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EMPLOYMENT LAW BULLETIN

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Welcome to Wrigleys' Employment Law Bulletin, November 2023.

We begin this month by highlighting the new statutory duty on employers to take reasonable steps to prevent sexual harassment of their employees which is supported by the new power for employment tribunals to uplift sexual harassment compensation by up to 25% where an employer is found to have breached the duty.

We also consider the case of ***Independent Workers Union of Great Britain v Central Arbitration Committee*** and another in which the Supreme Court upheld the decision of the Court of Appeal that there was no employment or worker relationship between Deliveroo and its riders and so they are not protected by the right to form and join trade unions under the European Convention on Human Rights.

And in part 2 of our Wrigleys' Essential Employment Guide to the Redundancy Process, we take a closer look at redundancy pooling and selection processes.

The next in our series of **free virtual Employment Brunch Briefings** takes place on 5 December 2023 and is our annual employment law update, taking a look at the key cases of the last 12 months and important upcoming changes to be aware of in 2024. We hope to see you there. Please click the link below to book your place.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

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Article published on 13 November 2023

However, protection from third-party harassment provisions of the Equality Act 2010 will not be restored.

The Worker Protection (Amendment of Equality Act 2010) Act 2013 (the Act) came into force on 26 October 2023, making amends to the Equality Act 2010 (EQA) to:

- Introduce a new duty on employers to take reasonable steps to prevent sexual harassment of their employees, and

- Give employment tribunals the power to uplift sexual harassment compensation by up to 25% where an employer is found to have breached the new duty.

The House of Lords voted to remove sections from the Act that would have made employers liable for sexual harassment of staff by third parties such as contractors, customers or clients in a similar fashion to protections that existed prior to 1 October 2013.

As summarised by a House of Commons Library Research Briefing, the original bill would have made employers liable for third party harassment of employees on the basis ofthe protected characteristics under the EQA (e.g. race, sex, disability) unless they took all reasonable steps to prevent it. This clause has been removed from the final version of the Act.

The bill would also have introduced a new legal duty on employers to take “all reasonable steps” to prevent sexual harassment of their employees. Instead, the Act includesa watered-down obligation on employers to take “reasonable steps” to prevent sexual harassment. As well as opening employers up to claims of failing to prevent sexual harassment, the Act gives employment tribunals the power to uplift by up to 25% the compensation awarded where an employer fails to reasonable steps to prevent sexual harassment.

Sexual harassment in the EQA is where a person (A) harasses another (B) by engaging in unwanted conduct of a sexual nature that has the purpose or effect of violating B’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Whilst the Act therefore strengthens protections for employees against sexual harassment in the workplace from colleagues, it has not offered the level of protection originally envisioned in the Bill.

It is already common for employers to highlight what sexual harassment is, usually as part of an anti-bullying and harassment policy and by making sexual harassment a clear disciplinary matter. However, the effect of the Act is that employers will need to take more proactive steps to demonstrate that they have addressed sexual harassment with their workforce through establishing, implementing and reviewing policy, and taking reasonable steps to provide training, signposting and support.

House of Commons Library publishes paper on AI and employment law

Article published on 30 November 2023

Decision upholds those of the CAC and Court of Appeal.

In recent years several cases on worker status have come to the end of the appeals process (see our articles 'Supreme Court confirms that Uber drivers are workers after denying appeal','Self-employed contractor found to be a worker can claim for all unpaid holiday pay on termination'and 'Addison Lee drivers confirmed as workers' – all available on our website).

Many of these cases have investigated the working relationship between organisations that use 'tech platforms' to engage others who provide services under them. On the face of it, these platforms would appear to operate on very similar lines, but the case law has shown that there are important differences between how these relationships are structured contractually, how they operatein practice and what this means in terms of the status of those providing services using the platform.

In particular, these cases have underlined the fundamental markers of a worker contractarethat the individual performs services personally and the arrangement is not one between a client or customer and a profession or business undertaking carried on by the individual. To date, these cases have largely focussed on the definition of worker in domestic legislation, for example in s.230 of the Employment Rights Act 1996.

The Supreme Court has now handed down its judgment in another case featuring a household-name app – this time, Deliveroo – and features consideration of what is a 'worker' for the purposes of Article 11 (Freedom of assembly and association) of the European Convention on Human Rights (ECHR).

Case details: ***Independent Workers Union of Great Britain v Central Arbitration Committee and another [2023]***

In 2016 the IWU made a formal request to Deliveroo to recognise it for collective bargaining purposes in respect of riders in an area of London. Deliveroo rejected the request which led to the IWU making an application to the CAC which has powers to order an employer to recognise a union and to engage in collective bargaining if certain conditions are met.

Key to the matter before the CAC was whether the riders met the definition of 'worker' under the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). Deliveroo argued that the riders did not, and the CAC agreed. As an alternative argument, the IWU argued that denying the rights of the riders under TULRCA in this matter was contrary to Article 11 (1) ECHR because the riders were 'workers' for the purposes of that article.

Article 11 ECHR provides as follows:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society […]

The IWU argued that the riders were afforded the right to form a union without restriction in accordance with Article 11. As a result, the IWU brought a judicial review of the CAC's decision, and was only allowed to proceed on the Article 11 ECHR point. However, the High Court and Court of

Appeal subsequently dismissed the IWU's case.

In regards to Article 11 ECHR, the Supreme Court considered the leading case of the European Court of Human Rights (CHR)known as 'The Good Shepherd' which considered the rights of orthodox priests and lay staff to form a trade union. In that case, the CHR concluded that the right to form a trade union could only arise where there was an employment relationship. Specifically, the CHR applied the criteria laid down in relevant international instruments including the International Labour Organization (ILO) Employment Relationship Recommendation, 2006 (No 198), which sets out guidance designed to help identify an employment relationship.

On review, the Supreme Court highlighted that the CAC noted the following key points in the Deliveroo-rider contract and relationship which were relevant to the ILO No 198 guidance:

- There was no direction by Deliveroo as to when the riders performed their work, how often they did it, for how long or where, provided it was within a certain geographical area
- The riders were expected to provideall of their own equipment from their own mobile phone and bike to suitable transport containers to perform jobs
- There was a practically unfettered right of substitution under the contract for the rider to allow another person to log in to the app using their access codes and perform deliveries
- Deliveroo did not police the use of substitutes and instead relied on its contractual position with the rider to seek recourse for poor or non-service
- Deliveroo did not prevent the riders from working for others and indeed did not prevent riders working for competitors

The riders were not obliged to take jobs offered by Deliveroo when logged into the app and Deliveroo was not obliged to offer jobs to the riders

The Supreme Court noted that the focus for the CAC and lower courts had fallen on the right of substitution and agreed that this was especially crucial in determiningwhether there was an employment relationship for the purposes of Article 11 ECHR. In this case, the Supreme Court considered that the CAC was entitled on the facts to find that that there was no employment or worker relationship between Deliveroo and the riders for the reasons highlighted above.

Comment

It is important to note that the contract which came under scrutiny before the CAC and subsequently the High Court and appeal courts was a new version of the Deliveroo contract recently introduced to riders.

This new contract went to considerable lengths to decrease the control and oversight that Deliveroo had over the drivers, how they carried out the jobs and indeed the degree of freedom afforded to riders to substitute another rider in their place.

This case, as with those in the series concerning Uber, Addison Lee and Pimlico Plumbers, reaffirms that the precise ways in which contracts are constructed and, importantly, are performed in reality will affect the findings of a court should worker status ever be challenged. Each case will be judged on its facts.

This case also underlines that personal performance remains one of the most central aspects of an employment relationship and that a genuine right of substitution will be a significant factor in determining whether personal performance is present in the contract.

For details of a case in which an individual providing a personal service was found to be self-employed see the following article available on our website: Cricket club groundsman required to provide personal service was self-employed.

Wrigleys' Essential Employment Guide The Redundancy Process (Part 2)

Article published on 6 November 2023

A guide to redundancy: pooling and selection for redundancy.

Part 2 - Pooling and selection for redundancy

In this series of articles for employers, we consider the key elements of a fair redundancy process and some of the pitfalls to avoid along the way. Please see Part 1 of this guide which covers the basics of redundancy and your approach to a fair redundancy process: Wrigleys essential employment guide: the redundancy process (Part 1). Part 1 also covers the basic requirements of collective redundancy consultation where 20 or more dismissals may occur within a 90 day period.

In part two, we cover the key considerations when planning redundancy pools and selection processes.

Planning for selection: do your homework

Before you start planning your pooling and selection process, you should do your homework on what makes a fair process. Helpful general guidance is available from Acas, CIPD and on the gov.uk website. You should also consider taking legal advice in good time before you start.

Look for and become familiar with policies or collective agreements which are relevant to your workforce. These may well include rights and obligations which go above and beyond statutory rights and require you to consult with trade unions. Before making decisions on pooling and selection methods, remember to check whether you already have an agreed procedure to follow.

Pooling principles

A redundancy pool is a group of employees from whom individuals will be selected and put at risk of redundancy.

The approach of employment tribunals suggests the following principles:

- Employers should "apply their mind" to the pool and be able to demonstrate that they have done so (in other words have a document setting out the reasons for your choice of pool);
- Employers should consult with employees or their representatives on the proposed pool before selecting from it and make adjustments to it if necessary in response to feedback;
- A tribunal will consider whether the choice of pool was within "the band of reasonable responses" - so there is no right or wrong pool in any particular case, but a spectrum of reasonable choices; and
- When employers consider the appropriate pool, they should focus on the type of work which is reducing and whether other employees are carrying out this kind of work, including at other sites.

In some cases, the decision on which employees to include in the pool will be straight-forward as there will be a clear group of staff who all carry out the kind of work which is ceasing or diminishing.

However, in other cases, this decision will not be so simple. You may have some employees in other teams or roles who sometimes carry out the type of work which is ceasing or diminishing, or are capable of doing so as they have crossover skills. You may have employees doing very similar work at a different location or for a different part of the organisation. Should you extend the pool to

include these employees?

Employers at times opt for a narrower pool to try to minimise the impact on morale and staff relations of having a wide pool of employees impacted by potential redundancy. In other circumstances, a wider pool may be chosen to increase the employer's options for the remaining or restructured team.

Case law suggests that in some circumstances, it will be unreasonable for employers not to consider a wider pool including staff from other sites, particularly where these are geographically close and there is a history of joint working. If employees could be realistically expected to work from either site, it is likely to be found to be fair to widen the pool.

A pool of one?

In some cases, there will only be one employee in the pool. This will happen where the type of work which is ceasing or diminishing is carried out by only one person.

In this case, the choice of pool will effectively be a decision to put that person at risk of redundancy. It is therefore very important to consult on the choice of a pool of one before confirming that decision. See our article: Redundancy consultation what should employers consult on and when? for an example of a case where this was a key issue.

If there is a pool of one employee there will be no selection process after consulting on and confirming the pool. You will then need to go on to confirm in writing that the employee is at risk of redundancy and consult with them on ways of avoiding or minimising its impact, including considering alternative roles.

Similarly, if there are no roles remaining after the redundancy process and all employees in the "pool" will be put at risk of redundancy, a selection process will not be applicable.

Selection processes

Tribunals will usually expect employees to be selected from a redundancy pool by the application of fair and non-discriminatory selection criteria. Acas guidance on selection for redundancy includes some useful pointers.

Other methods of selecting for redundancy, such as competitive interview, may be fair in particular circumstances but we recommend that you take legal advice before proposing such a process.

It is important always to consult with employees or their representatives on your proposed selection process before you set it in motion.

Pitfalls in the use of certain selection criteria

There is potential for discrimination and unfairness in using some selection criteria and you should consider changing these or taking steps to mitigate this risk. Examples include:

- Potential for age discrimination in a length of service criterion – this criterion can be used, but should have a lower weighting or be used as tie-breaker.
- If you are also using experience-related criteria, these should relate to exposure to different types of work rather than simply to length of service.
- Potential for discrimination in an absence-related criterion – leave because of disability, pregnancy, maternity and gender reassignment should not be included in absence figures for the purpose of redundancy selection.
- Absences linked to protected characteristics could also impact on appraisal information and achievement of targets – extend the time period for appraisal data where relevant.

- Potential for sex, disability, religion or belief discrimination in team culture related criteria, for example in the context of a drinking / social events related or long hours culture.
- Potential for sex or disability discrimination in criteria related to adaptability and flexibility.
- Potential for unfair dismissal where an expired disciplinary warning is taken into account for redundancy purposes and is the principal reason for dismissal.

Fair application of criteria

Employers should also ensure that the process of applying the chosen criteria and scoring employees is fairly carried out. Scoring should be carried out by more than one person against agreed criteria and employers should take steps to ensure scoring is consistently and rationally applied.

Keep a paper trail

Careful documentation of the selection process will be vital when dealing with any queries arising when consulting with employees about their scores, challenges to scoring decisions raised in an appeal, or when defending an employment tribunal claim.

When to take legal advice

Taking legal advice at the outset of a redundancy process when you are planning redundancy pools and selection processes will help to minimise the risks of having to back-track and change your plans. Waiting to take legal advice until later in the process can lead to difficult employee and trade union relationships, higher costs and greater risks of a claim.

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