March 2017

Employment Update

Key employment and business immigration developments for employers

In the News

Do you know your workers?

Employment status claims continue to make headlines, with another worker successfully challenging the "self-employed" label last month. Gary Smith, a plumber from Pimlico Plumbers, won a claim that he is a "worker" rather than a self-employed contractor, meaning he is entitled to basic worker rights like national minimum wage and paid holiday.

The decision follows the recent rulings in relation to two Uber drivers and a CitySprint cycle courier – all of whom have been found to be "workers" rather than self-employed.

In Mr Smith's case, although he was described as self-employed and paid tax on that basis, the level of control exercised by the plumbing company was inconsistent with him being in business on his own account. He had to provide his services personally for a minimum number of hours a week and was not allowed to send a substitute. He was also prevented from undertaking other plumbing work in competition with Pimlico Plumbers, both during his engagement and for a period after it ended.

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Although the rulings do not represent new law, they shine a spotlight on employment status issues, particularly for businesses that engage self-employed contractors and present them to the public as working for the company.

In the light of these developments, employers would be well-advised to review the different types of workers they engage – including casuals, zero-hours workers, agency staff, freelancers and contractors – to assess how they are being used and whether their terms of engagement are still appropriate.

Companies which engage large numbers of self-employed workers may come under closer scrutiny from HMRC, which has set up a specialist Employment Status and Intermediaries team to investigate such businesses and act on complaints about false self-employment. Chancellor Philip Hammond has also announced an increase in national insurance contribution rates for the self-employed from April 2018.

More developments on employment status are expected in the coming months and employers may wish to keep an eye on these:

Uber	Uber has appealed the ruling that two of its drivers are "workers" to the Employment Appeal Tribunal. The appeal date has not been set but is expected to be later this year.
Deliveroo	The Independent Workers Union has brought a claim for trade union recognition on behalf of Deliveroo riders. The claim depends on the riders being "workers" rather than self-employed. The case is expected to be heard this spring.
Addison Lee	Three drivers have brought unfair dismissal claims against Addison Lee after their contracts were terminated following a protest about terms and conditions at the company. The Employment Tribunal hearing is scheduled for 4 July 2017.
BBC	BBC presenters Joanna Gosling and Tim Willcox have appealed an HMRC ruling that they should be taxed as employees (under the IR35 rules) instead of self-employed freelancers. The case is due to be heard on 13 March 2017.
Taylor Review	The Government has launched an independent review into employment practices in the modern economy. The review, led by Matthew Taylor, will examine employment status in the "gig economy" and is expected to conclude this spring.

Case Watch

Office relocation – how far can you go?

The employer in this case had to close its office in Greenford due to workload and office capacity. It asked employees to relocate to Leatherhead, relying on a mobility clause in their contracts which said employees could be required to work at a different location in the UK or overseas on a temporary or permanent basis unless there were "exceptional circumstances". A number of employees with caring responsibilities left under the "exceptional circumstances" carve-out and received a redundancy payment. For those transferring, the employer offered a contribution to travel costs for six months and an earlier finish to help with traffic.

However, two employees refused to relocate. They both lived close to Greenford and complained about the considerable extra travel – an increased commute from 20 minutes to two-hours each way for one employee,

and from 18 to 47 miles for the other (who also had 25 years' service and was close to retirement). They were both dismissed for failure to follow a reasonable instruction and both claimed unfair dismissal and statutory redundancy pay.

The Employment Appeal Tribunal ruled that the dismissals were unfair. The EAT accepted that the reason for dismissal in each case was not redundancy but the failure to comply with the request to relocate. However, the employer's instruction to relocate had not been reasonable because of the greatly increased travel time. The mobility clause did not assist as it was so widely drafted and the steps taken by the employer to alleviate the impact were of no benefit to the two employees.

This case highlights the potential limitations of mobility clauses. While employers can sometimes rely on a contractual mobility clause to avoid making employees redundant, they must do so with caution. The employer should check the clause is tightly drafted and covers the situation, and make it clear in employee communications from the outset that the mobility clause is being invoked. Regardless of how wide the clause appears, employers must always act reasonably when asking staff to relocate, by giving plenty of notice and taking steps to mitigate the impact of the relocation. Employers should also be prepared to take into account the particular circumstances of individual employees on a case by case basis.

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KELLOGG BROWN & ROOT (UK) LTD V FITTON AND EWER

Dismissal – when is enough enough?

The employee in this case, who worked for a manufacturer of motorhomes, had a very poor disciplinary record. There were some 18 formal disciplinary issues in almost 13 years' service (in addition to informal discussions). He was dismissed after he was caught using his mobile phone on the shop floor which was "strictly prohibited" in the employee handbook. He had two recent warnings on file for misconduct but both had expired. The dismissing manager said that that the phone incident was worthy of a final written warning, taking into account the personal issues the employee had been having at home. However, he decided to dismiss because of the employee's extensive disciplinary history and because he did not think things would improve. The employee brought an unfair dismissal claim, arguing that the prior expired warnings should not have been taken into account.

The employee lost his claim. The Employment Tribunal and the Employment Appeal Tribunal ruled that the dismissal was fair. It was reasonable for the employer to take account of the employee's disciplinary record and base its decision on a prediction that things would not improve in the future. The disciplinary record was extensive and covered the entire period of the employee's employment.

This case is helpful to a point but should be approached with caution. An employer cannot usually rely on expired warnings to "tip the balance" where a later incident of misconduct is not enough on its own to justify dismissal. It will also be rare that an employer will be able to justify dismissal by deciding "enough is enough" based on an employee's prior disciplinary record. Where there is a history of repeated misconduct, it would usually be much safer for the employer to consider extending the life of warnings.

"An employer cannot usually rely on expired warnings to "tip the balance"..."

Although the Acas Code suggests warnings should normally have a time limit of 12 months, a longer period would be justified where the misconduct is especially serious or there is a pattern of misconduct recurring each time a warning expires.

STRATFORD V AUTO TRAIL VR LIMITED

Dismissal – how can you tell?

The employee in this case was employed by an agency and assigned to work for a client of the agency. The client had concerns about her performance and gave notice to terminate her engagement. The employee did not get in touch with the agency and a manager only made one failed attempt to get in touch with her. He did not proactively seek out any other assignments for her, as he was required to do under her contract, assuming she would not be interested. The employee brought an unfair dismissal claim against the agency. She argued that by not seeking out alternative work for her, the agency had effectively dismissed her. However, the Employment Tribunal and the Employment Appeal Tribunal ruled that the employee had not been dismissed by the agency. The agency had done nothing to communicate a dismissal to her, so she remained employed and could not claim unfair dismissal.

This case is a reminder that, to be effective, dismissal must be communicated clearly to the employee. While there are some cases where a dismissal has been inferred from conduct (eg where the employer stopped paying the employee or issued the P45), the conduct in those cases left no room for doubt that employment had ended and the employee was aware of it. Wherever possible, employers should ensure that dismissal is communicated expressly to the employee. The dismissal will only be effective once the employee has received that communication, so it is safest to communicate the dismissal in person or over the phone and then confirm this in writing, rather than relying solely on post or email.

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New Law

Strike ballots

On 1 March 2017, new rules concerning strikes and other industrial action came into force under the Trade Union Act 2016. The Act introduces a new turnout threshold for all strike ballots. Previously, there was no minimum number of workers who had to participate in a ballot, provided the majority of those who responded to the ballot voted in favour of the strike. Now, a strike is only valid if at least 50 percent of all eligible union members turn out to vote, and a majority of those who turn out vote in favour of the strike. There is also a new, additional requirement for important public services (eg the health service) that the ballot is only valid if at least 40 percent of all eligible members in total vote in favour of the strike.

"On 1 March 2017, new rules concerning strikes and other industrial action came into force..."

Other key changes include:

- an increase in the notice of the strike that the union must give the employer from seven to 14 days, and
- a new time limit of six months for taking strike action after the ballot, after which a new ballot would be needed for further strike action.

The changes apply to strike ballots on or after 1 March 2017.

National minimum wage

On 1 April 2017, the rates of the national minimum wage and national living wage will increase to:

- £7.50 per hour for workers aged 25 and over (rising from the current national living wage of £7.20 per hour)
- £7.05 per hour for workers aged 21 to 24 (rising from £6.95 per hour)
- £5.60 per hour for workers aged 18 to 20 (rising from £5.55 per hour), and
- £4.05 per hour for workers aged under 18 years (rising from £4.00 per hour).

The apprenticeship rate, for apprentices under 19 or in the first year of their apprenticeship, will also increase from £3.40 to £3.50 per hour.

Maternity pay rates

On 2 April 2017, the lower rate of statutory maternity pay and the rate of statutory paternity, adoption and shared parental pay will increase from £139.58 to £140.98 per week (or 90% of the employee's average weekly earnings if lower).

Statutory sick pay

On 6 April 2017, the rate of statutory sick pay will increase from £88.45 to £89.35 per week.

Employment Tribunal compensation

The annual increase in Employment Tribunal compensation limits will take effect on 6 April 2017. For dismissals taking effect on or after 6 April 2017:

- the maximum compensatory award for unfair dismissal will increase to the lower of £80,541 and a year's pay (currently the limit is the lower of £78,962 and a year's pay) and
- the maximum amount of a week's pay (used for calculating, for example, the unfair dismissal basic award and statutory redundancy pay) will increase from £479 to £489 per week.

Immigration for licensed sponsors

From 6 April 2017, employers who are licensed sponsors will be required to pay an Immigration Skills Charge for sponsored employees. The charge, which is designed to discourage reliance on migrant workers, will be £1,000 per employee per year on a Tier 2 visa (a reduced rate of £364 per year will apply to small sponsors). The charge will be payable upfront and for the total period covered by the Tier 2 visa. It will be payable for both Tier 2 General and Tier 2 Intra Company Transfer visas but will not apply to extensions where the original visa was granted before 6 April 2017.

The annual allocation of Tier 2 sponsorship certificates will expire on 5 April 2017 for all employers who are licensed sponsors. Employers who have not already done so should request a renewal of the annual allocation by 4 April 2017 to avoid delays. This is also done online via the sponsor management system. When requesting the annual allocation, employers should take into account:

- any potential new hires of non-EEA nationals that may be made over the coming year where the base salary will be at least £155,300

"Employers ... should request a renewal of the annual allocation..."

- any potential new hires of non-EEA nationals over the coming year of individuals who are already working in the UK for another employer
- any existing employees on Tier 2 whose visas that may be expiring in the coming year which will need to be extended, and
- any transfers from offices abroad which may need to be made over the coming year under Tier 2 Intra Company Transfer visas.

Gender pay gap reporting

The new rules in relation to gender pay gap reporting come into force on 6 April 2017. Employers with 250 or more employees will be required to publish on their website annually figures showing the pay gap in their organisation. Employers will have 12 months from the 5 April each year to report on the previous year, so the first reports will have to be published by 4 April 2018 (see our **January 2017 update** for details).

Apprenticeship levy

From 6 April 2017, employers with an annual pay bill of more than £3 million will be required to pay the apprenticeship levy. The levy will be charged at 0.5 per cent of the amount by which the pay bill exceeds £3 million. Employers who pay the levy will be able to access funding for apprenticeships through a new digital apprenticeship service account, and use this money to pay for training and assessment for apprentices.

Our Work

Since our last employment update, our work has included:

- hosting a conference for international lawyers to coincide with International Women's Day
- running a training session for a client's HR team on handling aspects of employee sickness
- advising on the application of a listed client's remuneration policy in the context of a director level exit
- detailed discussions around the application of the gender pay gap reporting requirements and the approach clients will take to their narrative
- advice to financial services clients around the new regulatory reference regime and helping an asset management client devise a project plan for the operation of the Senior Managers and Certification Regime from 2018 onwards
- presenting a webinar on the forthcoming apprenticeship levy, and
- advising on employment status issues in relation to "gig economy" workers.

If you have any queries on this edition of Employment Update, please contact any member of the Employment Department

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