EMPLOYMENT NEWS HEADLINES JAN-FEB 2019 ISSUE 19

DISMISSING AN EMPLOYEE ON LONG TERM DISABILITY – AWAN V ICTS UK LIMITED (EAT)

The case of *Awan v ICTS UK Limited* is an important reminder to employers to ensure that benefit provisions are drafted clearly and carefully in contracts of employment.

Mr Awan as a security agent for American Airlines for around 20 years. Under his contract of employment, he was entitled to long term disability benefit amounting to two-thirds of his salary until his return to work, retirement or death. In October 2012 Mr Awan went off sick with depression and was on sick leave under the long-term disability plan when his employment transferred by operation of TUPE (Transfer of Undertakings regulations) when the security function was outsourced by American Airlines to ICTS in December 2012. The insurers with ICTS changed and the new insurers were unwilling to cover Mr Awan under their policy, although they did agree to for a period of time. Mr Awan's employment was terminated on the grounds of incapacity by ICTS in November 2014 following a hearing.

Mr Awan brought a claim for unfair dismissal and disability discrimination. At first instance, the Employment Tribunal found that as an express term existed in Mr Awan's contract to terminate employment on notice, this could to be overridden by an implied term to not terminate the contract on the grounds of incapability whilst Mr Awan was in receipt of long-term disability benefit. It found that ICTS had acted reasonably having already explored reasonable adjustments. Mr Awan appealed.

Allowing Mr Awan's appeal, the EAT found that:

- A term should be implied so that where an employee is already in receipt of long-term disability benefit, he could not be dismissed for incapacity as to do so would deprive him of the substance of the entitlement;
- The EAT reconfirmed the limited circumstances when it may be permissible which is long established in case law (*Aspen v Webb*), for example, summary dismissal or redundancy;
- The EAT remitted the case to a fresh ET to determine the fairness of the dismissal.

Employers should consider a review of benefit terms and tighter drafting to ensure they do not end up in the same predicament as ICTS by making sure benefits can be withdrawn or revised and any such benefits are conditional on the insurers continuing to make payments and subject to the scheme rules.

DELIVEROO DELIVERY RIDER UPDATE (HIGH COURT)

Regular readers of Maxlaw Global employment news will recall we reported in Issue 12 the findings of the Central Arbitration Committee that compulsory trade union recognition was not possible for Deliveroo riders as they were not 'workers' but genuinely self-employed and working on their own account.

The judicial review challenge to this finding has now been dismissed by the High Court which emphatically confirmed that Deliveroo riders are self-employed. In coming to this conclusion, it reconfirmed the following which we addressed in Issue 12:

- An individual is a worker where he or she (i) works under a contract of employment or (ii) works under any other form of contract where the work undertaken is to be *performed personally* by the individual for someone who is not the professional client of the individual. The Court found that Deliveroo riders were not required to and did not always perform the work personally;
- The riders' genuine right to substitute for the work was incompatible with personal performance and, therefore, did not satisfy the 'worker' test;
- In respect of Article 11 of the European Convention on Human Rights (i.e., freedom of association and assembly, namely, the right to collective bargaining), the Court found these rights were not engaged as the Deliveroo riders did not have an 'employment relationship' under law, domestic or European, with the company for the reasons set out above.

THE "GOOD WORK PLAN" ANNOUNCED, SOME KEY HIGHLIGHTS

The Government has published its "Good Work Plan" following the earlier Taylor Review. It sets out proposals for employment law reforms and a vision for the future of the UK labour market. Highlights of the proposals for employers to be aware of are as follows:

- The extension of the current one-week requirement to four (4) weeks in order to break continuity of employment thereby affording employees on intermittent contracts greater protection;
- To give workers the right to "more stable" contract terms after 26 weeks of service, for example, requesting fixed hours or a more fixed pattern of work each week;
- Improve alignment between employment law and HMRC tests on 'employment status' to provide as much clarity as possible for employers and the way they engage staff;
- Introduce a ban on the "Swedish Derogation" which permits agency workers to be paid less than if they were hired directly by the end user after 12 weeks, provided they are employed by the agency and paid in between assignments by the agency;
- Introduction of day one rights for employees *and* workers to receive an expanded written statement of terms. Currently, employees have a right to written terms within two (2) months of commencing employment;
- Increasing the holiday pay reference period from 12 weeks to 52 weeks when calculating holiday pay which will protect workers on irregular work patterns such as seasonal workers;
- Introduce a ban on employers making deductions from staff tips; and
- Increase the Employment Tribunal powers to impose penalties for aggravated conduct by employers from £5,000 to £20,000.

There is no timeframe for when draft legislation will be published for consultation or when these proposals will come into force at the moment. We will keep you posted on developments.

CONSULTATION ON REDUNDANCY PROTECTION FOR MATERNITY RETURNERS LAUNCHED

The Government has launched a period of consultation following the findings of the Women and Equalities Select Committee Report published in 2016 and the Taylor review. The report found that discrimination on the grounds of pregnancy and maternity was on the rise and the purpose of this consultation is to explore the possibility and invite comment on the following:

- Extending the current protections afforded to women on maternity leave (ordinary or additional leave) who have the right of first refusal where their position is made redundant while on leave and a suitable alternative role is on offer. The employee on maternity leave has an automatic right to the alternative role without the need for interview or a selection process. The Government would like to explore extending this to (i) women who have notified their employer that they are pregnant but have not commenced leave and (ii) women who are returning to work following a period of maternity leave;
- In addition, the Government invites comment on extending these protections to employees who are out on leave for other types of "family-friendly" reasons for a lengthy period, for example, shared parental leave or adoption leave;
- The Government also would like to consider *the duration* of any protection that is afforded in this case, for example, 6 months after a woman returns from maternity leave; and
- Whether the limitation period for bringing a claim for discrimination on these grounds should be extended beyond the current Employment Tribunal limitation period of three (3) months, although the Government does recognise that courts do already have the right to grant extensions on the grounds of justice and equity.

The consultation closes on 5th April 2019.

ITEMISED PAY STATEMENTS ORDER EFFECTIVE 6 APRIL 2019 - A REMINDER

Last Summer we reported in Maxlaw Global Employment News (Issue 15) that itemised pay statements would be introduced for ***all*** workers not just employees and the key reasons for this. From April 6th, the Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No 2) Order 2018 (SI 2018/529) and Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018 (SI 2018/147) will come into force. It will require employers to include and itemise gross and net pay details, any variable and fixed deductions and variable hours worked, where this is applicable, for all workers. Please refer to Issue 15 of Maxlaw Global Employment News for further details at www.maxlawglobal.com

For further information and assistance please contact Max Woodley at:
mwoodley@maxlawglobal.com

Maxlaw Global
February, 2019