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Insights

UK HR TWO MINUTE MONTHLY: MARCH 2022

HOLIDAY PAY, EMPLOYMENT STATUS, UNFAIR DISMISSAL AND DISABILITY DISCRIMINATION

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SUMMARY

Our March update considers key employment law developments from February 2022. It includes an important case on holiday pay for gig economy workers, EAT guidance on employment status and a case considering the ability of a tribunal to take into account matters arising between a decision to dismiss and the communication of that decision to the employee.

HOLIDAY PAY – ENTITLEMENT ON TERMINATION WHERE INDIVIDUAL WAS WRONGLY TREATED AS SELF-EMPLOYED

In a further case in the ongoing Pimlico Plumbers litigation, the Court of Appeal has made a finding of significance for gig economy workers. The claim relates to Mr Smith, who worked for Pimlico Plumbers for a number of years. He was treated as self-employed and, as such, was not entitled to paid annual leave under the Working Time Regulations. However, in very recent litigation it was held that he was a worker. The current case considered whether, as a result of being a worker, he was entitled to paid annual leave. Mr Smith had previously taken annual leave but had not been paid for it, in line with his status as a self-employed contractor.

The Employment Tribunal and the Employment Appeal Tribunal (EAT) both found that Mr Smith was not entitled to be paid for leave on the basis of his pleaded claim. However, the Court of Appeal took a different view, based on its analysis of the decision of the ECJ in King v the Sash Window Workshop. In that case, Mr King was prevented from taking any annual leave due to his misclassification as self-employed and the ECJ held that, in these circumstances, the right to annual leave continued to accrue and a claim could be brought on termination for unpaid holiday for the entire period of employment. The lower tribunals drew a distinction on the facts in the current case, finding that Mr Smith had been able to take leave but had not been paid for it, so the principle in King did not apply. The Court of Appeal disagreed: given the fundamental importance of the health and safety principles underpinning the Working Time Directive, the right to leave and to

be paid for it are intrinsically linked so that where the employee was able to take leave but was not paid for it, their right to "paid annual leave" had been breached. Accordingly, the Court of Appeal found that this applied to Mr Smith, that his right to paid leave had been breached throughout the period of his engagement and the right to bring the claim had crystallised on termination and was therefore in time.

WHY THIS MATTERS

This is an important decision for gig economy businesses. It increases the financial consequences where an individual is treated as self-employed but successfully challenges their status on termination. Where an individual worked under these arrangements for a long period, the potential value of the claim for unpaid holiday could be significant. However, it should be noted that this applies to the 4 weeks of leave granted under the Working Time Directive. The UK Working Time Regulations grant a further 1.6 weeks' leave which are not interpreted in accordance with EU law and would therefore be considered under the previous UK law positon.

The case also gave consideration to the decision in the Bear Scotland & Ors v Fulton case in which the EAT held that a break of three months would break the series of deductions for the purposes of bringing an unlawful deductions claim. While not relevant to Mr Smith and therefore not binding, the Court of Appeal gave a "strong indication" that the decision was wrong. Its view was that Tribunals should look at all the circumstances when assessing whether there was a series of deductions but that nothing in the legislation provides for a three month cut off period. It should therefore be assumed that challenges to this decision may well be successful in future.

Smith v Pimlico Plumbers Limited

DISMISSAL, DISCRIMINATION AND WHISTLEBLOWING: HOW FAR CAN A TRIBUNAL TAKE INTO ACCOUNT MATTERS THAT OCCUR FOLLOWING A DECISION TO DISMISS?

As part of long-running litigation, an employer appealed to the EAT following a finding of unfair dismissal and disability discrimination. The employee in question, Mr Mefful was dismissed on grounds of redundancy. Prior to joining the Respondent, the Claimant had been in a personal relationship with the Respondent's CEO. During his employment he continually raised complaints about his pay and treatment which culminated in an allegation that the CEO had sexually harassed him. Set against this background, the Respondent suffered financial difficulties and an interim CEO was brought in to consider restructuring. As part of these considerations, the Claimant's role was placed at risk of redundancy in March 2012. The Claimant disputed this, continued to raise concerns about his pay and, finally, went off sick. He was ultimately dismissed on grounds of redundancy on 15 August 2012.

The key issue in this appeal related to the finding on when the decision was taken to dismiss the Claimant and the consequential impact on his other claims. The EAT upheld the Employment Tribunal's finding that the interim CEO had taken the decision to dismiss the Claimant and that this decision was taken on 19 March 2011. This was considerably earlier than the date the Claimant was notified of his dismissal and at an early stage in what proved to be a protracted consultation, however the Tribunal found that this was the date the decision to terminate the Claimant's employment became set in stone. The EAT, however, also found that this necessarily meant that any matters which occurred after that date could not be relied on as part of the reason for dismissal. This had significant consequences for the Claimant's disability discrimination claim: he was not a disabled person prior to April 2012 and the matters on which the Tribunal reached the finding of disability discrimination all occurred between April 2012 and July 201 when the Claimant was absent, which was after the decision to dismiss was taken. Accordingly, the decision to dismiss was not tainted by disability discrimination.

WHY THIS MATTERS

While this case has relatively unusual facts, there are two key points for employers to bear in mind. First, it confirms that the decision to dismiss an employee is not necessarily contemporaneous with formal notification of that decision. In many circumstances, for example redundancies (but also dismissals for misconduct or poor performance), it may be possible for employees to argue that a decision has been taken at an early stage. Where there is documentary evidence to support this, it can make it very difficult successfully to defend unfair dismissal proceedings as the procedure followed is likely to be flawed as a result. Second, however, as with this case, it can assist the employer in that the decision can only be based on matters of which it was aware at the time the decision was made. It is common for employees who are subject to termination processes to go off sick but where this leads to disability later in a process, any attempt to argue that the dismissal amounted to disability discrimination claim will fail.

Citizens Advice Merton and Lambeth Ltd v Mefful

USEFUL EAT GUIDANCE ON CHALLENGES TO TRIBUNAL DECISION ON EMPLOYMENT STATUS

Whether or not an individual is an employee, a worker, or self-employed is a complex issue which requires the analysis of a number of (often competing) factors. In Waters v the Mote Cricket Club, the EAT considered an appeal against a finding that the groundsman of a cricket club was neither a worker or employee. Mr Waters was a member of the Respondent's committee. In 2011, he started a business providing gardening and ground services. In 2017, following the removal of a previous groundsman of the Respondent (who was an employee), the Respondent approached Mr Waters and asked him to take on the role on a contractor basis. Mr Waters later brought a claim against the

Respondent, in which he alleged that he was entitled to holiday pay, notice pay and to bring an unfair dismissal claim.

The Tribunal weighed up a number of factors, including the terms of the contract between the parties. It concluded that the contractual arrangement was not a sham and did not provide for a number of terms expected for a worker or employee, for example deduction of tax or holiday pay. It further noted that although there was some evidence of mutuality of obligation, this did not go any further than the level of mutuality that would be a feature of any relationship between a business and client. Taking into account that he had already been running a business at the time the contract was entered into and that the work for the club was incorporated into that, it concluded that Mr Waters was neither an employee nor a worker.

The EAT upheld this decision. In doing so, it considered the test for "worker" status under section 203(3) of the Employment Rights Act 1996 and noted that it required not only that the person undertook to perform the work personally, but also that they did not do so under a contract to which the other party was a client or customer of their business. This was crucial in this case, as the Tribunal had given weight in its finding to the fact that Mr Waters already ran his own business, even though the evidence showed that the contract with the Respondent amounted to more than 50% of the total turnover of the business. Further, Mr Waters' appeal was put forward on the basis that the Tribunal had failed to have regard to a number of material factors, for example the fact that he was required to provide 40 hours of personal service during summer months. The EAT disagreed, concluding that the Tribunal had considered all the relevant factors and was not required to refer in detail to all the points in its judgment.

WHY THIS MATTERS

The second limb of the test for worker status (i.e. where the individual does not work under a contract of employment) is difficult and any case law guidance on this point is useful. It is particularly helpful that the EAT expressly confirms that, in order to meet the standard, personal service is not enough and that the individual must also not be running their own business. This case is also helpful for its analysis of competing factors, in that it shows that what in this case was a high level of personal service combined with a degree of control and a degree of mutuality of obligation may not be enough to establish worker status where the individual appeared to be running their own business. Finally, as is common in employment status cases, the claimant had run an argument that the express contractual arrangements were a sham, in accordance with the decision in Autoclenz v Belcher 2011 ICR 1157. The EAT confirms that this is a question of fact for the Employment Tribunal and the fact that the contractor would have preferred not to enter into this type of contract was not sufficient to make the arrangement a sham.

Waters v The Mote Cricket Club

ROUND UP OF OTHER DEVELOPMENTS

ETHNICITY PAY GAP REPORTING

Ethnicity pay gap reporting has been given further consideration by the House of Commons' Women and Equalities Committee. The report of its January evidence session recommends that ethnicity pay reporting is made mandatory by April 2023. Whether this is taken forward in this time frame remains to be seen but it is a clear indication that employers are likely to be required to report on these matters soon. This reflects the approach many employers are taking on a voluntary basis: a recent poll by Mercer suggests that 75% of employers are already taking steps to collect ethnicity pay data.

STATUTORY LIMITS FOR EMPLOYMENT COMPENSATION

The Employment Rights (Increase of Limited) Order 2022 has been published. This confirms that a week's pay for the purposes of redundancy pay and calculating the basic award for unfair dismissal will increase from £544 to £571. The maximum compensatory award for unfair dismissal will increase from £89,493 to £93,878. The new limits apply to dismissals from 6 April 2022 onwards.

ACAS PUBLISHES BEREAVEMENT GUIDANCE

Acas has published new guidance for employers to clarify the rights which apply where an employee has been bereaved. The guidance provides guidance on a number of matters including the entitlement to parental bereavement leave and best practice around bereavement policies and practical advice on supporting employees.

Time Off Work For Bereavement

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