers, with a number of significant developments on the horizon. Below are just some of the changes organisations should be on the look out for.

Data Protection

Most employers will be aware that the EU General Data Protection Regulation (GDPR) will apply in all Member States from 25 May 2018. The Data Protection Bill, which will implement the GDPR in the UK, was published in September 2017. It will replace the existing Data Protection Act 1998 and is expected to come into force on 25 May 2018.

An employer can be fined up to €20 million or 4% of its worldwide turnover if this is higher, if it breaches the GDPR. Employers should therefore be taking steps now, if they have not already done so, to ensure they will be compliant when the GDPR is implemented.

Employment status and the gig economy

There have been a number of recent high profile cases, including City Sprint, Uber and Pimlico Plumbers, where the courts have found that individuals engaged as self-employed contractors, are in fact "workers" entitling them to national minimum wage and holiday pay.

Both Pimlico Plumbers and Uber have appealed the courts' decisions. The Supreme Court is due to hear the appeal in the Pimlico Plumbers case in February 2018, and the Court of Appeal is likely to hear the Uber appeal in 2018. So, if your business engages self-employed contractors, or may consider doing so in the future, look out for these decisions as they will have significant ramifications for your business.

In July 2017, the much-awaited Taylor review of modern employment practices was published which made several recommendations on employment status. Select Committees produced a report on the Taylor review, which includes draft wording for a bill. This included a presumption that an individual claiming worker status is a worker unless proven otherwise, and codifies some factors from case law that point towards employee status.

The Government had stated that it intended to publish a discussion paper in response to the Taylor review by the end of 2017. However, we understand that a Government response is not now expected until 2018. The delay has been attributed to complications in Brexit negotiations and the growing concern that this boost to workers' rights could face considerable opposition from MPs.

Grandparental leave

In 2015, the Government committed to extend shared parental leave and pay to grandparents in 2018. A consultation was due in 2016 but this was put on hold during the EU referendum. The Government has not said they have shelved grandparental leave but they have not yet started the process. Therefore, it appears that this will still be introduced, but there is no present timescale for when this will come into force.

Taxation payments

From 6 April 2018, all payments in lieu of notice will be treated as earnings, and therefore liable to income tax and class 1 national insurance contributions (NICs), irrespective of whether there is a contractual payment in lieu of notice clause. This means that from 6 April 2018, employers will have to tax the basic pay that the employee would have received if had they worked their notice. It will no longer be possible for these sums to be paid gross under settlement agreements.

The Government also plans to subject all termination payments exceeding £30,000 to class 1A NICs (employer liability only). This was initially also due to come into force in April 2018, but it has been postponed until 6 April 2019.

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This Employment Brief aims to introduce you to legal issues and is not a substitute for taking appropriate specialist advice in individual cases.

We will be happy to assist - please contact a member of the team.

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