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EMPLOYMENT LAW BULLETIN

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Welcome to the Wrigleys Employment Law Bulletin, February 2021.

Now that more than 18 million people in the UK have received the first dose of a Covid vaccine, some employers are considering whether they might bring in a policy of compulsory vaccination for employees. In our first article this month, we set out some of the key employment law implications for employers considering such a policy.

We consider the recent revocation by the Government of the Restriction on Public Sector Exit Payments Regulations 2020 which came into force as recently as 4th November 2020. Following this step, the £95,000 cap on exit payments for staff in public sector organisations no longer applies, impacting on payments which have been made since November and on upcoming payments.

We look at the recent decision of the EAT in ***Allay (UK) Ltd v Gehlen***, providing helpful guidance on how tribunals will assess whether an employer has taken "all reasonable steps" to prevent discrimination, harassment or victimisation and so will not be found vicariously liable for an employee's unlawful actions.

We report on the Court of Appeal decision in ***Heskett v Secretary of State for Justice*** which examines when an employer will be able to justify an indirectly discriminatory cost-cutting policy on financial grounds

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We also review the very important but unsurprising decision of the Supreme Court in ***Uber BV and others v Aslam and others*** which confirms that Uber drivers are workers and so are entitled to the National Minimum Wage and to holiday pay in relation to the time they are logged on to the Uber app.

Our next Employment Brunch Briefing takes place on 13 April 2021. We very much hope you will join us for this free session where we recap some TUPE essentials and provide a timely update on recent TUPE-related case law. Please see the link below.

Forthcoming webinars:

- **13 April 2021, Webinar**
  Employment Brunch Briefing
  TUPE Update
  Speakers: *Sue King, partner & Alacoque Marvin, solicitor at Wrigleys Solicitors*
  Click here for more information or to book

Recorded employment law webinars:

- **Employment law update series: Flexible working: Part I - building a balanced society**
  16 June 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Flexible working: Part II - re-organisation and flexible working**
  7 July 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - transgender discrimination**
  4 August 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - disability and reasonable adjustments**
  1 September 2020, Webinar
  Click here for more information or to view webinar

- **Employment law update series: Equality in the workplace - atypical working, zero hours and ethical issues**
  6 October 2020, Webinar
  Click here for more information or to view webinar

- **Employment Brunch Briefing: What's new in employment law?**
  1 December 2020, Webinar
  Click here for more information or to view webinar

- **Employment Brunch Briefing: Data protection update for employers**
  2 February 2021, Webinar
  Click here for more information or to view webinar

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Can employers insist that employees are vaccinated against Covid-19?

Article published on 11 February 2021

This article covers what is reasonable, disciplinary procedures and discrimination claims.

The roll out of the Covid-19 vaccine programme has brought new hope to individuals and employers that working life will return to something approaching normality in the next few months. The question which some employers are already asking themselves is: can we make vaccination against Covid-19 compulsory for our employees?

This is a multi-faceted question and one to which there will not be a simple answer. A key point to note is that we are at an early stage in the vaccine programme and access to the vaccine is far from universal. Even when the vaccine is more widely available, the scientific view on the effectiveness of the vaccine in preventing transmission, serious illness and death is likely to be subject to change as new variants emerge and research continues.

Employers will need to tread extremely carefully when considering a policy of compulsory vaccination and be prepared to make adjustments to any such policy to reduce the risk of grievances, disputes and claims. Employers should also consider the wider reputational risks of social media and press interest in such a policy, particularly where there is significant opposition to it from employees.

We set out here the key considerations for employers who may be contemplating such an approach.

Is it reasonable to mandate the vaccine for employees?

Employers have an overall duty to act reasonably towards their employees, taking into consideration the particular circumstances which apply to the employee and the employer.

Assuming there will come a point where all employees can access the vaccination, the question of whether compulsory vaccination is a reasonable requirement is one which will need consideration in the round. A requirement to take a vaccine and disciplinary action for any refusal could be unreasonable in some circumstances. For example, where an employee has reasonable concerns about taking the vaccine.

Where employers act unreasonably, there is a risk that employees could resign and bring constructive dismissal claims based on a breach of "trust and confidence". This claim is based on the implied term in all employment contracts that employers and employees must not, without reasonable and proper cause, act in a way which is likely to damage or destroy the relationship of mutual trust and confidence between them.

The question then will be whether the employer has reasonable and proper cause to require the employee to be vaccinated or to take steps to discipline them if they do not. This would include considering the role the particular employee is carrying out; the risks to customers, service users or other staff which the employer is concerned to mitigate; the evidence on which the employer has decided to make the vaccine a requirement; and whether there is another way of mitigating the identified risks which would have less impact on the employee?

Disciplinary procedures for refusing to take the vaccine

Where an employee refuses the offer of a vaccine, could an employer start a disciplinary process and even dismiss fairly for this refusal?

As with any potential disciplinary issues, it will be important that employers have clearly communicated to employees the relevant rules or policy concerning vaccination, including explaining why this rule has been put in place. Consultation on such a policy with staff or their representatives will improve the chances that the policy is widely accepted and address key staff concerns, including consideration for special circumstances.

Employers should always begin by discussing with concerned individuals their reasons for not taking the vaccine before deciding whether to take any formal step, including beginning a disciplinary procedure.

Suspending, disciplining or dismissing an employee for a refusal to have the vaccine is likely to lead to grievances, and employers could well face employment tribunal claims for unfair dismissal, constructive dismissal and discrimination after taking such action.

Discrimination claims

It is important to note that some of the reasons why employees do not wish to take the vaccine will be linked to protected characteristics under the Equality Act 2010. The risk of discrimination claims arising from a blanket policy on mandatory vaccination is therefore considerable.

Employees with certain health conditions may not be able to, or may not wish to, take the vaccine and may be able to argue that the policy or action arising from it discriminates against them because of a disability or something connected to a disability.

Advice for pregnant women from the Joint Committee on Vaccination and Immunisation has recently changed to suggest that they can have the vaccine if they are at high risk from the virus. However, those who are pregnant are not routinely being offered the vaccine and may also be able to show that they are indirectly discriminated against by imposing such a policy.

The vaccination may raise concerns for employees with particular religious beliefs or philosophical beliefs, for example because of concerns about products used in the vaccine-making process or because of a belief-based objection to the practice of vaccination itself. In reality, it will be difficult for employers to be able to assess whether an employee's beliefs would be found by a tribunal to be protected under the Equality Act 2010. Case law indicates that a philosophical belief will be protected if:

- it is genuinely held;
- it is not just an opinion or view based on the present state of information;
- it relates to a 'weighty and substantial' aspect of human life and behaviour;
- it is sufficiently cogent, serious, coherent and important; and
- it is worthy of respect in a democratic society and not incompatible with human dignity or conflict with the fundamental rights of others.

More extreme "anti-vaxxer" views may not be protected if they lack coherence and are found not to be worthy of respect in a democratic society. However, proceeding on the basis that a particular belief will not be protected could be risky and lead to significant litigation costs and reputational risks.

Indirect discrimination claims can be defended if the policy in question can be shown to be a proportionate means of achieving a legitimate aim. To succeed in such a defence, employers would need very sound business reasons for mandating the vaccine, supported by documentary evidence of those reasons. Where the employee has good reasons for refusal and the discriminatory impact on the employee is significant, it is unlikely that an employer would be able to justify mandatory vaccination in all cases.

The health and safety duties of employers

Employers have a statutory duty to protect the health, safety and welfare at work of their employees as far as is reasonably practicable. This includes duties to assess the risks impacting on staff in their work, to consult on health and safety issues, to create a safe system of work, to ensure that system is properly implemented, and to have a regular programme of review.

Encouraging employees to accept a vaccination when available and providing them with accessible information about the vaccine will certainly be part of an employer's reasonable steps to manage and mitigate the risks of Covid-19 in the workplace. However, particularly in the short and medium term, encouraging staff vaccination will be only one of a suite of control measures. And, as set out above, there will be a number of categories of employees who may have good reason not to take up the offer of vaccination.

Because of the significant reputational and legal risks here, we highly recommend that employers take specific legal advice when considering a policy or risk assessment including compulsory workforce vaccination for some or all staff.

Public sector exit pay cap has been revoked

Article published on 17 February 2021

Regulations introduced in November 2020 have been scrapped due to 'unintended consequences'

The Restriction on Public Sector Exit Payments Regulations 2020 came into force on 4th November 2020 and set a £95,000 cap on exit payments for staff in public sector organisations, including local government, fire services and schools (including academies).

The regulations had originally been brought in to tackle the perceived issue of high earners in the public sector receiving significant, and sometimes repeat, severance payments only to be soon re-hired into a senior position elsewhere and to ensure prudent use of public money.

Concerns were raised by employment lawyers and unions during consultations with the government that the proposed cap of £95,000 would catch a much broader range of public sector workers. The cap was to be applied to pension entitlements, which, when combined with redundancy and notice payments, meant that a broad group of workers risked exceeding the £95,000 cap.

A guidance document published by HM Treasury in February 2021 has revoked the cap on exit payments with immediate effect. A government review of the cap concluded that it may have had 'unintended consequences', without specifying what these are.

The HM Treasury guidance stressed that it was still vital for exit payments in the public sector to deliver value for taxpayers and that employers should always consider whether exit payments are fair and proportionate.

The guidance also encourages employees who have been affected by the cap to approach their former employer directly and encourages those employers to pay affected employees any sums that they would have been due had the regulations not been in place.

Comment

The revocation of the cap barely four months after it was introduced poses a significant headache and financial drain for public sector employers who may now face the need to rectify exit payments made to recently departed employees. On the other hand, revocation recognises the potential impact on public sector staff, with unions highlighting that the cap would affect staff on annual

salaries from £25,000 and the broad issues this might create for public sector staff morale and confidence.

Despite the revocation of these regulations, HM Treasury's guidance suggests that the issue has not gone away and that fresh attempts will be made to tackle the perceived problem of 'unjustified exit payments'.

Employer should have refreshed equality and diversity training as a reasonable step to prevent racial harassment

Article published on 25 February 2021

EAT: assessment of whether employer took all reasonable steps to prevent discrimination should include deciding if a step is likely to be effective.

Under the Equality Act 2010, employers can be vicariously liable for an employee's discrimination, harassment or victimisation of another person. Employers can defend such claims on the basis that they took "all reasonable steps" to prevent the unlawful act from happening. This is sometimes known as "the statutory defence".

What are reasonable steps to prevent discrimination in the workplace?

Reasonable steps might include putting in place and regularly reviewing equality and diversity and anti-bullying and harassment policies; providing regular training on these issues to all staff; ensuring that disciplinary policies and workplace rules make clear that discriminatory acts will be a disciplinary matter; ensuring that managers are aware of how policies and procedures should work in practice; and taking rigorous steps to deal with breaches.

It is of course advisable to deal rigorously with any allegations of harassment or discrimination once they are received, investigating the matter and following a grievance and/or disciplinary procedure as appropriate. However, "reasonable steps" must be undertaken before the discriminatory act; retrospective action will not assist an employer in using the statutory defence.

There are very few reported cases which consider the "reasonable steps" defence. A recent EAT case has shed light on how tribunals should approach the assessment of whether an employer took all reasonable steps and can therefore avoid liability for an employee's unlawful actions.

Case details: ***Allay (UK) Ltd v Gehlen***

Mr Gehlen, an employee of Allay, was dismissed following performance concerns shortly before he reached one year's service. He brought claims including harassment related to race to an employment tribunal.

The tribunal accepted Mr Gehlen's evidence that a colleague had regularly harassed him in relation to his Indian origin, making comments about his skin colour, suggesting that he should go and work in a corner shop, and asking him why he was in the country. The tribunal also found that Mr Gehlen's colleagues had heard these comments and taken no action. When Mr Gehlen reported the harassment to a manager, the manager told the claimant to make a report to HR, but took no action to report or deal with the issue himself.

Allay argued that it had taken all reasonable steps to prevent the harassment from taking place and that it was not therefore liable for the harassment. It pointed to its equal opportunity policy, anti-bullying and harassment procedure, and the fact that the harasser had undertaken equality training 20 months before Mr Gehlen began to work for Allay.

The tribunal did not accept that Allay had taken all reasonable steps. It found that the harasser and colleagues who overheard his comments had all taken part in the equality training, which included reference to race discrimination. The tribunal found that the training was "stale" and needed to be refreshed. This finding was not based on the time which had passed since the training, but was on the basis that racial harassment had subsequently taken place and that a number of employees had failed to follow the guidance given in the training when they overheard the comments being made.

Mr Gehlen was awarded compensation of just over £5,000. This was on the basis of injury to feelings only and included a reduction of 25% because the claimant had not used the employer's grievance procedure to raise his concerns.

On appeal, the EAT agreed with the tribunal that the training was no longer effective to prevent harassment, and that there were further reasonable steps that the employer should have taken.

The EAT clarified that tribunals should first consider any steps already taken by the employer and whether these were reasonable, and then go on to consider whether there were any other reasonable steps the employer should have taken. When assessing whether a step is reasonable, the tribunal should consider a range of factors, including cost, practicality and whether a particular step is likely to be effective to prevent discrimination. However, there is no need for the step to be more likely than not to prevent the discrimination for it to be considered reasonable. Employers who argue that a step was not reasonable because it was very unlikely to have prevented the discrimination must establish to the tribunal that this was the case, bringing evidence on this point. In this case, the employer had asked the harasser to undergo equality training following the claimant notifying his potential claim to Acas, suggesting that it considered that such training would be effective.

Should employers rely on the statutory defence?

In order to rely on the reasonable steps or statutory defence, it will be helpful for employers to be able to evidence that they have implemented clear policies and put in place good quality training which specifically reference discrimination, harassment and victimisation and protected characteristics under the Equality Act 2010.

As this case highlights, it will not be sufficient for an employer to point to the simple fact that a policy has been written and training undertaken. The effectiveness, relevance, accessibility, implementation, review and updating of policies and training will all be factors in convincing a tribunal that all reasonable steps were taken to prevent discrimination.

Evidence that colleagues or managers have taken proactive steps in relation to a complaint of discrimination would help to evidence that policies and training are effective and that all reasonable steps have been taken.

It is important to note that it is not always advisable for an employer to run the statutory defence. This is because it in effect cuts adrift the employee who is alleged to have done the discriminatory act. This is of course likely to impact on whether the alleged perpetrator will be able to provide useful evidence as a witness to support the employer's case. It is more common for an employer to defend a claim on the basis that the alleged unlawful act did not take place, or that the treatment of the claimant was for a lawful reason. In such a case, the alleged perpetrator will often helpfully provide first-hand evidence on the reasons for the treatment in question in support of the employer's defence.

Claims under the Equality Act 2010 can also be brought against individual employees and claimants may bring claims against colleagues and their employer as joint respondents. Individual respondents to a claim may need their own independent legal advice where the interests of the employer and the individual could be in conflict and particularly where the employer is arguing

that it did all it reasonably could to prevent an employee from doing the alleged act.

Because of the difficulty of navigating these issues, employers should take legal advice when dealing with allegations of discrimination and before deciding to defend a claim on the basis that they have taken all reasonable steps to prevent discrimination from occurring.

Court of Appeal: costs alone are insufficient to justify indirect discrimination

Article published on 5 February 2021

A recent case examines the so-called 'costs plus' rule when considering indirect discrimination justification.

A person discriminates against another if they apply a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic the other person has.

In law, a PCP is discriminatory in if it puts someone who has a protected characteristic at a particular disadvantage compared to those without it and the person(s) who applied the PCP cannot show that the treatment is a 'proportionate means of achieving a legitimate aim'. In brief, this means there must be a good reason for introducing the PCP and the discriminatory effects of the PCP go no further than necessary to achieve it.

A case from the end of 2020 considered whether an employer was able to justify a significant reduction in its pay progression structure after budgetary cuts were applied in 2010.

Case: ***Heskett v Secretary of State for Justice [2020]***

Mr Heskett was employed as a probation officer. As a result of funding cuts, the rate of pay progression for Mr Heskett's job significantly decreased.

Mr Heskett brought a claim to the Employment Tribunal alleging that he had been subject to indirect age discrimination because the effect of the cuts meant that probation officers under the age of 50 were inherently less likely than officers aged 50 and over to reach the top of the pay scale after the cuts came into force. The result, Mr Heskett explained, was that he had colleagues who did the same job as him who were significantly better paid than he was, that it would take him many more years than it took those colleagues to reach that pay point, and the alleged reason for this was age.

The Secretary of State's chief defence was that even if Mr Heskett was able to prove he was indirectly discriminated against on the grounds of his age, the reduction in pay was a proportionate means of achieving a legitimate aim; namely the need to balance the ability to continue to award probationary officers with an annual incremental annual pay rise to retain them in employment against the significant reduction in public funds made available to run the service.

The Employment Tribunal and EAT ultimately dismissed Mr Heskett's claims and the case was appealed to the Court of Appeal.

Court of Appeal's decision

A key issue for the Court was whether the EAT had correctly concluded that the changes to the pay scale of probation officers were capable of being justifiable as a legitimate aim. This drew on the so-called 'costs plus' principle.

Origin and development of the 'costs plus' principle

The principle of being able to justify discriminatory PCPs on the grounds of cost originates in EU caselaw, primarily in relation to the disadvantageous treatment of part-time workers. This body of case law established that it was not justifiable to discriminate solely on the ground that avoiding discrimination would involve increased costs.

The first domestic case to consider this case law was the EAT in Cross v British Airways plc [2005] which provided that 'economic (which includes cost) grounds can properly be a factor justifying indirect discrimination, if combined with other reasons' but also noted that costs justifications were part of the weighing exercise a tribunal must undertake when determining if the action taken is legitimate and proportionate and that costs justifications were likely to weigh less if the discrimination incurred is 'substantial, obvious and deliberate'. This case led to the term 'costs plus' being applied to the principle, though that phrase was not mentioned in the decisions.

Later consideration by the EAT of this principle, including in Woodcock v Cumbria Primary Care Trust [2012], cast doubt on whether the distinction between 'cost alone' and 'cost plus' correctly applied the principles established in Cross and that it may be unhelpful to create a rule that cost considerations by themselves could never constitute sufficient justification for causing indirect discrimination.

The Court of Appeal summed up the position from case law in relation to a case of discriminatory pay as 'an employer cannot justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same'.

Put another way, if an employer's aim in imposing a discriminatory PCP is no more than a wish to save costs, the employer cannot justify the discrimination. If this is not the case, it is still necessary for a tribunal to consider the employer's aim in the whole context of the facts and decide whether that aim is legitimate.

Application to Mr Heskett

The Court was clear that a reference to 'costs' could be overly-simplistic. In Mr Heskett's case, the costs of maintaining the more generous pay progression scheme were clearly a factor, but this was set against the backdrop of budget reductions imposed on the employer. In this context, the Court considered that the EAT had been entitled to treat the employer's need to observe cuts imposed on it as a legitimate aim in itself because the motivation behind the change in pay scheme was not solely about saving costs. For this reason, the EAT was entitled to take wider considerations into account, such as ensuring that the probation service continued to retain officers and that the changes to the pay scheme were not intended to be permanent, when weighing the legitimate aims of the change to the pay scheme.

On this basis, the Court dismissed this aspect of the appeal.

Conclusion

This case is valuable because it sets out a very helpful explanation of the circumstances in which an employer can justify indirect discriminatory action due to financial considerations and draws out useful inferences on what is capable of being justified and then considering if the steps taken are proportionate.

The Court of Appeal's review of the so-called 'costs plus' principle makes clear that employers can justify indirect discrimination for financial reasons provided that those reasons are not the sole aim and the adjacent reasoning is considered legitimate in the full context of the situation it was facing. However, it also gave a useful clarification that an employer can justify an indirectly discriminatory PCP where it results from budget cuts or constraints.

In both scenarios an employer will have to show that the steps taken were proportionate and, in this case, the proportionality was weighed by the employer's intentions that such amends were not intended to be permanent and that the changes still allowed for pay progression, if at a much reduced rate.

The decision and the guidance provided by the Court may be of use to employers who are considering changes to terms necessitated by a change in financial circumstances and who are concerned that this may result in indirect discrimination claims. This might include changes that subject staff in certain age groups to a greater disadvantage than other age groups or in respect of sex, for example, where changes to part-time or job share working disadvantage women who are still statistically more likely to work under such arrangements.

Supreme Court confirms that Uber drivers are workers after denying appeal

Article published on 26 February 2021

Decision brings long-running case on key aspects of workers status to an end.

Almost since it started operating in the UK, the Uber taxi-hailing app has drawn questions about the employment status of the drivers who provide their services via the app. Uber has always maintained that it is merely a technology platform designed to connect self-employed drivers to customers. However, questions have arisen as to the accuracy of this position given how the drivers operate and are controlled by Uber when engaged to provide their services via the app.

Worker status continues to be a very fact-specific area of employment case law. Recent cases have examined contractual relationships from delivery services to referees and professional athletes. The three categories of relationship are independent contractor, worker and employee – see our article covering the distinctions on these roles (available from our website news page here) for more information.

Employers may wittingly or unwittingly mislabel a worker as a self-employed contractor. In turn, individuals may argue that they are in fact workers because worker status brings rights to paid holiday, rest breaks, and the National Minimum Wage, amongst other things. An employee has additional rights, for example in relation to unfair dismissal.

Case: ***Uber BV and others v Aslam and others***

In the case of Uber, a group of drivers brought claims in the employment tribunal arguing that they were engaged by Uber as workers whilst they provided taxi services via the Uber app. To benefit from the associated rights, the drivers would need to establish that they were workers for the purpose of the Employment Rights Act 1996 (ERA), the Working Time Regulations 1998 (WTR) and the National Minimum Wage Act 1998 (NMWA). Uber argued that drivers engaged via the app did not meet the definition of a worker within the meaning of the ERA and equivalent provisions in the WTR and NMWA. Uber's argument was that the drivers entered the contract in business for themselves and could not be workers.

However, when the case came before an employment tribunal, it determined that when it looked past the contractual relationship at the reality of the relationship between the drivers and Uber, the drivers were not self-employed. Pointing to numerous factors, including that Uber controlled the drivers' levels of pay, communication with customers, and whether or not they could continue to operate under the app, the tribunal concluded that the relationship was that of a worker and employer and that the individual driver's claims should be allowed to proceed.

The EAT and Court of Appeal both denied Uber's appeals before Uber finally appealed to the

Supreme Court.

The Supreme Court unanimously dismissed the appeal and therefore upheld the decision that Uber drivers are workers for the purposes of ERA, WTR and NMWA. In its decision, the court pointed out that it was critical to understand the rights being asserted by the claimants in this case were not contractual rights, but rights created by legislation. Therefore, the court upheld the employment tribunal's approach which was to determine whether or not the drivers were workers within the statutory interpretation rather than to determine their relationship via the contractual documents in place between the drivers and Uber.

Going further, the court noted that when interpreting statutory provisions, the requirement was to give effect to the purpose of the legislation, which is ultimately to protect individuals who have little or no say over their pay and working conditions because they are subordinate to an employer exercising control over their work and are therefore vulnerable to abuse.

The court emphasised several aspects of the employment tribunal's findings which justified the conclusion that the claimants were working for Uber:

1. Where a ride is booked through the app, it is Uber that sets the fare and drivers are not permitted to charge more – it was therefore Uber who dictated how much drivers were paid for the work they do;
2. The contract terms on which drivers performed their services are imposed by Uber and drivers have no say in them - this did not indicate that the drivers were in business for themselves as otherwise they would be able to negotiate terms;
3. When a driver had logged into the app, the driver's choice about whether to accept jobs was controlled by Uber. The court and tribunal had highlighted one way that this was done was via monitoring the driver's rate of acceptance and cancellation of jobs and imposing what was, in effect, a penalty if too many trip requests were declined or cancelled;
4. Uber exercises significant control over the way in which drivers deliver their services, such as by the use of a rating system that may lead to warnings and even termination of the driver. In effect, this gave Uber rights to impose disciplinary sanctions on the drivers; and
5. Uber restricted communications between passengers and the driver to the absolute minimum required to perform a particular ride and took steps to prevent drivers from establishing any relationship with a passenger which could exist beyond an individual ride. This further undermined opportunities for drivers to operate as an independent business and the argument that the driver entered into a separate contract with each passenger.

The court noted that drivers were therefore in a position of subordination and depended on the app and Uber to the extent that they had little or no ability to improve their economic position through professional or entrepreneurial skills. In practice, this meant the only way they could increase their earnings was by working longer hours while constantly meeting all of the various measures Uber put in place to review their performance.

Another key decision from the court was that it upheld the tribunal's conclusion that drivers were working for Uber for all of the time in which they were actually logged into the Uber app within the territory in which the driver was licenced to operate and that they were ready and willing to accept jobs. This constituted "working time" for the purpose of the WTR and "unmeasured work" for the purpose of the National Minimum Wage.

Comment

The decision of the Supreme Court to deny Uber's appeal has settled one of the longest-running and possibly most consequential employment law cases of modern times. Several key principles used to determine worker status have now been clarified by the Supreme Court which may prove useful to workers and employers alike in assessing their employment relationships.

Of primary importance is the clear assertion that the first obligation on courts and tribunals in cases such as these is to consider the employment status of an individual within the meaning of legislation based on the actual working relationship between the parties. Although the written contractual terms set out between the parties remain important, courts and tribunals have significant discretion to ignore or disapply terms and conditions stated in contractual documents if they find that these do not represent the reality of the working relationship or the intentions of the parties.

Although the decision of the court in this case carries significance, it has ultimately underlined the widely understood point that worker status cases will ultimately turn on the facts of their case. This has already been well established, even within seemingly similar industries where individuals have been found to be independent contractors or workers within parcel and food delivery courier services.

As for the impact on Uber, the company has claimed that the decision only impacts on a small group of drivers it engaged prior to 2016, which may yet be disputed by drivers who joined the platform since.

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