EMPLOYMENT NEWS HEADLINES NOV-DEC 2016 ISSUE 6

EMPLOYMENT STATUS IS MORE THAN JUST THE CONTRACT - UBER JUDGEMENT (ET)

There has been much media attention following a first instance Employment Tribunal (ET) ruling on a claim brought by Uber taxi drivers relating to their "employment status".

Briefly, the arrangement for customers accessing an Uber taxi is via an App which enables the availability and fares for the journey required to be set out and drivers can accept or reject the request. As with most things in the growing "gig economy" there is flexibility in the service. The question for the ET to decide here was whether the reality of the work arrangement between the Uber taxi drivers and Uber were sufficiently loose for the drivers to be considered "self-employed" or whether there was enough control by Uber for them, in fact, to be "workers" which would result in Uber having to cover them for national minimum wage, paid holidays and other protections under the Employment Rights Act 1996.

The ET found that the Uber taxi drivers, on the facts of this case, were not self-employed contractors but were actually "workers" and were, therefore, entitled to worker rights. The ET focussed on:

- The fact that the drivers performed the work personally for Uber;
- When the Uber app was switched on, this meant they were ready and available for fares and there were penalties for not complying with requests;
- The length Uber went to in order to control its image, brand and quality of service;
- The level of control Uber had over its drivers when they were working, for example, with routes and fares.

Uber has decided to appeal the outcome which could have huge financial implications for it. Although this case is fact specific, it is bound to continue the debate in today's flexible work economy as to which employment status is relevant and what protections are afforded to different types of roles and functions. It is important for all employers to consider the type of individuals it engages and which category they fall into in order to ensure its legal obligations are correctly satisfied.

REST BREAKS ARE NECESSARY – GRANGE V ABELLIO LONDON LIMITED (EAT)

Although the outcome of this case may seem obvious to the untrained observer, the ET had failed to see the logic of Mr Grange's reasoning and had initially dismissed his claim.

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In *Grange v Abellio London Limited* Mr Grange brought a claim against his employer for refusing a rest break. Mr Grange was a roadside controller for Abellio bus services and had initially worked for 8.5 hours a day with a 30 minute unpaid rest break. Mr Grange's hours were modified in 2012 which meant that he was told to work 8 hours a day, had no rest breaks but finished half an hour earlier. Mr Grange brought his claim. The ET had initially dismissed Mr Grange's claim on the basis that there had been no refusal as there had been no request, however, the Employment Appeal Tribunal (EAT) did not see it that way.

The EAT overturned this decision, clearly stating that employers have an obligation to grant rest breaks to its employees regardless of whether or not one has been expressly requested. Employers should remember that all workers are entitled to a least a 20 minute rest break where they work six or more continuous hours. They should not have to ask for this break before it is granted. Mr Grange's case is a clear reminder that employers should be proactive in ensuring their employees receive sufficient rest during the working day.

GENDER PAY GAP REPORTING – FINAL DRAFT PUBLISHED

The draft *Equality Act 2010 (Gender Pay Gap Information) Regulations 2017*, delayed from the summer was finally published on 6 December 2016. Subject to parliamentary approval, the Regulations are expected to come into force on 6 April 2017.

In the first issue of Maxlaw Global news (Jan-Feb 2016) we set out some key highlights of the initial draft regulations which have now been revised or expanded in the final version published last month as follows:

- There is a new "snapshot" date each year for the pay data for the preceding 12 months which will now be 5th April. The first reporting date for 'in scope' employers will be 4 April 2018;
- The scope of staff included in the data reporting requirement has been clarified and expanded and will now include employees, apprentices and those individuals who personally perform the contract, therefore, 'workers' are now included. They must be employed on the "snapshot" date;
- Note, however, partners and LLP members are expressly excluded in the data requirement;
- The final version also excludes those individuals who are not paid or are on a reduced rate of pay in the relevant reporting period by introducing the definition, a "full pay relevant employee" which would, for example, exclude those on long term sick leave or on maternity leave with a reduced rate of pay or no pay;
- The definition of pay is clarified and will include (basic pay, allowances other than out-of-pocket), shift premium, piecework pay). Pay for leave of any kind will only be included if paid at full ordinary rate – see above;
- Bonus pay has been clarified to include bonuses paid as securities and security options (when they become taxable income), vouchers, cash, commission or performance incentives or rewards.

Additionally, a few other issues have been addressed or clarified including:

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- The published data will require a statement of accuracy which a director of the company must sign before it is displayed on the company website in a manner accessible to all employees and members of the public and any site designated by the Secretary of State;
- The final regulations set out a clear six-step process to enable employers to calculate an "hourly pay rate" for comparisons, with a 12 week reference period for variable rates;
- It also includes a requirement to publish a 'median bonus pay', i.e., the difference between the median bonus paid to male relevant employees and female relevant employees during the 12 month period ending 5th April.

For those required to publish by 4th April 2018, it is important to start preparing and analysing systems and processes for the first year's data review now.

WHEN ARE EMPLOYERS VICARIOUSLY LIABLE FOR EMPLOYEES' CONDUCT? – BELLMAN V NORTHAMPTON RECRUITMENT LIMITED (HIGH COURT, QBD)

Bellman v Northampton Recruitment Ltd is an interesting, if tragic, recent High Court case which is a salutary reminder for employers of the risk of being vicariously liable for the actions of their employees during the course of employment.

The general vicariously liability principle is that employers will usually be found to be liable for any acts or omissions of its employees where these take place in the course of their employment. The question is where does this line fall where the employee is still in the "course of their employment"?

As with all matters, the outcome of this case turned on its very specific facts. However, the outcome may not always be so favourable to the employer. This case concerned an incident that took place in a hotel lobby bar after a Christmas party organised by the employer had ended. Some individuals retired to their hotel rooms and others continued to drink at the lobby bar when the altercation took place between Mr Bellman and a director and shareholder of the company. A conversation relating to a work matter became heated which resulted in the director striking Mr Bellman knocking him to the marble floor which fractured his skull and resulted in brain damage. Mr Bellman brought a claim against his employer for vicarious liability for the actions of the director.

The High Court in this instance ruled that the employer was not vicariously liable relying on the following facts in reaching this conclusion:

- The official organised party by the company had ended with some company staff retiring to their rooms for the night;
- The remaining individuals who had continued to drink at the hotel lobby bar did so of their own free will – it was an impromptu party and it was at bar that was open to other visitors at the hotel who were also using it at the time of the incident;
- The incident took place at a separate location from the official Christmas party and was not a continuing event sponsored by the employer – the employees could said to be on "a frolic of their own". There was no contractual obligation or work pressure to be there at this point;
- Although the discussion which led to the assault was related to work matters it could not be considered "in the course of employment" on the facts. The judge went so far as to state that if any discussion about work triggered employers being vicariously liable it would render employer's liability to be "so wide as to be potentially uninsurable".

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This is a sad outcome for Mr Bellman but it is an important case as it highlights how critical it is for employers to ensure that any social event organised by it is carefully thought out, the standard of conduct expected is communicated to all staff beforehand and the event is supervised. The line of "in the course of employment" happened to fall in the employers favour here but it could so easily have gone the other way.

EMPLOYEES MUST PROVE RIGHT TO WORK IN THE UK REGARDLESS OF RESIDENT STATUS- BAKER V ABEILLO LONDON LIMITED (ET)

It is simply not enough for an individual to prove he or she is legally resident in the UK to satisfy his or her right to work in the UK.

In another case involving Abellio London Limited, the bus company, the employment tribunal ruled that the company could fairly dismiss an employee who could not produce a document confirming his right to work in the UK.

In July 2016, under a new Immigration Act 2016, an employer is criminally liable if they "knowingly employ" an illegal worker or has "reasonable cause to believe" the person does not have the right to work in the UK. The penalties are more stringent and an employer can be subjected to fines of up to £20,000 per illegal worker, or possibly prison for up to 5 years increased from 2 years.

Under the 2006 and 2016 Acts, an employee must provide original documents from either list A or list B (see the UKVI website for details of these lists), which prove his or her right to work in the UK. The responsibility to produce these documents lies with the employee. The employer must check the authenticity and validity of these documents in the employee's presence and retain copies on file.

In this case, Mr Baker arrived in the UK as a child and had an expired passport with his legal right of residence, which meant he had the right to live and work in the UK without restrictions. However, he could not produce a valid document from List A or List B which confirmed his right to work in the UK as required under the new immigration rules. Mr Baker needed to apply for a biometric residence permit known as a BRP card in order to get the endorsement from the expired passport transferred to a BRP which would have satisfied the employer's legal requirements under the immigration acts.

The company loaned Mr Baker funds in order for him to do this, they checked whether he was progressing his application with the Home Office and gave him ample opportunity to obtain the proof. Mr Baker failed to produce the required documents. Further, they warned him of the risk of dismissal if he could not confirm his right to work in the UK and, when this took place, the employer also gave him a right of appeal. Having gone to these lengths the Tribunal found there was not much more the company could have done and the dismissal was found to be 'fair'.

Although this case is fact specific, it highlights the need for employers to ensure proper checks are carried out immediately and preferably before recruitment. The new criminal penalties are further incentive for employers to ensure that their house is in order and all paper work is fully and accurately completed and up-to-date.

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