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Employment Law BULLETIN

Welcome to our November employment law bulletin.

There are some interesting cases to report in this month's issue.

In *Aslam & Others v Uber BV & Others* an employment tribunal has determined that Uber taxi drivers are workers for the purposes of employment legislation. Drivers working through Uber's online private hire platform are not self-employed, said the tribunal, and are workers for the purposes of the Working Time Regulations, the National Minimum Wage rules and for the purposes of whistle-blowing protection legislation. This would effectively dismantle Uber's business model, if applied generally to Uber's taxi drivers. Uber may, of course, appeal.

In *The Interim Executive Board of X School v Her Majesty's Chief Inspector of Education* the High Court has determined that segregating boys and girls from age 9 to 16 in a mixed-sex Islamic school was not direct sex discrimination.

In *Bandara v British Broadcasting Corporation*, the EAT agreed with an employment tribunal's view that a final written warning issued a few weeks before dismissal had been manifestly inappropriate and criticised the tribunal's decision that, nonetheless the dismissal was fair. If, said the EAT, significant weight had been attached to the warning, it would be difficult to demonstrate that the employer's decision was reasonable.

In *Thomas v BNP Paribas* the EAT allowed an appeal against an employment tribunal decision that a redundancy dismissal was fair in the face of its findings that a redundancy consultation process was "perfunctory" and "insensitive".

In *Grange v Abellio London Limited* the EAT held that, for the purposes of the Working Time Regulations, a worker does not have to request a rest break before an employer can be considered to have refused that rest break and thereby to have breached the Regulations. An employer can be in breach of the Regulations even where there has been no actual refusal of the right to a rest break. The employer's duty to provide rest breaks is proactive in nature.

In *Liddington v 2gether NHS Foundation Trust* the EAT upheld a decision of an employment tribunal to make a costs order against an unrepresented claimant due to her lack of preparation for a preliminary hearing. It is very unusual for a tribunal to make a costs order for the employer's costs against an employee, especially in the case of an unrepresented claimant. But this was a case where the claimant's lack of preparation for the preliminary hearing was simply unreasonable.

May I also remind you of our forthcoming events:

Click any event title for further details.

Annual TUPE Update

- Breakfast Seminar, 7th February 2017

And in conjunction with ACAS

Understanding TUPE: A practical guide to business transfers & outsourcing

- Full day conference, Manchester, 7th December 2016

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1: Children's social care sector job applicants to have whistle-blower protection

The Government has announced a new legal protection for whistle-blowers applying for jobs in local authority children's social care.

The amendment to the Children and Social Work Bill is intended to protect applicants from unfair treatment on account of their having previously made protected disclosures about their organisation.

Business Minister Margot James commented: "Those working with the most vulnerable children in society need to be able to blow the whistle about concerns they have within their organisation and when they make a protected disclosure they should have no fear of being blacklisted and unable to find a new role.

The existing Department for Business Code of Practice setting out employers' responsibilities in regard to whistle-blowing *(available here)* is due to be reviewed by the end of 2017.

2: UK will opt in to EU General Data Protection Regulation (GDPR) in May 2018

The Government has confirmed that the UK will opt in to the GDPR in May 2018 despite the referendum vote to leave the EU, although uncertainty remains as to how data protection law could change after the UK exits the EU.

In March this year, the Information Commissioner's Office (ICO) published useful step by step guidance for organisations on preparing for the new rules which are designed to give individuals more control over their data. This guidance remains relevant as it helps organisations to review current policy and practice and to ensure that key members of staff understand the requirements of the GDPR.

The ICO plans to issue new information and guidance in the upcoming months and organisations are encouraged to keep up to date with the latest publications *available here*.

3: Employment Tribunal determines that Uber taxi drivers are workers

In *Aslam & Others v Uber BV & Others* (ET/2202550/2015) an employment tribunal found at a preliminary hearing that drivers working through Uber's online private hire platform are not self-employed and are workers for the purposes of the Working Time Regulations, the National Minimum Wage rules and for the purposes of whistle-blowing protection legislation.

In reaching his decision, Employment Judge Snelson considered, amongst other documents, the service agreement entered into by the drivers and Uber. On paper, this was ostensibly an agreement between an independent businessOn paper, this was ostensibly an agreement between an independent business undertaking offering driving services and the Uber platform. However, EJ Snelson found that in reality the majority of drivers were not working for independent driver services businesses using the Uber platform but were simply driving a vehicle for Uber which was, in effect, operating as a taxi company.

The Employment Judge criticised Uber for resorting to "fictions, twisted language and even brand new terminology" in an attempt to avoid the fact that Uber in reality runs a transportation business and employs drivers. EJ Snelson stated that the language used by Uber in its contracts was contradicted by the language used by the company in unguarded moments when communicating with drivers

and in marketing material. The ET found that Uber *does* in fact run a transportation business and that it cannot be said that it simply offers leads to driving services companies.

EJ Snelson was scathing about the proposition that there was a contract between the driver and the passenger using the Uber app. The Employment Judge found that the drivers could not strike independent bargains with passengers, were not provided with the identity of passengers or their contact details, were not allowed to know the passenger's destination, had to follow a prescribed route or be subject to penalties, and had to charge a set fee or suffer a penalty by agreeing to charge a lesser fee.

The Employment Tribunal found that Uber in fact took the risk of any fraud orrequest for refund from a passenger. It pointed out that a genuinely self employed driver working as an independent business would be required to take such risk. EJ Snelson commented: "We are satisfied that the supposed driver/passenger contract is a pure fiction which bears no relation to the real dealings and relationships between the parties".

The Employment Judge's ruling that the drivers were not self-employed was based upon the significant amount of control which Uber exercises over the drivers. He noted that: Uber has "sole and absolute discretion" to accept or decline bookings made using the Uber app; it interviews and recruits its drivers; Uber controls key information and excludes its drivers from it; drivers are required to accept trips and/or not to cancel them on pain of penalty; drivers must follow a default route set by Uber or suffer a penalty; there is a set fare which the driver does not control; Uber imposes conditions on drivers, issues instructions and controls the drivers in the performance of their duties (including performance management and disciplinary penalties); Uber determines complaints and requests for refunds from passengers; and the drivers do not market their services to others.

The judgment makes clear that as the written terms of the contract do not correspond with the reality of the relationship between Uber and the drivers, the tribunal felt itself free to disregard the written terms. EJ Snelson also commented that there was an unequal bargaining relationship between Uber and the drivers in this situation and this was contributed to, by the fact that many of the drivers did not speak English as a first language.

Considering the issue of working time, EJ Snelson determined that the drivers were working for all of the time when: they had the app switched on; they were within their licensed territory; and they were ready and willing to accept trip requests.

In terms of the National Minimum Wage rules, EJ Snelson found that the drivers are undertaking unmeasured work. The judgment states that working time for National Minimum Wage rules purposes, should not include travel to the licensed territory to begin work or travel home from the territory at the end of work. However, it would include time taken to return to the territory after an out of territory trip.

As this is a first instance preliminary hearing only, this decision is not binding on other tribunals.

4: Deliveroo: the next case?

The Independent Workers' Union of Great Britain (IWGB) has threatened to bring legal proceedings against Deliveroo if they refuse their riders' request for union recognition and employment rights.

As with Uber, Deliveroo does not pay holiday pay, sick pay and the National Minimum Wage. Deliveroo even includes a clause in contracts purporting to exclude riders' right to go to an employment tribunal. In the absence of agreement it seems another employment tribunal case is inevitable.

As a postscript, the Business Enterprise Innovation and Skills Select Committee has launched an enquiry into the future of the world of work, including gig economy issues. For details of the enquiry see *here*.

5: Segregating boys and girls in a mixed sex faith school is not sex discrimination

In ***The Interim Executive Board of X School v Her Majesty's Chief Inspector of Education***, the High Court determined that segregating boys and girls from age 9 to 16 in a mixed sex Islamic school was not direct sex discrimination.

The school brought judicial review proceedings in the High Court after receiving a draft Ofsted report which determined that leadership and management at the school was inadequate and expressed the opinion that the practice of segregating the sexes in classes, during lunchtimes and on school trips was discriminatory.

Ofsted argued that both girls and boys at the school were treated less favourably, as their social development and confidence in interacting with the opposite sex was limited by the segregation. It also argued that segregated girls suffered a particular detriment, given that women are a less powerful group in society and the segregation perpetuates female social inferiority. It did not argue that the girls received a lesser education than the boys.

The High Court found that there was no less favourable treatment of one sex when compared to another, as both sexes lost the opportunity to mix with the other. It noted that the Equality Act 2010 specifically prohibits segregation on the grounds of race but that segregation on other grounds is not inherently discriminatory.

The High Court did not agree that segregation of boys and girls generates a feeling of inferiority in girls particularly, or that it perpetuates female social inferiority. However, Mr Justice Jay did comment that if Ofsted had argued that Islamic schools segregate because Islam (or their interpretation of it) views girls and women as second-class citizens, he would have been duty-bound to address the issue on the evidence before him.

Single sex schools do not infringe the Equality Act as there is an exception for such schools allowing them to admit one sex only. There is no equivalent exemption allowing schools to discriminate in their provision for pupils on the ground of sex. It is possible, therefore, that a mixed school could be found to have discriminated against one sex by providing a lower quality of education or opportunity to one sex when compared with the other.

6: Dismissal may have been unfair where final written warning was manifestly inappropriate

In ***Bandara v British Broadcasting Corporation***, the EAT agreed with a tribunal's view that a final written warning issued a few weeks before the dismissal had been manifestly inappropriate but allowed an appeal on the tribunal's decision that the dismissal was fair.

The case concerned a senior producer working for the BBC's Sinhalese service. After many years' service with no disciplinary issues, the producer shouted at a senior manager in March 2013. He apologised the following day and no action was taken at the time. In July 2013, he decided to prioritise coverage of a key anniversary in Sri Lankan history over coverage of the birth of Prince George the day before. Taking these two incidents together, he was subject to disciplinary proceedings, being charged with abusive behaviour for the former incident and a breach of editorial guidelines for the latter. His manager decided that both were gross misconduct and issued a final written warning. In August 2013, the producer was subject to further disciplinary proceedings linked to allegations of bullying and abuse towards colleagues and refusing to obey management instructions. The producer was summarily dismissed.

He brought claims for unfair dismissal and race discrimination in the employment tribunal. The tribunal found that the final written warning had been manifestly inappropriate and excessive in the circumstances and that the conduct leading to the warning was misconduct rather than gross misconduct. It commented that the claimant had been entitled to consider that the March incident was closed and could not be resurrected for the purpose of disciplinary proceedings some months later. It determined, however, that the dismissal was fair. It also rejected the claimant's discrimination claims.

The claimant appealed the decision that the dismissal was fair. The BBC crossappealed the decision that the final written warning was manifestly inappropriate. The EAT upheld the decision that the final written warning was excessive in the circumstances. However, it held that the tribunal had taken the wrong approach when considering if the BBC had acted reasonably in treating the reason for dismissal as sufficient reason to dismiss the claimant in all the circumstances. The tribunal considered whether the dismissal would have been fair if an ordinary warning had been issued in July (rather than a final written warning).

The EAT made clear that the tribunal should rather consider whether the decision to dismiss was reasonable in all the circumstances, including the extent to which the decision maker took the live final written warning into account. If the warning was simply background to the decision to dismiss, the decision may have been fair. If, on the other hand, significant weight was attached to the warning, the EAT commented that "it is difficult to see how the employer's decision can have been reasonable". The case was remitted to the tribunal to consider whether, in all the circumstances, the dismissal was fair.

Employers should be aware that, as has been clarified in previous case law (for example *Simmonds v Milford Club* UKEAT/0323/12), a dismissal can be found to be unfair if based on a prior warning which was "manifestly inappropriate", issued in bad faith or for an oblique motive.

7: Unfair dismissal: perfunctory and insensitive redundancy consultation

In ***Thomas v BNP Paribas***, the EAT has allowed an appeal against a tribunal decision that a redundancy dismissal was fair where it was found that a redundancy consultation was "perfunctory" and "insensitive".

Mr Thomas had worked for BNP Paribas since 1972 and he was ultimately promoted to the role of Director in the Property Management Division. The employer undertook a strategic review and concluded that there were too many employer undertook a strategic review and concluded that there were too many director roles within Mr Thomas' group. A number of people were identified as being at risk of redundancy, four of whom, including the Claimant, were in their mid to late 50s.

At the first brief consultation meeting, Mr Thomas was told about the findings of the strategic review and that he was at risk of redundancy. He was immediately put on paid garden leave and told that he should not contact clients or colleagues. A letter was sent to Mr Thomas during the consultation process which used the wrong first name. A dismissal letter was sent with the wrong termination date.

Mr Thomas brought claims for unfair dismissal and age discrimination in the employment tribunal. The tribunal found that the consultation process was "insensitive" and "perfunctory", particularly noting the mistakes made in correspondence with the Claimant. However, it found that the consultation fell within the range of reasonable responses and that the dismissal was fair. The age discrimination claims were also dismissed.

On appeal, the EAT was concerned that the tribunal had criticised the consultation process and yet had not fully explained its reasoning in finding it to be fair. It noted that the tribunal did not appear to take into account the fact that the employer had immediately put Mr Thomas on garden leave and prohibited any contact with any colleagues or clients when considering whether the consultation was reasonable.

The EAT remitted the case to another employment tribunal to consider again the question of whether the dismissal was fair given the nature of the consultation process.

Employers should be aware that all of the circumstances of a dismissal process will be considered by a tribunal when deciding if the dismissal was procedurally fair. In this case, the fresh tribunal will need to decide, amongst other things, whether the imposition of garden leave indicates that the decision to dismiss was predetermined and that the employer was simply going through the motions in its conduct of the consultation process. This is the danger of putting employees at risk of redundancy on garden leave during the consultation period. Generally, we advise against it.

8: Working Time Regulations: when will an employer breach rest break rules?

In ***Grange v Abellio London Limited***, the EAT held that, for the purposes of the Working Time Regulations (WTR), a worker does not have to request a rest break before an employer can be considered to have refused that rest break and to have breached the Regulations. An employer can also be in breach of the Regulations even where there has been no actual refusal of the right to a rest break.

Mr Grange worked for Abellio originally as a bus driver and later as a Relief Roadside Controller (known as a SQS). As a bus driver, he was given fixed rest breaks in line with the WTR. As a SQS, he monitored and regulated bus services in response to traffic conditions. In this role, he worked for 8 hours a day and had a 30 minute unpaid lunch break which he found difficult to find time to take given the nature of his work.

Abellio had a meeting with its SQSs at which those present agreed to forgo the 30 minute lunch break and to finish 30 minutes earlier each day. Mr Grange was not present at this meeting. Following this, Abellio emailed Mr Grange to inform him of this expectation. Mr Grange submitted a grievance complaining that he had been forced to work without a break and that this had contributed to a decline in his health. Mr Grange brought a claim under the WTR in the Employment Tribunal.

The employment tribunal dismissed the claim, following the prior EAT case of *Miles v Linkage Community Trust Ltd* [2008] IRLR 602, stating that there had to be a deliberate refusal of a worker's request to exercise the right to a rest break in order to give rise to a legal liability under the WTR. It found that the claimant had not requested a rest break under the WTR until he submitted his grievance and that the respondent had not actually refused the request before the tribunal claim was submitted. (The grievance outcome dismissing the complaint post-dated the tribunal claim.)

The EAT allowed Mr Grange's appeal and remitted the case to the tribunal. In doing so, it stated that it preferred the approach of the EAT in *Scottish Ambulance Service v Truslove* UKEATS/0028/11 to that in *Miles*. This was because *Truslove*, unlike *Miles*, took into consideration the purpose of the EU Working Time Directive (WTD) in protecting the health and safety of workers by ensuring they are able to take rest breaks during their work.

The EAT considered ECJ case law on the WTD and WTR and held that the entitlement to a rest break set out in the WTD is intended to be actively respected by employers. It stated that it is not enough that employers merely permit the taking of rest breaks but they must "proactively ensure working arrangements allow for workers to take those breaks". The EAT commented that such an interpretation "enables a real world protection of rights to rest breaks". The judgment makes clear that there is no need for a worker to request a rest break for the obligation under the WTR/WTD to arise. An employer who fails to put in place working arrangements which allow a worker to take a rest break in effect "refuses" the worker's WTR entitlement and infringes the rules.

9: Costs award upheld against Claimant who unreasonably failed to prepare for preliminary hearing

In ***Liddington v 2gether NHS Foundation Trust***, the EAT upheld the decision of an employment tribunal to make a costs order against an unrepresented claimant due to her lack of preparation for a preliminary hearing.

Ms Liddington worked for 2gether as a community practitioner. Following her dismissal, she brought several claims in an employment tribunal, including unfair dismissal, religious discrimination, victimisation and detriments because she had blown the whistle.

Three employment judges attempted to assist Ms Liddington to particularise her complaints over the course of a number of preliminary hearings. Ms Liddington failed to specify the dates of four of the six alleged protected acts relied upon for the victimisation claim, the detriments she had suffered and the identity of comparators. The tribunal considered it particularly important that exact dates were not specified given that some of the alleged protected acts may have taken place after the alleged detriments. The claimant was only able to give the month and year in which the alleged protected acts had taken place.

At a third preliminary hearing, deposit orders were made on all remaining claims (the claims were later dismissed on withdrawal). The tribunal ordered the claimant to pay the employer's costs for a wasted preliminary hearing on the basis that Ms Liddington had unreasonably failed to provide the required information.

Upholding the tribunal's decision, the EAT noted that the tribunal had taken into account the lower standards which should be applied to a litigant in person. It had not expected too much of the claimant in asking her to provide in layman's terms details of "what it is that was said or done, by whom and on what dates". The EAT also noted that the tribunal had not made its costs order on the basis that the claimant's inability to provide the requisite information was unreasonable. Rather, the decision was based on the claimant's unreasonable lack of preparation for the preliminary hearing.

Employment tribunals have discretion to make a costs order if either party has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting proceedings. It remains very unusual for a tribunal to make a costs order for the employer's costs against an employee. Key to this case was the importance of the missing information to the claims.

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