EMPLOYMENT NEWS HEADLINES MAR-APR 2017 ISSUE 8

PIMLICO PLUMBER WAS A WORKER – PIMLICO PLUMBERS LTD AND CHARLIE MULLINS V GARY SMITH (COURT OF APPEAL)

This case has been a hot topic in employment law and HR circles as the debate on the status of workers in the 'gig' economy rages on. The significance of this case over the worker status cases reported in earlier issues of Maxlaw Global employment news (see Issues 6 and 7) is that this is a Court of Appeal case and, therefore, binding on lower courts.

The background to the case relates to a plumber, Mr Smith, who worked under various contracts exclusively for Pimlico Plumbers Limited over a period of approximately six years when he suffered a heart attack and was subsequently dismissed. Mr Smith brought a number of claims against Pimlico Plumbers and Mr Mullins the owner of the company. The issue for the courts to decide, on the basis of often contradictory or inadequate paperwork, was the actual work status of Mr Smith. In doing this, they would clarify what legal claims he was entitled to bring based on this analysis. The case went all the way up to the Court of Appeal who found that:

- Mr Smith was not an employee and, therefore, did not have the right to bring a claim for unfair dismissal. They based this on the fact that Mr Smith had flexibility to arrange his own work hours and there was no obligation on the part of Pimlico to provide him with work. He also took on some of the burden of risk with the purchase of material at his own expense in advance, was not paid until the customer had paid Pimlico and rectified problems on his own time and at his own cost – none of this pointed to a traditional employer-employee relationship.
- Mr Smith was, however, a 'worker' for the purposes of wrongful dismissal and was "in employment" in order to bring a discrimination claim – a protection also afforded to those with "worker" status. The court looked at a number of factors in reaching this conclusion, specifically:
  - Although there was no obligation to accept work, once accepted, Mr Smith was required to commit to 40 hours per week. This meant he did not have full control of his own work schedule;
  - The court found that Mr Smith was required to provide the service personally as there was no unfettered right of substitution and no indication that any such right, even conditional, had been exercised;
  - Mr Smith was also required to wear a Pimlico uniform when working and had a Pimlico logo on the side of his van, he was required to submit timesheets and comply with the Pimlico work manual which all suggested he was an integral part of the company and a worker;
  - The court found that although Mr Smith provided his own equipment, was responsible for his own taxes and insurance and was registered self-employed this was insufficient, in light of other facts identified above, in and of itself, to indicate he was genuinely self-employed. The court did not find that Pimlico was a "consumer" of services provided by Mr Smith on his own account.

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This finding is a clear indication that the courts in such cases will look beyond the paper documents and labels on a contract, preferring to look at the role and function as a whole and examine the "reality" of the situation instead. Companies should be clear in their documentation and practice before putting a label on a work arrangement.

THE LATEST ON HEADSCARVES IN THE WORKPLACE – ACHIBITA AND BOUGNAOUI CASES

In previous issues of Maxlaw Global employment newsletters (see Issues 2, 3 and 4) we reported on the French and Belgian European Court (CJEU) cases relating to headscarves in the work place. Specifically, on the facts of each of those cases, whether or not a dismissal resulting in the employees' refusal to remove the headscarves was directly or indirectly discriminatory. The CJEU considered these cases together and have confirmed the following:

- In *Achibita* where the employer's policy was one based on the concept of 'neutrality' and applicable equally to all employees was not directly discriminatory as it did not single out a particular religion or belief;
- The CJEU stated that although potentially indirectly discriminatory it could be objectively justified provided the requirement was a proportionate means of achieving a legitimate aim. Objective justification is quite a narrow in practice and although in *Achibita* the policy of presenting an image of "neutrality" to customers was a legitimate aim which could be objectively justified, there will be few instances where this is the case. The culture and customs of the particular jurisdictions from which these two cases were referred to the CJEU were relevant to the courts findings;
- The court noted that this was applicable to customer facing roles but did not address the fact that the employer in *Achibita* might have considered a non-customer facing role for the employee rather than moving to dismissal. The group of employees to which a rule or policy applies will also be an important consideration in the justification defence;
- In *Bougnaoui* the CJEU found that where an employer bans the wearing of a headscarf due to a customer request, as was the case in *Bougnaoui,* this will be directly discriminatory as there is no "genuine and determining occupational requirement". This is even tougher than the objective justification test for indirect discrimination as it relates to the objective activities or requirements of a particular role and would be very difficult for the employer to argue.

The take away from these rulings for UK employers while we are still in the EU is that employers may have a policy for a neutral dress code provided this can be objectively justified, is applied proportionately and is in place to achieve a legitimate aim. Important considerations will be:

- The group or groups to which such a policy applies;
- The legitimate aim it is intended to achieve;
- Whether consultations have taken place before implementation and whether there are exceptions to the general rule and in what circumstances;
- The manner in which the policy is applied and enforced – is it systematic and consistent;
- Whether any alternatives have been considered before applying a policy e.g., putting someone in a non-customer facing role.

DISMISSAL OF EMPLOYEE ON LONG-TERM SICK LEAVE IS UNFAIR – O'BRIEN V BOLTON ST. CATHERINE'S ACADEMY (COURT OF APPEAL)

This is an interesting case which travelled through the ET to the Court of Appeal (CA) and back with shifting views. Ultimately, the CA ruled in the employee's favour finding there had been discrimination and Ms O'Brien had been unfairly dismissed. The CA gave some important guidance for employers to consider before taking the decision to dismiss an employee who is off sick long term, for example, more than 12 months.

This case concerned the head of department, Ms O'Brien, a teacher who was off for over a year due to acute stress following an assault by a pupil at the Academy. Although temporary measures had been taken to accommodate Ms O'Brien's absence, the Academy, in the absence of any clear indication of a return date and

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unclear and insufficient medical evidence of the prognosis, commenced capability proceedings. It concluded that Ms O'Brien should be dismissed.

At appeal, Ms O'Brien stated that with treatment she would soon be able to return to work and produced new evidence in the form of a GP's fit note. The decision to dismiss her was upheld at the appeal hearing. Ms O'Brien claimed unfair dismissal and discrimination. At initial Tribunal the finding was that Ms O'Brien had been unfairly dismissed and discriminated against due to her disability. At the Appeal Tribunal (EAT), the tribunal was more sympathetic to the employer stating that as she was a senior employee the Academy would undoubtedly have suffered an adverse impact on the running of the school due to such a long-term absence. However, the CA found the dismissal was unfair and highlighted the following issues for employers to consider more closely before moving to a final decision to dismiss.

- The employer should maintain evidence throughout a long-term absence of the impact that such an absence has on the staffing, running, efficiency, costs etc., for the employer thereby potentially justifying discrimination by using a proportionate means of achieving a legitimate aim;
- Where new evidence is introduced at the appeal stage this should be carefully considered as dismissal needs to be fair at the time of the appeal not when the original decision to dismiss was made;
- Although the court conceded that an employer needs to have finality when dealing with long-term sickness absence with no clear timeframe for return, it was important to "wait long enough" if evidence, medical or otherwise, provided is unclear, incomplete, confusing or contradictory to verify and seek clarification before the final decision is taken.

Had the Academy taken a bit of time to review and investigate Ms O'Brien's claims about treatment for her condition and imminent return and the GP's fit note further the outcome of the appeal may have been different or her dismissal may have been properly justified based on clear evidence.

HOLIDAY PAY AND COMMISSION– SUPREME COURT REFUSES APPEAL IN THE CASE OF LOCK V BRITISH GAS

In earlier issues 1 and 4 of Maxlaw Global employment news we highlighted the case of *Lock v British Gas* which concerned the issue of whether commission should be included in holiday pay calculations. The case was heard by the Court of Appeal in July last year which confirmed the EAT decision that - individual contractual performance based commission pay earned should be included for the purpose of holiday pay calculations under the Working Time directive when the employee is on annual leave.

The Supreme Court in late February 2017 refused British Gas the right to appeal further which means the waiting game for employees with pending cases is now over. The original tribunal, CJEU and Court of Appeal rulings apply which means for the first 4 statutory weeks of holiday granted under the Working Time directive, results based commission must be included in the holiday pay calculation. This supports the premise of the Working Time directive which is designed to protect the health and safety of workers by ensuring they take holiday without any negative consequences.

In determining the reference period for commission pay, there seems to be agreement that the average pay period of the 12 weeks preceding leave was an appropriate reference period.

It is unlikely that even with a hard Brexit, the Conservative government will change this position for UK workers in the short term.

Note: Employers should note this calculation need not apply to the 1.6 additional weeks granted under the UK Working Time Regulations.

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IMMIGRATION SKILLS CHARGE NOW APPLIES

As of 6th April 2017, a number of immigration changes came into force as follows:

- The Government introduced an immigration skills charge. The skills charge applies to all employers issuing a certificate of sponsorship under Tier 2 of the points-based system;
- The skills charge is £1,000 for each certificate issued per year. This charge is reduced to £364 for small employers and charities. This applies to each person under the Tier 2 scheme with a few exceptions;
- The Tier 2 (General) category salary requirement increased to £30,000 per annum;
- Certain workers entering the UK for work in the education, social care and health sectors are required to provide criminal records certificate for the preceding 10 years.

ANNUAL STATUTORY RATE INCREASES

In line with the employment changes that come into force in April each year the statutory rates are as follows:

- The statutory maternity, paternity, shared parental leave etc., rates of pay will increase from £139.58 to £140.98 per week for leave commencing on or after 2nd April 2017;
- Statutory sick pay will increase from £88.45 to £89.35 per week with effect from 6th April 2017;
- Statutory redundancy pay will increase from £479 to £489 per week with effect from 6th April 2017;
- The maximum compensation limits for unfair dismissal claims increases from £ 78,962 to £80,541.

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