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Insights

UK HR TWO MINUTE MONTHLY: EMPLOYMENT STATUS, HARASSMENT AND REASONABLE STEPS, WORKPLACE SURVEILLANCE AND UNFAIR DISMISSAL

Mar 25, 2021

SUMMARY

Our March 2021 update considers key employment law developments from February. It includes recent cases on employment status in the gig economy; the reasonable steps defence in harassment claims; and practical issues arising from the dismissal of an employee who had conducted his own covert surveillance in the workplace. We also outline other points of note, including off-payroll working and the most recent annual report on board representation for women.

THE SUPREME COURT DELIVERS VERDICT IN LANDMARK UBER CASE

As we reported in our dedicated update, the Supreme Court gave judgment in the final appeal in relation to the Uber litigation at the end of February, unanimously concluding that the Uber drivers who brought claims against Uber in 2015 were workers within employment legislation.

Why this matters?

The outcome of this case has been long awaited given its importance to gig economy businesses. The Supreme Court found that the rights asserted by the drivers were not contractual rights but rather rights granted under statute. As such, while the contract between the parties is something that the courts can consider, the correct approach is to consider all the relevant circumstances, which will also include the relationship between the parties in practice and the general purpose of the legislation in question.

It is worth noting that this assessment must be carried out on a case-by-case basis and, as such, this decision does not determine the status of all gig employee workers. The issue of employment status therefore remains an area of debate.

Uber BV and others v Aslam and others

EMPLOYER UNABLE TO RELY ON “REASONABLE STEPS” DEFENCE IN RESPECT OF CLAIM FOR RACIAL HARASSMENT

In discrimination claims brought under the Equality Act 2010 (the “**EqA**”), an employer is generally liable for acts carried out by its employees in the course of their employment. However, there is a defence under section 109 of the EqA, where the employer has taken all reasonable steps to prevent the conduct from occurring. This is generally known as the “reasonable steps” defence.

In Allay (UK) Ltd v Gehlen, an employee complained after his dismissal that he had been subjected to racial harassment by a colleague. The employer investigated and upheld Mr Gehlen’s complaints. However, when he subsequently brought a claim, it sought to rely on the reasonable steps defence. In particular, it made reference to its equal opportunities policy and to the training it had provided on equality and diversity and on bullying and harassment. In each case, the training was delivered several years before Mr Gehlen’s dismissal and the employee who had harassed Mr Gehlen had attended the training.

The Employment Tribunal did not accept the employer’s defence. It found that the training was out of date and stale, in particular because an employee who had undergone the training had nonetheless gone on to racially harass a colleague. It noted that the defence requires **all** reasonable steps and a reasonable step would have been to refresh/update the training.

The Employment Appeal Tribunal upheld this decision. It considered previous authorities and concluded that, having considered the steps the employer had actually taken, a tribunal should also consider what other steps could reasonably have been taken, taking into account the likelihood of the steps being effective, the cost of the steps and the practicality. If other steps could reasonably have been taken, the defence will fail, as in this case.

Why this matters?

Whether to invoke the “reasonable steps” defence in a discrimination claim is a difficult tactical decision for employers, however where an employer has clear evidence that harassment has taken place, it can be crucial if the employer wishes to defend the proceedings.

This case therefore offers a clear reminder of the importance of both instilling a robust culture of equality and diversity within an organisation, and keeping that culture of equality/diversity up to date by regular training. While most employers will have appropriate policies in place and many will run training, for example as part of induction procedures, this case highlights that these measures will not, on their own, be sufficient protection against discrimination claims. Employers should therefore make sure that steps to combat harassment and discrimination are regularly refreshed/updated and form part of the ongoing training provided to all staff.

Allay (UK) Ltd v Gehlen

UNFAIR DISMISSAL: COVERT SURVEILLANCE BY THE EMPLOYEE AND PROCEDURAL CONSIDERATIONS ON AN INVESTIGATION

In Northbay Pelagic Ltd v Anderson, an employee was dismissed for five grounds of misconduct. He was dismissed at the same time as two other employees for connected but not identical issues. The employer had engaged external HR consultants to carry out the investigation and disciplinary process. However, there was an overlap so that in Mr Anderson's case, the disciplinary decision maker had investigated the allegations against one of the other dismissed employees.

Mr Anderson brought unfair dismissal proceedings and the Employment Tribunal found that his dismissal was both procedurally unfair and substantively unfair in relation to all five grounds relied on by the employer. The employer appealed to the EAT and its decision highlights two interesting issues.

First, one of the grounds of misconduct relied on by the employer was that Mr Anderson had set up a surveillance camera in his office to monitor whether anyone accessed his work computer. The employer had found this to be grounds for dismissal. On appeal, the EAT found that dismissal on this ground had been unfair. When assessing whether surveillance of this nature amounted to misconduct, the employer was required to balance the privacy rights of other employees against the individual's right to protect his confidential information. The employer had failed to carry out this balancing exercise, in particular it had not taken into account the fact that it was an office only used by Mr Anderson or that no one had been captured on the camera.

A second point of interest was the Tribunal's finding that the use of a disciplinary hearer who had acted as an investigator on a related case was a fatal procedural flaw. The EAT disagreed with this finding. It concluded that while the ACAS Code of Practice on Disciplinary and Grievance Procedures states that the same person should not conduct the investigation and disciplinary hearing stages in a disciplinary process where practical, it does not require entirely separate investigations in overlapping cases involving multiple employees. It further concluded that it was appropriate for a statement made in one investigation to be considered in another, in order to ensure accuracy and consistency across the investigations.

Why this matters?

Both findings are of practical importance. It has become increasingly common for employees to have the ability to monitor or record colleagues or management, both in disciplinary processes and for other reasons. This case follows a trend seen in other recent cases, concluding that an employer cannot rely on this as gross misconduct without a broader consideration of the circumstances. If an employer is particularly concerned about the risk of such conduct, it is therefore worth including covert monitoring as an express example of gross misconduct in the disciplinary policy. Even then, it would still be prudent to carry out the balancing exercise outlined by the EAT before taking a decision to dismiss.

The guidance on the conduct of overlapping investigations is helpful for employers. In complex investigations, it is common for more than one employee's conduct to be investigated and it is useful confirmation that it is will not be a fatal procedural flaw to rely on evidence from one investigation where it is relevant to another. It is, however, also a reminder of the crucial importance of having a separate investigation and hearing stage when considering disciplinary issues. While the ACAS Code does allow some leeway, for example for small employers, a failure to adhere to this requirement leaves any subsequent dismissal vulnerable to challenge on grounds of procedural unfairness.

Northbay Pelagic Ltd v Anderson

ROUND UP OF OTHER DEVELOPMENTS

FTSE Companies – Gender Balance: The fifth annual Hampton-Alexander report has been published into representation of women on the leadership teams of FTSE companies. The report confirms that there are no longer any all-male boards in the FTSE 350 and suggests that this top down approach is starting to provide pathways to leadership for women at all levels.

Off-payroll working: HMRC has issued a paper which outlines its approach on supporting compliance and tackling non-compliance in relation to the off-payroll working rules. This includes details of the application of the 12 month penalty holiday which applies for inaccuracies.

Gender Pay Gap Reporting: The EHRC has suspended enforcement action on gender pay gap reporting until 5 October 2021. This gives employers an additional 6 months to comply with reporting obligations for the 2020/2021 reporting year.

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MEET THE TEAM

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