SLAUGHTER AND MAY

Employment Bulletin

December 2018

In this December edition, our headline item is the latest **gig economy worker status** decision. We also report on cases on **carry forward of annual leave** and **incapacity dismissals.** We look at a **part-time worker's pay discrimination** claim, before concluding with some **horizon scanning.**

EAT confirms Addison Lee drivers are "workers"

Summary: The Employment Appeal Tribunal has confirmed that three Addison Lee drivers were "workers" and therefore entitled to holiday pay and the national minimum wage. The EAT also confirmed that the periods during which the drivers were logged on to the internal driver portal system should be counted as "working time" for the purposes of the Working Time Regulations (*Addison Lee Ltd v Lange*).

Key practice point: This case is another example of a key principle in employment status cases – that it is not just about what the contracts say; courts and tribunals will look behind the contractual formalities to identify the genuine relationship between a business and its workforce.

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Facts: Three drivers were selected as a test case to challenge the Addison Lee (AL) business model, which was to engage its drivers as self-employed independent contractors. Their written contracts expressly reflected this model, and denied any employment or worker relationship between AL and the drivers. The drivers' contracts stated that there was no obligation on either AL to provide work, or on the drivers to undertake any work. They did not however contain a substitution clause; the drivers had to perform the work personally. Drivers were issued with a handheld device, which they would use to log on to the AL portal when they were ready to work. Jobs could then only be refused for "acceptable" reasons, otherwise sanctions would follow.

The drivers invariably signed a vehicle hire agreement to lease their branded car from an associated company of AL. The vehicle hire agreement imposed significant restrictions on vehicle use and they could not accept bookings nor tout for business, and could not use the car to work for other private hire operators.

The drivers claimed that they were in fact "workers" and entitled to holiday pay and to receive the national minimum wage for all the time that they were logged into the AL driver portal. The Employment Tribunal agreed; AL appealed.

Decision: The Employment Appeal Tribunal upheld the Tribunal's decision. The Tribunal had correctly applied the Supreme Court decision in *Autoclenz Ltd v Belcher* (see our Bulletin dated 4 August 2011) in finding that the contractual provisions did not properly reflect the true agreement between the parties, and that the drivers, when logged on, were undertaking to accept driving jobs allocated to them, notwithstanding what was said in the contracts. A driver had to accept an allocated job, in the absence of an acceptable reason; and if he did not do so a sanction could be imposed. This was not consistent with an unfettered right to refuse work while logged on.

Although the arrangements between the drivers and AL left the drivers with a great deal of leeway as to the times when (and places where) they logged on, each side engaged in these arrangements in the belief that the other undertook an obligation - the drivers to do some work and AL to put them on its system and give them a fair opportunity of obtaining bookings. These obligations existed despite the fact that they were not spelt out in the contracts.

The EAT also agreed with the Tribunal that, when drivers were logged on, they satisfied the definition of "working time" for the purposes of the Working Time Regulations, even though for part of the time they were not actually engaged in carrying passengers. To be confident of satisfying demand, AL had, at any one time, to have some of its drivers carrying passengers and some waiting for an opportunity to do so. Being available was an essential part of a driver's work. The drivers were entitled to the national minimum wage for all the time they were logged on, therefore.

Analysis/commentary: The EAT's decision is unsurprising, given previous gig economy status cases on similar facts decided in favour of workers, including a case brought by a cycle courier against AL (see our Bulletin dated 18 August 2017).

The facts of this case are similar to those in *Uber v Aslam* (where a group of Uber drivers were found to be workers rather than self-employed - see our Bulletin dated 8 December 2017), with one notable exception – even when signed into the app, the Uber drivers were at liberty to take on or refuse work as they chose, or to cancel trips already confirmed, and could even work for others, including direct competitors. This gave the EAT in *Uber* some difficulty with the question of whether working time should comprise any time when the drivers were logged on (although ultimately the EAT was satisfied that it should). There were no such problems for the EAT in this case – AL drivers were obliged to accept trips.

This is a fast moving area – the Court of Appeal's decision in the *Uber* appeal, and the Government's response to its consultation on employee status, could both be issued at any time.

European law does not allow automatic loss of right to paid annual leave because of worker's failure to apply

Summary: The European Court of Justice (CJEU) held that a worker cannot automatically lose the right to paid annual leave (and to an allowance in lieu of untaken leave), solely because he did not apply for leave before the employment relationship ended. Those rights can lapse only if the employer gave the worker the opportunity to take the leave, in good time, and can prove it did so (*Kreuziger v Land Berlin* and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*).

Key practice point: Employers should ensure they inform workers of their right, and the need, to take annual leave during the relevant holiday year, as well as making it clear that they will lose any outstanding entitlement (and any corresponding payment in lieu on termination) at the end of the holiday year or any authorised carry-over period.

Facts: The claimant in *Kreuziger* decided not to take annual paid leave for the last five months of his job, and instead requested payment in lieu of untaken annual leave. The claimant in *Shimizu* was employed for more than 10 years under a number of fixed-term employment contracts. When his employer decided not to renew the last contract, it invited him to take his outstanding annual leave during his two month notice period. He took only two days' leave, and requested payment in lieu of the remaining 51 days of untaken annual leave due to him in respect of the last two years.

The employers in both cases refused to make any payment in lieu of untaken holiday, on the basis that, under German legislation, the right to paid annual leave (and with it any payment in lieu) is lost at the end of the holiday year, where the worker does not apply to exercise their right during that period. When the workers brought claims in the German courts, the courts referred the cases to the CJEU to determine whether the German legislation was in line with the European Working Time Directive (from which the UK's Working Time Regulations derive) in this respect.

Decision: The CJEU held that the Directive does not allow an employer to forfeit the right to paid annual leave (and to an allowance in lieu) if the worker did not request leave before termination of employment, unless the employer allowed the worker the opportunity to exercise the right prior to termination.

Whilst employers are not required to force their workers to take leave, they must ensure that they are given the opportunity to exercise that right. They must encourage workers to take their leave, whilst also informing them, in good time, that if they do not take it, their leave will be lost at the end of the holiday year or authorised carry-over period, or on termination. The burden of proof is on the employer to show that it has "*exercised all due diligence*" to enable workers to take leave.

However, if the employer is able to prove that a worker deliberately did not take his paid annual leave despite being given the opportunity to do so, the right can be forfeited. Again, the rationale behind this is that workers should not be encouraged to avoid taking paid annual leave in order to increase their pay in lieu on termination.

In another German holiday pay case decided on the same day (*Stadt Wuppertal v Bauer and Willmeroth v Martina Broßonn*), the CJEU decided that the right to untaken paid annual leave also cannot lapse automatically on a worker's death; the right to an allowance in lieu of annual leave not taken must be allowed to pass to the worker's estate.

Analysis/commentary: The decisions endorse the principle, set out by the CJEU in *King v Sash Windows*, that any practice that may potentially deter a worker from taking annual leave is incompatible with the purpose of the right to paid annual leave. (*King v Sash Windows* decided that a worker who was wrongly classified as self-employed, and denied the right to paid annual leave as a result, could bring a claim for holiday pay for the whole period of his employment - see our Bulletin dated 8 December 2017.) It is now clear that this principle also entails a positive obligation – to inform workers of their right (and need) to take annual leave during the holiday year, and to make it clear that they will lose any outstanding entitlement (and any corresponding payment in lieu on termination) at the end of the holiday year or any authorised carry-over period. Workers must be given sufficient time to take their leave after this notification.

The CJEU's Advocate General, in his preliminary Opinion on the cases, considered whether the employees had in fact been given the opportunity to exercise their rights to leave. He concluded that, in *Kreuziger*, the employer had done enough but, in *Shimizu*, doubted whether the employer had taken the necessary steps – the only measure it took was to invite the employee to take leave, at the same time as it communicated the non-renewal of his contract (two months before it ended). Unfortunately, the CJEU did not comment on this point in either judgment.

We have heard recently that *King v Sash Windows,* which was due to return to the Court of Appeal to decide whether the Working Time Regulations could be interpreted in line with the CJEU's judgment, has been settled. Unfortunately, this means that the complex law in this area remains in a state of flux for the time being.

Employer could not dismiss for incapacity if it resulted in loss of long-term disability benefits

Summary: The Employment Appeal Tribunal upheld an Employment Tribunal decision that a term could be implied into an employment contract to limit an express contractual right to terminate on notice, to prevent the exercise of that right in circumstances where it would frustrate an entitlement to long term disability benefits provided for specifically in the contract (*Awan v ICTS UK Limited*).

Key practice point: Employment contracts should always make it clear that payment of long term disability benefits or PHI is conditional on the provision of cover under the underlying insurance policy. Otherwise, as here, the employer could be obliged to provide the benefits itself.

Facts: The claimant, A, was a security coordinator for American Airlines at Heathrow. His contract of employment entitled him to sick pay for six months and then long-term disability benefits (LTDB) of two thirds of salary until he returned to work, retired or died. His employer could terminate his contract at any time by giving him notice.

American Airlines had a group income protection policy for the provision of LTDB. The policy provided that insurance would terminate immediately in the event of the insured member ceasing to be in employment.

The sequence of events leading up to A's claim in the Employment Tribunal was:

- In July/August 2012 American Airlines became engaged in discussions about employee cost savings, and affected employees were informed of its intention to outsource its security department to ICTS.
- On 14 October 2012 A was certified as unfit to work because of depression.
- A's employment (and that of 17 others in similar posts) transferred to ICTS under TUPE with effect from 1 December 2012, along with the obligation to provide LTDB.
- ICTS tried unsuccessfully to get the insurer to agree to carry on covering the risk, and then sourced a new insurance provider to meet its obligations. However, the new provider refused to accept liability for those, including A, who were already on sick leave.
- ICTS terminated A's employment on grounds of medical capability on 28 November 2014.

The Employment Tribunal held that:

- there was no implied term in A's contract preventing ICTS from dismissing him for incapability while he was entitled to receive LTDB;

- A's continued employment would have caused operational difficulties and ICTS acted reasonably in dismissing A for incapacity, so his dismissal was fair; and

- A's dismissal was "a proportionate means of achieving a legitimate aim", with the result that there was no unlawful disability discrimination under the Equality Act 2010.

A appealed against the Tribunal's decision.

Decision: The Employment Appeal Tribunal allowed A's appeal. The employer could not exercise the contractual power to dismiss so as to deny A the benefits which the LTDB plan envisaged would be paid.

As an initial point, the EAT rejected ICTS's argument that A's only contractual entitlement was to his employer obtaining cover under an insurance policy and passing over to him any benefits payable under it. The obligation on the employer to pay LTDB existed regardless of whether the insurer paid under the policy or not.

The EAT went on to say that, in accordance with *Aspden v Webbs Poultry Meat Group (Holdings) Ltd*, there was an implied term of A's contract of employment to the effect that, once he had become entitled to payment of LTDB, his employer would not dismiss him solely on the grounds of incapacity.

The EAT did not accept the argument that the absence of insurance cover meant that the term ought not to be implied. The contract was clear: entitlement to benefits was expressly provided for and was regardless of how it was funded. It was open to the employer to contract with the insurer on terms that ensured continuing cover once benefits were accruing even if the employee was no longer on the employer's books. Alternatively the employment contract could have made clear that refusal of cover by the insurer would discharge the employer's duty to pay under the scheme. Equally it was open to ICTS to seek to protect its position by obtaining warranties from American Airlines.

As a result of the implied term, the dismissal was in breach of contract. Although this was not necessarily unfair, the implied term was very relevant in testing the reasonableness of the employer's actions. The Tribunal's finding that there was no such implied term meant that its conclusions on unfair dismissal and disability discrimination had to be set aside and sent back to a new tribunal.

The employer had successfully argued in the Tribunal that it would have come to the same decision to dismiss A for incapacity even if it had taken account of its obligation to pay him LTDB. The EAT disagreed with this conclusion as well. Although the question involved a degree of speculation, it was for the employer to provide evidence as to what it would have done if it had thought it was obliged to continue making payments while A was employed. The employer had not done this, so the Tribunal's finding on this point was also set aside.

Analysis/Commentary: The EAT acknowledged that the employment contract (from 1992) was unusual and generous, but pointed out that such clauses were common in the 1980s and 1990s. Nowadays, provisions in employment contracts dealing with long-term disability benefits/PHI should avoid creating any contractual entitlement to benefits, instead simply saying that the employee may be eligible for certain benefits, as well as making it clear that the employer has no obligation to pay out unless and until it has received payment from the policy provider.

The other unfortunate aspect, from the employer's point of view, was the TUPE transfer occurring after the employee had already started his sickness absence, with the result that the new provider refused to cover him. As the EAT pointed out, the employer should have dealt with the issue at the time of the transfer.

Cases since *Aspden* suggest that the principle of an implied term preventing dismissal may not apply where there is "good cause" for the dismissal, unrelated to the employee's ill-health (gross misconduct or redundancy, for example). It may also be possible to defeat the *Aspden* implied term by including an express clause in the contract allowing the employer to dismiss even if it would prejudice entitlement to benefits. However, this has not been tested in the courts.

Part-time worker paid 50% of full pay for 53.5% of full-time hours was less favourably treated

Summary: The Court of Appeal held that a part-time member of cabin crew who had to be available for 53.5% of the hours of her full-time counterpart, but who received only 50% of the full-time salary, had established a prima facie case of less favourable treatment for the purpose of a claim under the Part-time Workers Regulations (*British Airways Plc v Pinaud*).

Key practice point: Whilst it may be difficult for employers with complex workforce patterns to maintain complete equality between full and part-time workers, this case is a reminder of the difficulties that can arise if there is a pay discrepancy. Employers should always ask themselves whether there is a less discriminatory way of achieving their aim.

Facts: The claimant, P, was employed as a part-time cabin crew purser, under a "14-14" contract - she was on duty for 14 days and off duty for the next 14 days. Within the 14-day on duty period she had to be available for work on 10 days – a total of 130 days per year. Full-time pursers worked six days on duty, followed by three days off, so they had to be available 243 days per year. The overall effect was that P had to be available for 53.5% of a full-time purser's hours but was paid only 50% of a full-time purser's salary. She brought a claim in the Employment Tribunal for less favourable treatment under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR).

The Employment Tribunal upheld her claim, finding that, although the employer had a legitimate objective for its part-time shift pattern, it was not a "necessary or appropriate means" of achieving that objective, as required by the PTWR. The employer appealed to the Employment Appeal Tribunal, which held that the Tribunal had failed to address the employer's argument that the treatment was objectively justified because its statistics showed that, in practice, P was not required to work more hours pro rata than her full-time comparator. The question of justification was sent back to a new employment tribunal. Meanwhile, the employer appealed to the Court of Appeal, arguing that the EAT should not have upheld the finding of prima facie less favourable treatment.

Decision: The Court of Appeal dismissed the employer's appeal. P was paid 50% of her comparator's salary and yet had to be available for a proportionately greater number of days per year. This was prima facie less favourable treatment. The Court commented that the way the 14-14 contract was constituted might be advantageous for a part-time worker, and this could potentially establish the justification defence, but that was a matter for the new tribunal to consider.

The Court of Appeal went on to comment on remedy – this will have to be considered if the justification defence is rejected. The Tribunal had noted that a non-discriminatory way of achieving the employer's aim would have been to have increased the part-time salary to 53.5% of full-time salary. In the Court of Appeal's

view, however, if the employer's statistical evidence was accepted, it would be "*very surprising*" to conclude that P had suffered loss amounting to 3.5% of her total remuneration for the 10 year period she was on the part-time contract, or that compensation on that basis would be "just and equitable in all the circumstances" (as required by the PTWR).

Analysis/commentary: Remedy for losses caused by discrimination will be the key issue here if the employer fails to establish justification for its arrangements for part-time workers. There are significant sums involved – on the basis of an increase of 3.5%, P's losses for salary and pensions contributions amounted to over £50,000, and apparently there are hundreds of similar claims. However, both the EAT and the Court of Appeal made it very clear that a simple increase in salary was not necessarily an answer to the question of what would constitute a non-discriminatory system. If the apparently unfavourable treatment did not in fact work its way through to the amount of work P did, then that increase might be out of proportion to the impact.

Horizon scanning

What key developments in employment should be on your radar?

1 January 2019	Revised UK Corporate Governance Code due to take effect Associated legislation due to come into force – including to require listed companies to report annually the ratio of CEO pay to the average pay of their UK workforce
29 March 2019	European Union (Withdrawal) Act 2018 due to take full effect
4 April 2019	Gender pay gap reporting deadline
6 April 2019	Workers entitled to written statements of terms and itemised pay slips
April 2019	Annual updates to employment rates and limits
9 December 2019	Extension of the SMCR to FCA solo-regulated firms
6 April 2020	All termination payments above £30,000 threshold will be subject to employer class 1A NICs

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status**: *Uber v Aslam* (Court of Appeal)

- **Discrimination / equal pay**: *ASDA Stores v Brierley* and *Sainsbury's Supermarkets v Ahmed* (Court of Appeal: equal pay); *Hextall v Chief Constable of Leicestershire Police* (Court of Appeal: indirect

discrimination and shared parental pay); *The Trustees of Swansea University Pensions & Assurance Scheme v Williams* (Supreme Court: discrimination arising from a disability and the meaning of unfavourable treatment)

- **Whistleblowing**: *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure)
- **Trade unions**: *IWGB v UK* (ECtHR: challenge to recognition rules); *IWGB v CAC* (High Court: recognition by 'de facto' employer in outsourcing): *Kostal v Dunckley* (Court of Appeal: inducements); *Jet2.com v Denby* (Court of Appeal: refusal of employment)
- **Restrictive covenants**: *Tillman v Egon Zehnder* (Supreme Court: non-competes and minority shareholdings)
- **Collective consultation**: *Seahorse Maritime Ltd v Nautilus International* (Court of Appeal: territorial scope of employer's obligations)
- **Employer's liability**: *Lungowe v Vedanta Resources Plc* (Supreme Court: parent company duty of care for subsidiary operations).

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