SLAUGHTER AND MAY

Employment Bulletin

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In this January edition, our headline item is the **Government's response to the Taylor Review of Modern Working**. We also report on Court of Appeal cases on **worker status** and **collective redundancy consultation**. We look at a proposal for a **code of practice on sexual harassment**, before concluding with some **horizon scanning.**

Good Work Plan – Government's response to the Taylor Review

Summary: Just before the Christmas break the Government published its "Good Work Plan", a response to its consultations on the Taylor Review of Modern Working Practices. This was followed the next day by regulations to implement some of the proposed changes to employment law.

Key practice point: Most changes do not come into force until April 2020 at the earliest and in the key area where employers were hoping for action – clarity around employment status – there are no specific proposals. The fact that the Government has commissioned "*further detailed research*" and describes the task of defining employment status as "*not straightforward*" indicates that changes to the law may still be some way off.

Contents

Written statement of terms

As previously announced, the right to a written statement of employment details under section 1 of the Employment Rights Act 1996, currently available to employees only, is to be extended to workers, from 6 April 2020. The new regulations also provide that the statement must be given on day one of employment, instead of within two months, as well as expanding the information that has to be given. The additional information includes:

- the days of the week workers are required to work and whether and how hours/days may be variable;
- details of all paid leave (not just sick leave);

- all benefits provided by the employer (not just pay);
- duration and conditions of any probationary period; and
- any training entitlement/requirements. Information about training, along with details of pensions; collective agreements; and disciplinary procedures, can be given in instalments over a two month period from the start of employment.

These changes apply to workers (and employees) whose employment begins on or after 6 April 2020; however, "existing employees" (as at 6 April 2020) can request a statement in the new form and the employer must provide it within one month. The requirement to supply a statement in the new form will also apply if there is a change in the terms (in their new form) which needs to be notified on or after 6 April 2020.

Separately, there will be legislation requiring employment agencies to give agency workers a "key facts page", showing their rates of pay and type of contract.

Employee information and consultation

The Information and Consultation of Employees Regulations 2004 are being amended, from 6 April 2020, to lower the percentage required for a valid employee request for their employer to implement information and consultation arrangements, from 10% to 2% of the total number of employees. The 15 employee minimum for a valid request remains.

Agency workers

Regulation 10 of the Agency Workers Regulations 2010 (AWR) - the "Swedish Derogation" (an opt-out of the right to pay equality with permanent workers in return for a contract guaranteeing pay between assignments) is to be abolished, from 6 April 2020. Agencies who have used the opt-out will be required to give a written statement to agency workers, informing them of their rights under the AWR. The written statement must be given by 30 April 2020.

Holiday pay

There is a change to the calculation of an average week's pay for holiday pay purposes under the Working Time Regulations 1998. Where a worker has variable remuneration, the reference period for calculating pay is extended from 12 weeks to 52 weeks. This change – designed to make the system fairer for seasonal and atypical workers whose holiday pay can vary significantly depending on when they take holiday - takes effect from 6 April 2020.

Other changes proposed by the Good Work Plan paper include:

- **Employment status** – the Government will legislate to "*improve the clarity of the employment status tests*" and to tackle misclassification but will conduct further research first to find out more about those with uncertain employment status. The employment status frameworks for tax and employment rights will be aligned. No timescale has been set for these changes.

- In order to tackle what it describes as "one-sided flexibility", the Government will introduce a right to **request a more predictable and stable contract**, such as minimum hours, or fixed days of work, after 26 weeks' service.

- The rules on **continuity of employment** will be changed, so that a break of up to four weeks (instead of just one week) between contracts will not interrupt continuity for the purposes of acquiring employment rights. This is intended to help those who work intermittently for the same employer.

- The Government is reviewing the legislation relating to **redundancy protection** and considering whether it is sufficient and will shortly be publishing a consultation looking at extending redundancy protections for women and new mothers.

- **Employment tribunals** – there will be an increase in the maximum level of penalty for breaches of a worker's employment rights which have aggravating features (the duration/repetition of the breach, or the employer's behaviour, for example). For breaches from 6 April 2019, the maximum goes up from £5,000 to £20,000. To date, very few penalties have been imposed. There will also be legislation (no date has been set yet) to enable the use of sanctions for repeated breaches by the same employer, coupled with an obligation on employment tribunals to at least consider the use of those sanctions. The Government is also introducing a "name and shame" system for employers who do not pay employment tribunal awards, with immediate effect. This will operate in a similar way to the existing scheme for minimum wage underpayment.

Analysis/commentary: Arguably, the two areas in the Good Work Plan package of most interest to employers are the proposed new laws on employment status and the right to request a more fixed working pattern. Unfortunately, details on both are sparse.

On the right to request, it is not clear whether the employer will be able to refuse the request (and, if so, on what grounds) but, based on the scenario set out in the Good Work Plan – which refers to a three month period for the employer to respond - this may well operate in a similar way to the right to request flexible working.

What can we expect in the employment status legislation? In cases in the tribunals and courts, the right to appoint a substitute has been an important factor used to argue that the level of "personal service" required for employee/worker status is not present. The Taylor Review highlighted that an individual can have nearly every aspect of their work controlled by a business and still be considered self-employed if a right for the individual to send a substitute in their place exists. The Government discusses this point in the Good Work Plan, agreeing that "*businesses should not be able to misclassify or mislead their staff*" and endorsing the Taylor Review recommendation that status tests should place more emphasis on control and less on the right to send a substitute, reflecting new business employment models.

Court of Appeal rejects Uber's appeal on worker status

Summary: The Court of Appeal has dismissed Uber's appeal against the decision of the Employment Appeal Tribunal that its drivers were "workers" rather than self-employed, and were entitled to paid holiday, the National Minimum Wage, and whistleblower protections (*Uber BV v Aslam*).

Key practice point: Uber has been given permission to appeal to the Supreme Court. However, as things stand, this is a clear message from the Court of Appeal that if there is any element of doubt as to whether

contractual documentation reflects the position on the ground, tribunals and courts will look beyond the documents and assess the reality of the relationship.

Facts: The written documentation issued to Uber drivers indicated that they were self-employed and contracted directly with passengers and that Uber acted only as an intermediary. However, the Employment Tribunal ruled that a group of drivers were "workers" rather than self-employed and as such were entitled to paid holiday, the National Minimum Wage, and whistleblower protections. The EAT upheld that decision (see our Employment Bulletin dated 8 December 2017).

Decision: The Court of Appeal (by a 2:1 majority) confirmed that the Employment Tribunal was entitled, under the principle established by the *Autoclenz* case, to look beyond the contractual documentation describing drivers as self-employed contractors, which it found did not accord with the actual working arrangements. The reality was that Uber ran a transportation business and the drivers provided the skilled labour through which Uber delivered its services and earned its profits.

The Court rejected Uber's argument that the operational matters relied on as characterising the drivers as workers were simply conditions of its licence to use the smartphone App (through which customers ordered taxis and paid fares) and consistent with the written agreements between Uber and drivers and Uber and passengers. The fact that they were statutory/regulatory requirements, safety measures or standard conditions in the taxi/minicab industry did not invalidate their significance; if anything this reinforced their importance.

The majority found that there was a "*high degree of fiction*" in the contracts between Uber and the drivers - they required the drivers to agree to numerous facts/legal propositions about the position of others (such as the relationship between the customer and Uber/the driver), rather than being confined to the mutual obligations of the parties to the agreement. Uber London Limited, the company which held the Private Hire Vehicle licence, was not a party to the agreements, despite enforcing a high degree of control over drivers. The production of an invoice addressed (but not sent) to the passenger at the end of the transaction contributed to the fiction.

Other considerations supporting the conclusion about the true relationship between Uber and the drivers included the fact that Uber:

- interviewed and recruited drivers;
- controlled the key information (passenger's surname, contact details and intended destination) and excluded the driver from it. The fact that these were desirable safety measures did not detract from their significance;
- required drivers to accept trips and/or not to cancel trips, and enforced the requirement by logging off drivers who breached those requirements;
- fixed the fares - drivers could not agree a higher sum with the passenger;
- imposed numerous conditions on drivers, instructed them how to do their work, and controlled them in the performance of their duties;
- subjected drivers through the rating system to what amounted to a performance management/disciplinary procedure; and

- reserved the power to amend a driver's terms unilaterally.

As to when the drivers were workers, for the purposes of working time/minimum wage, the Court found this difficult (as did the EAT) but held that the Tribunal was entitled to conclude that they were providing services throughout the time when they were in the "territory" (London) and had the Uber App switched on, even before they accepted a trip. The high level of acceptances required, and the penalty of being logged off if three consecutive requests were not accepted within 10 seconds, justified the conclusion that the drivers waiting for a booking were available to Uber and at its disposal.

Analysis/commentary: Decisions on employment/worker status are notoriously fact specific, and this case is no exception, but some of the points made by the Court may be relevant in other gig economy scenarios – for example, that it is not helpful to argue that contractual provisions that indicate worker status are included only because they are regulatory requirements.

Lord Justice Underhill gave a detailed dissenting judgment, concluding that the contractual agreement provided that the drivers did not any stage provide services to Uber under a contract and none of the Tribunal's findings were capable of supporting the conclusion that the true agreement was different. He also argued that the public policy aspect is one for Parliament not the Courts. Underhill LJ also took the view that if the drivers did provide services, it was only when they had accepted a trip. These arguments will no doubt resurface if, as seems likely, the case goes to the Supreme Court.

Individual ships were "establishments" for collective redundancy consultation

Summary: The Court of Appeal overturned decisions of the Employment Tribunal and EAT and held that individual ships in a fleet were separate establishments for the purposes of employer collective consultation obligations. The Court also found that there was no jurisdiction to hear a complaint that the employer had failed to consult, as the establishments were located abroad and there was an insufficiently close connection with Great Britain (*Seahorse Maritime Ltd v Nautilus International)*.

Key practice point: This decision establishes that the test for UK tribunal jurisdiction in collective redundancy cases is based on the connection between Great Britain and the establishment itself (not the employees). It also confirms that an "establishment" is essentially the workplace.

Facts: Seahorse Maritime Ltd, a Guernsey company with a UK agent based in Surrey, supplied employees to work on ships owned and operated (mostly outside GB) by Sealion Shipping Ltd. Seahorse's employment contracts provided that its employees agreed to serve on any ship, but, in practice, most employees worked on the same ship for periods of time. Crew members were from UK and overseas.

After a redundancy exercise affecting crews based on some of the ships in the fleet, the recognised trade union, Nautilus, applied for a protective award on the basis of Seahorse's failure to consult in respect of redundancies of 20 or more employees at one establishment within a period of 90 days or less, under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992.

There were two issues:

- whether individual ships were establishments; and
- whether there was a sufficient connection with Great Britain for the UK employment tribunals to have jurisdiction to decide the claims.

The importance of the establishment issue was that if each ship was a separate establishment, then it was very unlikely that at least 20 Seahorse employees would be liable to be made redundant on any one ship.

The Employment Tribunal found that the "establishment" was all the ships of the fleet on which Seahorse had employees; and that it had territorial jurisdiction to hear the claim, in respect of UK domiciled employees. The EAT upheld that decision on both points. Seahorse appealed to the Court of Appeal.

Decision: The Court of Appeal allowed the appeal, deciding that each ship was an establishment and dismissing Nautilus' claim regarding the proposed redundancies.

The Court found that each ship was clearly a self-contained operating unit with a workforce assigned to it. The crew were, and remained, assigned to particular ships for long periods. Correspondence to employees made references to "*their*" ships; and although the standard form contract said they could be employed on any Sealion vessel, it also contained a box with the words "*Ship Name (if known)*".

It was not significant that Sealion's UK agent treated the Seahorse workforce collectively, particularly in the handling of the redundancy exercise (which was approached on a fleet-wide basis). The European and domestic authorities make it clear that a work unit can constitute an establishment notwithstanding that many functions, including HR, are performed centrally. The Court also said that it did not matter that the owner of the ships was not the employer.

On the issue of the territorial jurisdiction of UK employment tribunals, the Court of Appeal decided that the question was answered by reference to the establishment (the ship) and not to the individual employees. The obligation under section 188 is to consult with the employees' representatives, not the individual employees. It would be unsatisfactory in deciding whether consultation obligations are owed, and which employees should benefit from a protective award, for individual assessments of the connection with GB to be carried out.

The only connection between the ships and GB was that some of the employer's functions were performed by an agent based in Surrey. This was not of itself enough to overcome the "*territorial pull*" of the ship's overseas location.

Analysis/commentary: The Court did stress that its reasoning was specific to the particular circumstances of the case. Nevertheless, this decision, the first significant one to consider the section 188 establishment test since *USDAW v WW Realisation 1 Limited* (the "Woolworths" case, where the European Court decided that dismissals do not have to be aggregated across the employer's entire undertaking), is helpful in confirming that "establishment" is simply a workplace. The Court's comment that it was irrelevant that the employer was not also the owner of the establishment is also potentially useful in the context of service companies supplying employees to work in the businesses of other companies.

On the jurisdictional issue, the decision avoids the practical problems in relation to consultation obligations that might otherwise arise from the "sufficient connection" test being satisfied in the case of some of the workforce but not others.

Workplace sexual harassment – Government to introduce statutory code of practice

Summary: The Government has announced it will work with the Equality and Human Rights Commission to introduce a statutory code of practice on sexual harassment at work. However, at this stage, there is no commitment to impose a new duty on employers to protect workers from harassment and victimisation, as proposed by the House of Commons Women and Equalities Committee, although the Government will consult on this.

Key practice point: The new code of practice will be statutory, with the result that employment tribunals considering claims under the Equality Act 2010 will have to take it into account when it appears relevant.

In its July 2018 report on workplace sexual harassment, the Women and Equalities Committee made a number of proposals, the key one being that there should be a mandatory duty on employers to protect workers from harassment and victimisation in the workplace, with substantial financial penalties for breach (see our Employment Bulletin dated September 2018).

The Government has now responded to the report, confirming that it will ask the Equality and Human Rights Commission (EHRC) to develop a statutory code of practice. There are no plans to introduce a duty to protect workers from sexual harassment, although the Government will consult on this. Their consultation will also cover the possibility of extending employment tribunal time limits for bringing workplace discrimination/harassment cases from three to six months; and whether further legal protections are needed for interns/volunteers, as they may not be employees/workers.

The Government considers that it is premature to give employment tribunals power to increase compensation by up to 25% for failure to comply with the new code (as with the Acas code on discipline and grievances), although the Government will keep this under review. Recommendations that tribunals should be able to award punitive damages, and should be required to award costs against an employer losing a case in which sexual harassment has been alleged, have not been accepted, the Government's response highlighting the strengthening of tribunals' powers announced in the Good Work Plan (see above). The Committee's call to reinstate a version of the statutory questionnaire (which previously enabled employees to request information from employers about a potential discrimination claim) has also been rejected.

The Government does agree with some of the Committee's other recommendations, including:

- **Non-disclosure agreements** require better regulation and a clearer explanation of the rights that a worker cannot surrender by signing one, and there should be a standard approved confidentiality clause. The Government will consult on how best to achieve this and on enforcement.

- Sexual harassment should be taken into account by **regulators** when considering the fitness and propriety of the individuals and employers they regulate.

- Employers should have a responsibility to take reasonable steps to protect their staff from **third party harassment** where they know that there is a risk. The Government will consult on "*how best to strengthen and clarify the laws*". (There were provisions to this effect in the Equality Act 2010 which were repealed in 2013.)

- The EHRC will be added to the list of prescribed organisations to whom disclosures qualifying for whistleblowing protection can be made.

Analysis/commentary: The Government has provided detailed reasons why it does not favour legislation in this area, pointing out that that employers can already be liable for sexual harassment by one employee against another unless the employer can show it took reasonable steps to prevent the harassment. This is unlikely to satisfy the Committee, who had made the point that the EHRC cannot currently take enforcement action for failure to take those preventative steps; a breach of a mandatory duty would have enabled it to do so.

The Government's backing for the Committee's proposal for stronger action from regulators does perhaps increase the chances of separate developments for employers in regulated sectors.

Horizon scanning

What key developments in employment should be on your radar?

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 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
6 April 2020	Written statement of terms to be provided to employees and workers from day one of employment and to contain extra details

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

- **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); *Chief Constable of Norfolk v Coffey* (Court of Appeal: perceived disability discrimination)

- **Whistleblowing**: *Royal Mail v Jhuti* (Supreme Court: awareness of protected disclosure); *Bamieh v FCO* (Court of Appeal: territorial jurisdiction)

- **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/by-passing of collective bargaining); *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Restrictive covenants**: *Tillman v Egon Zehnder* (Supreme Court: non-competes and minority shareholdings)

- **Agency workers**: *Kocur v Angard Staffing Solutions* (Court of Appeal: parity of terms)

- **Constructive dismissal:** *Agoreyo v London Borough of Lambeth* (Court of Appeal: whether suspension was repudiatory breach of contract)

- **Employer's liability**: *Lungowe v Vedanta Resources Plc* (Supreme Court: parent company duty of care for subsidiary operations).

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