EMPLOYMENT NEWS HEADLINES MAY-JUNE 2017 ISSUE 9

WORKER STATUS DEBATE CONTINUES – BOXER V EXCEL GROUP SERVICES LTD

In the last issue of Maxlaw Global Employment News (Issue 8) we reported on the key tests applied by the Court of Appeal in the *Pimlico Plumber* case for establishing if an individual is a 'worker' or genuinely self-employed. The ET in *Boxer v Excel Group Services Limited* has reaffirmed these tests yet again.

Mr Boxer worked for Excel Group over a period of three years as a cycle courier. Although he supplied his own equipment such as his bike, a mobile phone and appropriate cycling attire, the ET found that he was not self-employed and working on his own account and was, therefore, entitled to statutory holiday pay under the definition of worker in the Employment Rights Act 1996. It considered the following in reaching that decision:

- The period Mr Boxer had worked for Excel – 3 years;
- He worked 5 days per week and when he was working he was required to follow Excel's instructions for his day-to-day work, such as instructions on pick-up and drop-off, waiting locations etc.;
- Mr Boxer was paid a fixed non-negotiable rate of pay by Excel and could not agree his own terms with the clients;
- The terms of his contract did not permit him to readily substitute a replacement courier, the term was too restrictive;
- He was required to provide advance notice to Excel if he wished to take time off.

Drilling down into the day-to-day reality of the working relationship, the ET was clear that Mr Boxer was a 'worker' and not self-employed as his contract suggested and found he was entitled to holiday pay. This approach by the courts is here to stay and it is important for employers to evaluate the bigger picture of the work relationship and ensure compliance with the individual's rights and entitlements accordingly. In order to assist with this evaluation, the report into the gig economy by Parliament has now been released:

Self-employment and the gig economy
https://www.publications.parliament.uk/pa/cm201617/cmselect/cmworpen/847/84702.htm

It recommends the introduction of a default status of 'worker' rather than self-employed for gig-economy workers which, given the direction of these recent court rulings, appears to be a sensible solution.

UNDERPAYMENTS IN HOLIDAY PAY LIMITED TO THREE MONTHS – FULTON & ANOR V BEARS SCOTLAND LIMITED (EAT)

In Issue 1 of Maxlaw Global Employment News we referred to the *Bears Scotland* case in connection with the court rulings on holiday pay calculations in *Lock v British Gas* (in respect of commission), also reported in earlier issues.

The *Bears* case focussed on whether non-guaranteed overtime pay should be included for the purpose of calculating holiday pay entitlements. The Court in the original case found that it should. Later it was established that claims for unlawful deduction of wages should be limited to two years for cases submitted on or after 1 July 2015.

The present case further protects employers from excessive claims by limiting the period for the back claim to three months from the last unlawful deduction or series of unlawful deductions. Rejecting the appeal by Mr Fulton and his colleague, the EAT has ruled where there has been break in the continuity of unlawful deductions of a gap of three months or more any claim for a period beyond that break would be out of time. The normal limitation period for bringing an unlawful deduction of wages claim is three months from the last unlawful deduction so the decision although controversial appears to be logical. That said, this issue may someday reach the Court of Appeal for further consideration.

WHISTLEBLOWERS AND WORKERS – DAY V HEALTH EDUCATION ENGLAND & ANOR (CA)

The purpose of whistleblowing laws is to ensure that the person "blowing the whistle" on an organisation does not suffer a detriment as a result of his or her actions. This detriment can be anything from feeling excluded in the workplace to a serious detriment in career progression.

Dr Day was a junior doctor placed by Health Education England (HEE) into training positions in different Trust hospitals. The contract was therefore between Dr Day and the Trust into which he was placed by HEE. Dr Day raised concerns to both bodies about serious staffing shortages at one of the Trusts which he believed was a danger to patient safety. He subsequently brought a claim against HEE and the Trust claiming he had suffered a detriment as a result of raising his concerns.

The issue for consideration in this case was whether Dr Day could bring his claim against HEE who did not directly employ him nor did he fall into the traditional definition of 'worker' in relation to HEE. The HEE claimed that Dr Day could not, therefore, claim against it. The EAT agreed, the Court of Appeal did not. Allowing the appeal the CA said that where one organisation has the responsibility of placing an individual into another organisation, it is possible for the purposes of whistle-blowing protection, for the individual to have two employers as was the case here. The CA said it was possible for both organisation in this case to substantially determine Dr Day's terms of work and so both could be his "employers".

It is important for organisations to be aware, especially in a fluid gig economy where working arrangements are not so traditional, that the courts will be willing to stretch the reach of certain legislation where it is 'just' to do so. Organisations should ensure they keep whistleblowing policies and training programmes up- to-date and under review and to ensure staff awareness, particularly, where it relates to health & safety.

RELIGIOUS CEREMONIES AND TIME OFF WORK – GAREDDU V LONDON UNDERGROUND LTD (EAT)

In order to succeed in an indirect discrimination claim, the employee must show that the employer has a provision, practice or criterion (PCP) which applies to the whole of its workforce, but puts a specific group on the grounds of a protected characteristic, at a disadvantage which the employer cannot objectively justify and which is, therefore, indirectly discriminatory.

The case of *Gareddu v London Underground Limited* is an important reminder to employers that, even where there may be a finding in one instance that the employer did not indirectly discriminate, these issues are often fact specific and each request must be assessed on its own merits.

Mr Gareddu wished to take five weeks annual leave to attend religious festivals based on his faith in Sardinia. Although his employer could accommodate three weeks of continuous leave, it could not accommodate a five week absence. Mr Gareddu brought a claim for indirect discrimination on the grounds of his religion or belief.

On a closer examination of the specific facts of this case, both the Employment Tribunal and the Appeal Tribunal rejected Mr Gareddu's claim for indirect discrimination as it transpired that the real reason for the duration of the leave was the availability of Mr Gareddu's relatives on specific dates rather than his religion or belief. His employer had not discriminated against him by refusing the five weeks leave based on any protected characteristic. That said, employers should carefully consider any such requests, as in other instances, it may be a genuine requirement of the religious belief and potentially discriminatory.

INDIRECT DISCRIMINATION – REASON IS NOT NECESSARY IF PCP EXISTS (SUPREME COURT)

In light of the above case, the following two cases jointly heard by the Supreme Court are very useful for employers and clarifies the tests which need to be applied to establish if indirect discrimination exists, and if it does, can it be objectively justified as a proportionate means of achieving a legitimate aim.

The two issues for the Courts to consider in the cases of *Essop v Home Office* and *Naeem v Secretary of State for Justice* was:

- Does the claimant have to prove the reason *why* a PCP puts a particular group at a disadvantage; and
- Must that reason be related to the protected characteristic(s).

The case of *Naeem v Secretary of State for Justice* concerned prison chaplain pay in the Prison service. Prison pay scales worked on the basis of length of service. As Muslim chaplains were only employed on a salaried basis from 2002 onwards, this affected their pay rates as they had a shorter length of service than Christian chaplains. Mr Naeem brought a claim for indirect discrimination on the grounds of his religion. The claim ultimately failed and the Court considered a number of issues:

- It looked at all the chaplains in the prison service not only those employed on a salaried basis after 2002. It was important to consider the whole group to which the PCP was applied, as a seemingly neutral PCP, could adversely impact a specific group even if it did not impact the whole of that specific group;

- It said there was no need to prove a causal link between the protected characteristic (that he was a Muslim) and the disadvantage (that his rate of pay was lower due to a shorter length of service);
- The claim failed as although Mr Naeem was able to show indirect discrimination, anyone employed after 2002 would be affected in the same way whether they were Muslim or not and the pay structure was objectively justified by the Prison Service as a proportionate means of achieving a legitimate aim.
- Social factors and context were also considered as there was not a need for salaried Muslim prison chaplains prior to 2002 and they were engaged on an 'as needed' basis before that time.

In *Essop v Home Office*, the case concerned a Core Skills Assessment (CSA) requirement by the Home Office in order to move up the civil service grades. Statistics showed that individuals were less likely to succeed in the CSA if they were above 35 years of age and from a black or ethnic minority group. Mr Essop brought a claim for indirect discrimination on the basis of age and race. Considering the same tests, the Supreme Court ruled:

- It is not necessary to explain why a PCP disadvantages a particular group in order to show indirect discrimination. This meant is was not necessary to prove *why* older, black or ethnic minority candidates has a lower pass rate, it was sufficient to show that they did in order to bring the claim;
- It was important to look at the whole group impacted, either negatively or positively by the PCP;
- And to show that the group or individuals within the group were impacted even though not necessarily all of the group. It is still necessary for the individual, however, to show that the disadvantage to him personally was due to the protected characteristic;
- It was then for the Home Office to objectively justify the use of the CSA requirement as a proportionate means of achieving a legitimate aim. In this case, promotion to a Higher Executive grade.

The Court was vocal in stressing that objective justification should not be seen "*as casting some sort of shadow or stigma upon them [the employer]. There is no shame in it. There may well be very good reasons for the PCP in question*."

It is important to not lose sight of the fact that the purpose of indirect discrimination legislation is to achieve a level playing field for employees and avoid hidden barriers for certain groups. In most cases, the reason for a disadvantage will be obvious, for example, the recent European cases banning the wearing of a veil, in other cases, it will not be. However, in the words of the judge, "*it is not necessary to pin down the reason behind the disadvantage suffered".*

A practical way in which employers can avoid these types of claims is to ensure it has a strong equal opportunities policy and to periodically assess any PCP which it uses which may adversely impact a particular part of its workforce and to ensure its staff is fully aware and trained in its policy requirements and to make adjustments to the PCP where any risks exist.

APPEAL CAN CURE PROCEDURAL DEFECTS OF A DISCIPLINARY HEARING – ADESHINA V ST GEORGE'S UNIVERSITY HOSPITALS NHS TRUST AND ORS (CA)

Although the issues in the case of *Adeshina v St George's NHS Trust* are not new, it is a helpful affirmation by the Court of Appeal on what remains good law.

The case related to Ms Adeshina who was a senior Pharmacist in the unit serving Wandsworth Prison. She was dismissed for gross misconduct following a disciplinary and an appeal process on the grounds of:

- Her failure to lead in a project for change to the way in which Pharmacy services were provided to the Prison;
- Her unprofessional conduct at a meeting of senior managers;
- Her inappropriate behaviour, attitude and resistance to organisational change.

Ms Adeshina brought claims for unfair dismissal, wrongful dismissal and discrimination. She had claimed the disciplinary process resulting in her dismissal was flawed in that:

- All of the allegations against her had not been put to her at the disciplinary and were not clear;
- There had been someone more junior to her on the appeal panel contrary to ACAS guidelines;
- There was a manager on the appeal that had been a mentor to a member of staff who alleged unprofessional behaviour against Ms Adeshina and was also involved in a related policy document.

Dismissing all her claims the CA found that:

- While there had been flaws in the disciplinary process itself, this had been remedied at appeal as it had been a full rehearing of the issues rather than a limited appeal on specific points;
- Although there had been a junior member on the panel which the non-statutory ACAS guidance does advise against, there had been two senior managers and an external independent advisor on the panel so, although not ideal, any flaw on balance was remedied;
- In respect of the senior manager who was a mentor and had been involved with a policy document, the court found that it was often the case that managers will be responsible for many staff and also be required to participate in disciplinaries, unless there was a clear suggestion of bias it could not find that the dismissal was unfair.

Although this case is fact specific and Ms Adeshina ran a number of different arguments, the position remains that provided flaws and procedural defects in the disciplinary process are identified and remedied appropriately by, for example, some of the methods applied in this case, any shortfalls in the original process will not necessarily render the decision to dismiss unfair.

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