Birketts

WELCOME TO THE JANUARY 2019 UPDATE OF

Employment Law

IN THIS ISSUE

Welcome to the January 2019 update of Employment Law.

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Our first issue of 2019 continues with the recurring theme of employment status, which has been top of the employment law agenda for the past few years.

We examine at the Court of Appeal's decision in the ongoing *Uber* case, which looks set for a hearing in the Supreme Court in due course. We also include a case dealing with the provision of a statement of employment particulars to a short-term employee, and a decision from the Supreme Court on ill health retirement and disability discrimination.

Our 'Quick fire' items cover the latest employment law developments and we also include our usual immigration update.

Our February 'Early birds' sessions are filling-up fast, so don't forget to book your place if you want to get to grips with dismissals for 'some other substantial reason': www.birketts.co.uk/events.

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IN THIS ISSUE

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Uber drivers and worker status

The Court of Appeal has, by a majority, upheld the decision of the employment tribunal and the Employment Appeal Tribunal (EAT) that its drivers are workers rather than independent contractors.

Uber BV and others v Aslam and others [2018] EWCA Civ 2748

Facts

Uber runs a technology platform through which it provides taxi services to customers, by drivers that are designated as self-employed contractors. A group of drivers brought claims against the company, arguing that they are 'workers' rather than self-employed contractors, and, therefore, entitled to the national minimum wage and paid annual leave. The drivers succeeded in their claim before an employment tribunal and the EAT. Uber appealed to the Court of Appeal.

"... the Court of Appeal... held that there was a "high degree of fiction" in the wording of the agreement...

Court of Appeal decision

The Court of Appeal has rejected Uber's appeal, finding the drivers to be workers.

In considering the contractual documentation governing the relationship between the parties, particularly when the terms are standard and non-negotiable and the parties are in an unequal bargaining position, it is necessary to take a 'realistic and worldly-wise' approach. The written documentation stated that Uber only acted as an intermediary, providing booking and payment services. However, the majority of the Court of Appeal found there to be ample evidence of the fact that Uber is a transportation business, for which the drivers provide the labour. It held that there was a 'high degree of fiction' in the wording of the agreement between the parties. In reality, the company enforces a high degree of control over the drivers in order to protect its position as a licensed private hire vehicle operator in London. The drivers work for them rather than the other way around, as claimed by Uber.

"The Court agreed with the tribunal's conclusion that each driver should be regarded as a worker...

The court agreed with the tribunal's conclusion that each driver should be regarded as a worker when they have signed into the app and are ready and willing to accept fares.

The dissenting judge, Lord Justice Underhill, disagreed with the majority that the contractual documentation could be disregarded on the basis that it is in accordance with a well-recognised model for relationships in the private hire car business. He made reference to previous decisions involving taxi companies, in which worker status had been rejected.

The judge emphasised, however, that his conclusion that the Uber drivers were not workers did not mean that those working in the gig economy should not enjoy the same rights and protections as other workers. If the relevant legislation does not extend protection far enough, this is a matter for Parliament to determine.

Consequences

"The Court of Appeal has given Uber permission to appeal to the Supreme Court...

The Court of Appeal has given Uber permission to appeal to the Supreme Court, so it is likely that in another year or so we will have a further, definitive, ruling on whether Uber drivers are workers. The fact that the Court of Appeal judgment is a majority decision offers a glimmer of hope to Uber in pursuing its appeal. As with all cases involving employment status, it is very context-specific. However, a Supreme Court judgment may also go some way in establishing new boundaries for employment status in the context of the gig economy. In addition, the Government is proposing to clarify the statutory tests for determining employment status, under its recently published *Good Work Plan*.

QUICK FIRE

Gender pay gap reporting

This year's deadline for employers of 250 or more employees to report their gender pay gap data is fast approaching: 4 April 2019 (or 31 March 2019 for public sector employers).

"The EHRC urges employers to provide narrative reports alongside the pay gap figures...

The Equality and Human Rights Commission (EHRC) has recently published a new report, *Closing the gender pay gap*, based on research analysing 440 gender pay gap reports across various sectors. Only half of the employers in the sample group had provided a narrative alongside the data they are required to publish, and only 20% provided an action plan for taking steps to eliminate the gender pay gap.

The EHRC urges employers to provide narrative reports alongside the pay gap figures, which would provide them with the opportunity to publicly set out the reasons for the gap and state what measures they are taking to address it. The report includes examples of positive and concrete commitments made by employers to bring about change. It suggests that employers should refer to the GEO guide on practical steps for closing the gender pay gap.

Written statement of particulars

The Employment Appeal Tribunal (EAT) has considered whether an employee who was employed for less than two months was entitled to be provided with a written statement of particulars of employment.

Stefanko and others v Maritime Hotel Ltd and another, UKEAT/0024/18

Facts

The three claimants were all Polish nationals employed as waiting staff at a hotel. They were all dismissed after complaining about persistent shortfalls in their wages, late payment and falsification of wage slips. None had been provided with a statement of the particulars of their employment, as required under section 1 *Employment Rights Act 1996 (ERA)*.

On the termination of their employment, the claimants brought various claims against the respondents, including unlawful deductions from wages, compensation for failure to provide a section 1 statement, and race discrimination. Most of their claims succeeded, but one of the claimants failed in her claim for breach of section 1 ERA on the grounds that she had only been employed for six weeks. The tribunal also dismissed the complaint of direct race discrimination.

Employment Appeal Tribunal decision

The second claimant's appeal against the tribunal's finding that there had been no breach of section 1 ERA succeeded.

Under section 1, a written statement must be provided not later than two months after the beginning of the employment. It does not apply to individuals employed for less than one month. However, the tribunal had failed to take into account section 2(6) ERA, which states that a statement must be given even if the individual's employment ends within the period of two months provided under section 1. Even though the claimant's employment ended after a period of six weeks, she was still entitled to be provided with a statement.

The race discrimination claim was remitted back to the tribunal to be reheard.

> *... a statement must be given even if the individual's employment ends within the period of two months...*

... it is best practice for written particulars to be provided as soon as possible...

Consequences

The EAT pointed out in the judgment that the rights provided under the ERA represent the minimum floor of legal rights, and it is best practice for written particulars to be provided as soon as possible to protect both parties, and in order to minimise risk of ambiguity or misunderstanding of the terms.

Under the Government's recent *Good Work Plan*, it has committed to introducing a new right for all workers (in addition to employees) to be provided with a written statement of terms from day one of employment. This is expected to take effect from April 2020.

A new statutory code of practice on sexual harassment will be developed by the EHRC...

QUICK FIRE

Government response on sexual harassment

The Government has published its response to the Women and Equalities Select Committee report on sexual harassment in the workplace (see our previous Quick fire, August 2018). The 12 action points in the response include recommendations, proposals for consultation and various other commitments.

A new statutory code of practice on sexual harassment will be developed by the Equality and Human Rights Commission (EHRC), which is intended to assist employers in understanding and demonstrating compliance with the statutory defence that they have taken reasonable steps to prevent harassment from occurring. The Government is also raising the maximum limit of the penalty that may be awarded by a tribunal for an aggravated breach of employment rights from £5,000 to £20,000. This will come into force on 6 April 2019.

The Government also plans to consult on proposals to introduce a mandatory duty to protect workers from sexual harassment, how to strengthen and clarify laws relating to third party harassment, whether new protections are necessary to protect interns and volunteers, and whether to extend tribunal time limits from three to six months for claims under the *Equality Act 2010*. It will also consider how best to regulate the use of non-disclosure agreements (NDAs).

In addition, the Government has committed to working with Acas, the EHRC and employers to raise awareness of appropriate workplace behaviours and individual rights, and will commission a survey that gathers data on the prevalence and nature of workplace sexual harassment.

Medical retirement and disability

The Supreme Court has considered whether the award of an enhanced pension due to medical retirement, based on a part-time salary, is unfavourable treatment due to disability.

Williams v The Trustees of Swansea University Pension & Assurance Scheme and another, [2018] UKSC 65

Facts

Mr Williams suffered from a number of psychological problems, including obsessive compulsive disorder and depression. He worked full time for a period of ten years, following which his hours were reduced as a result of reasonable adjustments agreed by the University. After three years of working part-time on a reduced salary, he took ill-health retirement. Under the rules of the pension scheme, he was entitled to his accrued pension and an enhanced pension based on a period of deemed pensionable service. These were calculated on the basis of his actual final (part-time) salary at retirement.

Mr Williams brought a claim for discrimination arising from disability under section 15 Equality Act 2010.

Mr Williams brought a claim for discrimination arising from disability under section 15 *Equality Act 2010*. The employment tribunal agreed that the failure to base his enhanced pension on his full time salary amounted to unfavourable treatment because of something arising in consequence of his disability, and that the treatment was not justified.

The University successfully appealed to the EAT, which held that advantageous treatment (the award of the enhanced pension) could not be said to be unfavourable merely because it could have been even more advantageous. The Court of Appeal agreed with the EAT's finding.

Supreme Court decision

The Supreme Court has dismissed Mr Williams' appeal. It held that there was nothing intrinsically 'unfavourable' or disadvantageous about the award of a pension. Mr Williams was only entitled to be awarded the pension by reason of his disabilities; if he had been able to work full time, the consequence would have been no immediate right to a pension at all rather than a bigger pension entitlement.

Consequences

This decision confirms the principle that in general, advantageous treatment cannot be unfavourable (and, therefore, discriminatory), even if it could have been more advantageous. In making a reasonable adjustment by reducing a disabled employee's working hours, they will not generally be entitled to be paid a full time salary nor be entitled to be paid a pension based on full time earnings. However, this will depend on what a tribunal considers to be 'reasonable' in all the circumstances of the case.

"The first such reports must be published in 2020, covering pay awarded in 2019.

QUICK FIRE

Executive pay: new transparency measures

New regulations came into force on 1 January 2019, requiring UK listed companies with over 250 employees to annually disclose the ratio of their CEO's pay to the median, lower quartile and upper quartile pay of their UK employees. The first such reports must be published in 2020, covering pay awarded in 2019.

All large companies will also be required to report on how their directors take employee and other stakeholder interests into account and to report on their corporate governance arrangements.

These reforms form part of the Government's industrial strategy and are designed to address public concerns over the level of CEO salaries and also to give employees a greater influence over boardroom decisions.

The Government has published a set of FAQs on the new reporting requirements.

Immigration update

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EU Settlement Scheme

On 21 January 2019, Theresa May announced that the Government will waive the £65 fee for applications under the EU Settlement Scheme. This is good news for EU nationals and for any employers who had previously agreed to meet this cost.

Mrs May confirmed that the fee will be removed when the scheme opens fully on 30 March 2019. Meanwhile anyone who pays/has paid the fee during the pilot phases will be reimbursed.

No mention was made of the application fee for permanent residence cards. Previously individuals who held these cards were exempt from paying the settled status fee. At this time it seems unlikely that they will be reimbursed, but this may be subject to further discussion in Parliament.

The latest pilot phase of the scheme is now open, with EU nationals able to submit applications for settled or pre-settled status using the passport scanning app. An android phone is required to download the app.

The scheme is due to be fully rolled out from 30 March 2019. In the event of a no-deal Brexit, EU nationals and their non-EU citizen family members will have until 30 December 2020 to apply.

For further guidance on the scheme, please see our previous FAQs.

Birketts is supporting employers with seminars for their EEA national staff, to explain what they need to do and what other options they may have to secure their status in the UK. If you would like to discuss a seminar at your workplace, please contact Clare Hedges.

Proposals for a new post-Brexit immigration system

On 19 December 2018, the Government finally published the long awaited White Paper: "*The UK's future skills-based immigration system*". This was followed a day later by *The Immigration and Social Security Coordination (EU Withdrawal) Bill.*

Once enacted, the Bill will end free movement rights for EU nationals, whilst protecting the special status of Irish citizens who will continue to be able to enter and remain freely in the UK.

The White Paper contains the Government's proposals for the new regime that will apply to EU nationals who arrive in the UK after Brexit. The end of free movement means they

> *The White Paper contains the government's proposals for the new regime that will apply to EU nationals who arrive in the UK after Brexit.*

will face new restrictions. However, rather than apply the current visa system as it is, the Government has suggested some amendments to soften the impact. These amendments would also affect non-EU nationals, who may, therefore, find it slightly easier to work in the UK than they do now.

These amendments would also affect non-EU nationals...

It should be noted that at this time they are just proposals. The Government has said it wishes to spend a year consulting on its plans before laying new Immigration Rules. Therefore, all of the points covered in this article are not yet in force and may be subject to change.

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Visitors

EU nationals will be permitted to visit the UK for up to six months without a visa, subject to obtaining an Electronic Travel Authorisation. As visitors they will not be permitted to work in the UK. However, there are proposals to allow switches to work categories, which will assist visitors who come to the UK looking for work.

Temporary work

Headlines have focused on proposals to create a new temporary short-term work route.

Headlines have focused on proposals to create a new temporary short-term work route. Migrants would be allowed to do any job (with no minimum skill level or sponsorship required), but would be limited to 12 months in this category, followed by a 12 month cooling off period. This has been designed to address concerns raised by employers in a wide range of sectors, who are currently reliant on EU nationals to fill lower skilled roles. However, it could also be used by highly skilled migrants.

It is important to read the proposal in full. This is only designed to be a transitional measure to give the economy time to adjust to a post-Brexit world. It will be fully reviewed by 2025 and may actually be suspended earlier depending on economic conditions. There would be restrictions on numbers. Visas would be required and application fees are expected to increase incrementally each year.

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Furthermore, *"it will only be open to migrants from specified low-risk countries"*. So although this is presented by the Prime Minister as *"a system where it is workers' skills that matter, not which country they come from"*, that is not actually the case.

Migrants would be free to move between employers during the year of their visa. This flexibility should help protect them from abuse and encourage competition between employers. However, there would be no right to bring dependants, settle in the UK or access public funds. This may be seen as a way of supressing net migration and reducing the burden on local services. However, concerns have been raised that the proposed rules will lead to even greater integration problems and a high turnover of workers could exacerbate problems in some areas.

Existing Tier 2 sponsors will be pleased with many of the government's proposals to broaden and simplify this visa route.

Changes to Tier 2

Existing Tier 2 sponsors will be pleased with many of the Government's proposals to broaden and simplify this visa route.

In 2018 many employers struggled to fill vacancies from outside the UK, due to the cap on the number of Tier 2 General Restricted Certificates of Sponsorship. This was eased when doctors and nurses were removed from the quota, thereby freeing up places for other roles. It is good news that the Government proposes to remove the cap altogether.

Many sponsors are frustrated by the bureaucracy of the resident labour market test. Although this is meant to ensure settled workers are prioritised for vacancies, the reality is that if an employer is determined to recruit a skilled migrant, they can usually find a way to do so. Also in many cases, even if the role is not deemed to be in national shortage, it may be locally and so running adverts for 28 days is futile. Therefore, the proposal to remove this hurdle will be welcomed.

Instead the Government wishes to use cost to deter employers from recruiting migrants. This means the Immigration Skills Charge will be retained, to incentivise training of local workers rather than paying for migrant workers.

Currently sponsors can only support Tier 2 visas for roles deemed to be skilled to RQF level 6 or above (degree level). The proposal is to lower the minimum skill level to RQF level 3 (A level). On the face of it this will broaden the type and number of roles that can be sponsored. However, this is tempered by the Government's confirmation that there will be a minimum salary level for sponsorship. The Home Secretary has suggested this should be maintained at £30k, which actually rules out even some RQF level 6 jobs, especially outside London and in the public sector. However, the minimum salary will be subject to consultation.

... more employers are likely to need to become sponsors...

As more employers are likely to need to become sponsors, the Government has suggested that it wants to adopt a lighter touch and speed up visa processes. It remains to be seen if this will actually happen.

Tier 5 Youth Mobility Scheme

The Government wishes to continue the current youth mobility scheme, which allows migrants from designated countries up to age 30 to work freely in the UK for up to two years. They have suggested more countries could be added to the scheme, for example EU countries. This is perceived as another route that may help employers fill temporary vacancies for lower skilled work.

Tier 5 Agricultural Workers Scheme

A small scale pilot of this new scheme has already started and will be reviewed before deciding if it should be expanded.

The Government intends to improve post-study work rights for migrants who complete a degree in the UK.

There are no particular plans to facilitate self-employment.

... the end of free movement means more couples may find their relationship requires a visa if they are to establish their family life in the UK.

It is essential that employers participate in this consultation, in particular regarding the minimum salary level for Tier 2 visas and the maximum duration and cooling off period applicable to temporary work visas.

Post-study work

The Government intends to improve post-study work rights for migrants who complete a degree in the UK. They would be allowed to work for six months post-Bachelors or Masters and 12 months post-PhD.

Concessions which facilitate switching to Tier 2 work visas would also be expanded, so that migrants who have completed a degree in the UK can benefit from the more generous rules even if they apply for their Tier 2 visa from outside the UK, for up to two years after they graduate.

Self-employment

There are no particular plans to facilitate self-employment. This is likely to be a problem for EU nationals who want to come and work in the UK on this basis. Like other migrants, they would be restricted to routes such as Tier 1 Exceptional Talent or Tier 1 Entrepreneur.

Students

The Government suggests that it will continue to allow non-visa nationals to come to the UK for short-term study up to six months. EU nationals coming to the UK for short English languages courses are likely to fall into this group. However, EU national students coming for longer courses would need to apply for a Tier 4 visa. This will increase the burden on schools, colleges and universities.

Family of British nationals

The Government is not proposing any changes to the rules for British nationals to bring family members to the UK. So the minimum income requirement of £18,600 for a spouse/partner visa will continue. Meanwhile the end of free movement means more couples may find their relationship requires a visa if they are to establish their family life in the UK.

Settlement

The Government plans to update the 'Life in the UK' test, which must be passed before a migrant is granted indefinite leave to remain (settlement) in the UK.

Importance of consultation

The Government wishes to spend a year consulting before laying new Immigration Rules. It is essential that employers participate in this consultation, in particular regarding the minimum salary level for Tier 2 visas and the maximum duration and cooling off period applicable to temporary work visas. Otherwise there is a risk that promises to soften the rules will have little impact in practice.

If you would like to discuss how these proposals will affect your future recruitment plans, please contact our Head of Immigration, Clare Hedges.

Evidential flexibility may not save a PBS applicant from refusal

In the recent case of *Singh v Secretary of State for the Home Department [2018] EWCA Civ 2861*, the Court of Appeal agreed with the Home Office's decision to refuse Mr Singh further leave to remain as a Tier 1 (Entrepreneur) migrant based on a factual issue of specified documents not being submitted with the application.

The Immigration Rules require a Tier 1 (Entrepreneur) migrant to demonstrate that they have created the equivalent of two new full-time jobs for settled workers which had existed for at least 12 months. As evidence of this, Mr Singh included schedules detailing monthly gross and net pay received by the relevant employees over the tax year and stated in this application that 'payslips' were provided (albeit evidently in the wrong format). The Court of Appeal held that even if the schedules contained the same information, they were a wholly different kind of document. The Rules required duplicates of the employees' actual payslips and so it was a 'wrong document' and not a 'wrong format' case and, therefore, evidential flexibility cannot apply.

"... the Secretary of State was within his rights to have an inflexible system which did not allow for an opportunity to correct administrative errors..."

The appeal was accordingly dismissed. While the court had sympathy for Mr Singh, it was held that the Secretary of State was within his rights to have an inflexible system which did not allow for an opportunity to correct administrative errors, and applicants had to take the consequences of their own mistakes.

For further information on any of the matters covered in this update, please contact Clare Hedges or Janice Leggett in our Immigration Team.