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EMPLOYMENT LAW BULLETIN

REVIEW OF 2018

Welcome to our employment law bulletin.

Welcome to this edition of the Employment Law Bulletin, in which we review some of the key employment cases of 2018 heard in the EAT, the Court of Appeal and the Supreme Court.

We review the case law U-turn on sleep-in shifts and the National Minimum Wage effected by Lord Justice Underhill in *Royal Mencap Society v Tomlinson Blake*.

We consider the joined sex discrimination cases of *Ali v Capita Customer Management Ltd* and *Hextall v Chief Constable of Leicestershire Police* and the potential for claims from fathers entitled only to statutory pay on shared parental leave when their female colleagues are entitled to enhanced maternity pay.

Two cases this year have highlighted the risk of vicarious liability for employers. In the case of *Bellman v Northampton Recruitment Ltd*, the Court of Appeal overturned the High Court's decision and determined that the employer was liable for brain damage inflicted by a managing director on a colleague at a drinking session following the Christmas do. Vicarious liability was also found by the Court of Appeal in the case of Morrisons v Various Claimants. In this case, the employer was liable for losses caused by a malicious data breach even though it had complied with data protection law.

And finally, we consider the Supreme Court's predictable decision in *Pimlico Plumbers v Smith* along with the most recent workers' rights cases in the private hire sector.

Finally, may I remind you of our forthcoming events:

- **Annual TUPE Update**
  Breakfast Seminar, Leeds, 5th February 2019
  For more information or to book

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New scheme for refunding employment tribunal and ET fees now in operation

The Government announced in December its intended reforms following the 2017 Taylor Review of Modern Working Practices. In the "Good Work Plan", the Government sets out its intentions to legislate to bring more clarity on employment status and to improve protections for those with more precarious working arrangements. Where indicated below, legislation has already been drafted and is expected to come into force in April 2020.

The reforms include:

- Refining tests for employment status and developing an online employment status tool
- Increasing the length of time required to break continuity of service from one week to four weeks (expected to be in force from April 2020).
- A right to a written statement of terms from day one for all workers and employees (expected to be in force from April 2020).
- Changing the reference period for calculating holiday pay for those with variable hours from 12 weeks to 52 weeks.
- A right to request a more stable contract for those with no guaranteed hours after 26 weeks ("zero hours contract" workers).
- Extending rights of agency workers to earn the same pay as permanent staff to those workers who are employed by the agency and have guaranteed pay between assignments. This will involve repealing the "Swedish Derogation" (expected to be repealed in April 2020).
- Making it easier for workers to request an information and consultation arrangement (expected to be in force from April 2020).
- The naming and shaming of employers who do not pay tribunal awards on time and increasing the maximum penalty for aggravated breach of employment law from £5,000 to £20,000.
- State enforcement of holiday pay rights for vulnerable workers.

Hours spent sleeping by sleep-in care workers should not be taken into account when calculating NMW

In Royal Mencap Society v Tomlinson-Blake, the Court of Appeal overturned an EAT decision that care workers were actually working throughout a sleep-in shift.

According to the National Minimum Wage (NMW) Regulations, a worker is entitled to the NMW for time when they are actually working or for time when they are available and required to be available at or near a place of work for the purposes of working. But a worker who is "available" for work rather than working will not be entitled to the NMW for time when they are at home or when the worker is provided with facilities to sleep during a shift – in this case, only time spent actually responding to calls will be counted.

Mrs Tomlinson-Blake was employed by Mencap as a care worker supporting two people with learning disabilities living in the community. As well as her day shifts, she undertook sleep-in shifts for which she was paid a fixed amount. She had her own bedroom in the house and was expected to sleep for most of the night. Her contract required her to remain in the house and she was expected to intervene to support her clients when necessary during the night. This happened only rarely (six times in 16 months). She received additional pay for time spent assisting her clients during these shifts.

Mrs Tomlinson-Blake brought a claim that she had not been paid the NMW when taking into account time spent on sleep-in shifts. An employment tribunal upheld her claim, finding that she was actually working throughout each sleep-in shift. This was on the basis that Mencap had regulatory and contractual obligations for a care worker to be in the house at all times and that Mrs Tomlinson-Blake was obliged to remain in the house and to listen out in case she was required to intervene. In other words, it was part of her work simply to be there. The EAT agreed.

The Court of Appeal did not agree. Lord Justice Underhill held that Mrs Tomlinson-Blake and another care worker in a similar case were rightly classified as "available for work" during their sleep-in shift, rather than actually working. Therefore only the time when they were required to be awake for the purpose of working counted for NMW purposes. Lord Justice Underhill stated that an arrangement where "the essence of the arrangement is that the worker is expected to sleep" falls squarely under the exception set out in the NMW Regulations, that is when a worker is available to work but provided with facilities to sleep. He did not agree with the EAT that Mrs Tomlinson-Blake was actually working simply by being present on the premises.

Lord Justice Underhill took into account the Low Pay Commission report which influenced the drafting of the NMW Regulations 1999. This report recommended that workers who were "required to be on-call and sleep on their employer's premises (e.g. in residential homes ...)" should not have the sleep-in hours counted for NMW purposes.

This decision goes against a recent line of cases where workers have been found to be actually working when contractually or statutorily obliged to be present throughout the night. It suggests that care workers who are usually expected to get a good night's sleep during the sleep-in shift should not have hours spent sleeping taken into account when carrying out the NMW calculation. However, tribunals will still determine each case on its facts. It is also questionable whether this decision will apply to cases which do not involve care worker sleep-in arrangements such as overnight security / caretaker roles.

Employers should note that Unison has sought permission to appeal this decision to the Supreme Court and it is therefore possible that the interpretation of the NMW Regulations will change once again.

Prior to the outcome of this case, it was estimated that liability for underpayment of NMW relating to sleep-in shifts could have cost the care sector £400m. Employers in the care sector who might have underpaid workers were able to apply to join HMRC's Social Care Compliance Scheme (SCCS). Those employers in the scheme who declared the amount of their underpayments by 31 December 2018 and paid any underpayments by 31 March 2019 were able to avoid having to pay the financial penalty for underpayment (200% of the amount owed to workers, up to a maximum of £20,000 per worker) and being publicly named for underpayment of the NMW. We understand that HMRC is continuing with the timetable set out under the SCCS but is asking employers in the scheme to calculate any underpayments on the basis of the Mencap judgment.

HMRC updated its guidance on Calculating the Minimum Wage in November to reflect the Court of Appeal judgment. The guidance now states: "*If the employer provides suitable facilities for sleeping, minimum wage must be paid for time when the worker is required to be awake for the purpose of working, but not for time the worker is permitted to sleep…The position is different where workers are working and not expected to sleep for all or most of a shift, even if there are occasions when they are permitted to sleep (such as when not busy). In this case it is likely minimum wage must be paid for the whole of the shift on the basis that the worker is in effect working all of that time, including for the time spent asleep.*"

Following the earlier Tribunal and EAT rulings, many care sector employers took action to ensure that carers were paid the NMW overall, taking into account sleep-in hours in their entirety. With this change in the interpretation of working time during sleep-ins, some

employers may be tempted to revert to fixed allowances. However, employers should also take into account that any reduction in pay for existing workers would be a fundamental change of contract and require the workers' agreement to the change.
Interestingly, Mencap has stated that it will continue to pay carers carrying out sleep-ins at the increased rate of pay, even though this is not required by statute. Mencap has stated: "We would like the Government to legislate so that all care workers are entitled to this and so that Local Authorities cannot refuse to pay."

Is enhanced maternity pay discriminatory on the ground of sex?

Many employers have more favourable provisions for pay during maternity leave than for those taking adoption leave or shared parental leave. Two employment tribunals considering similar claims from men who wanted to take shared parental leave came to different conclusions on whether enhanced maternity pay is discriminatory on the ground of sex. This year, the EAT resolved this issue.

The case of Ali v Capita Customer Management Ltd concerned Mr Ali who transferred under TUPE from Telefonica to Capita in 2013. Female employees who transferred were entitled during maternity leave to 14 weeks' on full pay and 25 weeks' statutory maternity pay. Male employees who transferred were entitled to 2 weeks' ordinary paternity leave on full pay followed by up to 26 weeks' additional paternity leave with no guaranteed pay. Mr Ali took his two weeks' paid paternity leave and explored the option of taking shared parental leave (SPL). His employer informed him that he could take SPL but would only be paid statutory shared parental pay (SSPP). Mr Ali brought claims of direct sex discrimination, indirect sex discrimination and victimisation in the Employment Tribunal.

Interestingly, the Tribunal found that he had been directly discriminated against. It decided that he could compare himself with a hypothetical female on maternity leave after the initial two week compulsory maternity leave. Under the Equality Act 2010 no account is to be taken of the special treatment afforded to women in connection with pregnancy or childbirth when deciding on a man's sex discrimination claim. But the Tribunal decided enhanced maternity pay after the initial two weeks was not in connection with pregnancy and childbirth. Rather it was in connection with caring for a new-born baby ("which role is not exclusive to women").

The EAT disagreed. It noted that the right to maternity leave and pay and the right to shared parental leave and pay spring from two different European directives which have different purposes. The Pregnant Workers Directive (the source of maternity leave and pay rights) has the primary purpose of protecting the health and wellbeing of the mother during pregnancy and period following birth. This directive requires member states to provide a minimum of 14 weeks' paid maternity leave. The Parental Leave Directive (the source of SPL rights) on the other hand is focused on care for the child and does not require member states to provide for pay during shared parental leave.

The EAT decided that the correct comparator for the direct discrimination claim was a woman on SPL and not a woman on maternity leave. A woman on SPL would have been offered pay at the same rate as Mr Ali and so he had not been treated less favourably

By contrast, in the case of Hextall v Chief Constable of Leicestershire Police, the employment tribunal found on similar facts that a father had not been directly discriminated against. Mr Hextall is a police officer whose female colleagues are entitled to enhanced maternity pay of 18 weeks' full pay. Male and female police officers are entitled as primary adopters to enhanced adoption pay at the same rate. Mr Hextall took three months' SPL and was paid only at the statutory rate. He brought direct and indirect sex discrimination claims in the Employment Tribunal.

The tribunal reasoned that he could not compare himself to a woman on maternity leave and

that the correct comparator is a woman taking SPL (who would have been paid SSPP only). The tribunal decided that, even if Mr Hextall could compare himself with a woman on maternity leave, this would fall under the derogation for special treatment of a woman in connection with pregnancy and childbirth in the Equality Act.

The indirect discrimination claim was also dismissed by the Tribunal on the basis that Mr Hextall could not compare himself to a woman on maternity leave and the policy did not cause men a particular disadvantage because a woman on SPL would have been treated in the same way.

The EAT held that the tribunal was wrong on two counts on the indirect discrimination claim. First, the tribunal had confused the issue of deciding on a comparator for the purposes of the direct discrimination claim with the process of identifying a pool for comparison for the indirect discrimination claim. Secondly, it should not have found there was no disadvantage to men simply because the policy on SPL was the same for both men and women. The tribunal should have sought to identify any disadvantage to men inherent in the policy.

Possible future claims: direct discrimination

While employers will be relieved that these cases indicate that it will not be directly discriminatory to pay enhancements to women on maternity leave and not to those on SPL, they do leave open the possibility of future sex discrimination claims where enhanced maternity pay is paid but enhanced shared parental pay is not. In Ali the EAT commented that there may come a point during maternity leave where the purpose changes from the health and well-being of the mother to the care of the child. The EAT commented that this might be at the end of ordinary maternity leave (26 weeks). However, it could be argued that the change of focus could come at 14 weeks as per the protected period in the Pregnant Workers Directive. Fathers who can compare themselves with a woman on maternity leave in this later period could potentially bring direct discrimination claims.

Possible future claims: indirect discrimination

A tribunal may find that men are disadvantaged by a policy of not paying enhanced SSPP but paying enhanced maternity pay. A man might successfully argue that he is disadvantaged by not having the choice between enhanced maternity pay and SSPP (a choice which is open to women who give birth). However, employers may be able to justify the indirect discrimination as a proportionate means of achieving a legitimate aim. The high costs of enhancing pay for those on SPL will not be sufficient justification on their own. Legitimate aims may include the promotion and retention of women in a male-dominated workforce. The employer would also have to show that the policy was proportionate in that it was reasonably necessary and there were no less discriminatory means of achieving the legitimate aim.

Employer vicariously liable for managing director's attack at post-Christmas party drinks

In Bellman v Northampton Recruitment Limited, the Court of Appeal has overturned the decision of the High Court and held that a drunken attack by the managing director of a small business on an employee was in the course of employment. We reported on the High Court's decision in our December 2016 Employment Law Bulletin.

An employer will be vicariously liable for wrongdoing by an employee if that wrongdoing is "closely connected" with the employment. This was established in the case of *Lister v Hesley Hall Ltd* [2001] UKHL 22. The courts have applied a broad interpretation of this test. In the recent case of *Mohamud v WM Morrison Supermarkets Plc* [2016] UKSC 11, the Supreme Court held a supermarket vicariously liable for an employee's assault on a customer at one of its petrol stations. This was on the basis that there was a sufficiently close connection between the assault and the employee's job of attending to customers and the wrongdoing was a misuse of the employee's position as a petrol attendant.

In this case, Mr Major was the managing director of Northampton Recruitment Ltd. Mr Bellman was employed by the company as a sales manager. In 2011, the company organised a Christmas party for employees and their partners which took place at a golf club. After the party, a number of people who attended went on to have impromptu drinks in the bar of a hotel. The company paid for taxis to the hotel and for some of the impromptu drinks.

At around 2am a work-related discussion began concerning the placement of a new recruit within the business. Mr Major became angry and lectured his employees about his freedom to make decisions as the owner of the company. Mr Bellman, who had known Mr Major since childhood, challenged Mr Major in a non-aggressive way. Mr Major then moved towards Mr Bellman saying: "I f***ing make the decisions in this company; it's my business. If I want him based in Northampton he will be f***king based there". He then punched Mr Bellman twice. Mr Bellman fell to the floor, fracturing his skull. He suffered severe brain damage.

Mr Bellman sued his employer for damages in the High Court. The High Court held that the company was not vicariously liable for the assault. It found the impromptu drinking session was separate from the Christmas party in time and place. It decided that there was insufficient connection between Mr Major's role as managing director and the assault and so the wrongdoing was not in the course of his employment.

Court of Appeal did not agree. It made clear that two questions must be considered: what are the functions or "field of activities" entrusted to the employee (or what is the nature of his job); and is there sufficient connection between the position in which he was employed and the wrongful conduct to make it right for the employer to be held liable?

Lady Justice Asplin gave the leading judgment and held that Mr Major had a very wide field of activities as managing director. She made clear that the question is not what the employee is expressly authorised to do. She noted that vicarious liability had been found in cases where an employee had misused their position in a way which injured someone else. She also held that there was sufficient connection between Mr Major's job and the assault. She decided that Mr Major had chosen to wear his "metaphorical managing director's hat" at the drinks session (even though it was separated from the work's Christmas do in terms of both time and location). She noted that the conversation had focused on work for around an hour before the attack. She held that the assault was an attempt to assert Mr Major's authority and arose out of a misuse of the position entrusted to him as managing director. She held that those attending were doing so as subordinate staff members and managing director.

Lord Justice Irwin agreed with the judgment but wished to emphasise that "this combination of circumstances will arise very rarely. Liability will not arise merely because there is an argument about work matters between colleagues, which leads to an assault, even when one colleague is markedly more senior than another. This case is emphatically not authority for the proposition that employers become insurers for violent or other tortious acts by their employees."

This judgment is in line with that of the Supreme Court in Mohamud. It highlights the risk that an employer will be found vicariously liable for a wrongdoing where there is a close connection between the tortious act and the nature of the job carried out by the wrongdoer and in particular where the wrongdoing arises from a misuse of the position in which the wrongdoer is employed. Employers should be aware that vicarious liability can arise for acts carried out on or off work premises and both inside and outside working hours. The key question for the court will not be, did the act happen at work or at a work event, but rather, was the act closely connected with the wrongdoer's job.

Could an employer be liable for a malicious data breach by an employee?

In Wm Morrison Supermarkets Plc v Various Claimants, the Court of Appeal upheld the decision

of the High Court that Morrisons was vicariously liable for the deliberate disclosure of the personal data of thousands of employees on the internet.

Mr Skelton was a senior IT internal auditor employed by Morrisons. He became disgruntled after receiving a formal verbal warning for a disciplinary issue. As part of his job, he had access to Morrisons' payroll data. He copied this data onto a personal USB stick, planning to disclose the data in order to harm his employer.

In January 2014, he posted the personal details of nearly 100,000 employees of Morrisons on a file sharing website. The data consisted of the names, addresses, gender, dates of birth, phone numbers, national insurance numbers, bank sort codes, bank account numbers and details of salary. Two months later, he sent a CD containing a copy of the data to three newspapers, pretending to be a concerned person who had discovered that this data was available on the internet.

The newspapers informed Morrisons which took steps to ensure that the website was taken down and informed the police. Mr Skelton faced criminal proceedings and was sentenced to eight years in prison.

Over 5,000 employees brought a class action for damages from Morrisons in the High Court on the basis of the misuse of private information, breach of confidence, and breach of Morrisons' statutory duty to comply with the data protection principles under the Data Protection Act 1998.

The High Court found that Morrisons had taken proper measures to protect the employees' data (save for some failings in its data deletion practices which would not have prevented the data breach) and could not have known that Mr Skelton was not to be trusted. It therefore found that Morrisons was not directly liable under data protection law. However, it found that there was sufficient closeness between the wrongdoing of Mr Skelton and the tasks he was employed to do, to hold Morrisons vicariously liable for his actions.

The Court of Appeal agreed. It agreed that there was an unbroken chain of planned events linking Mr Skelton's wrongdoing to his employment.

The high level of fines under the General Data Protection Regulation have been much publicised. This case highlights the additional risk that deliberate disclosure of personal data by a disgruntled employee could lead to significant civil damages for vicarious liability, even where an employer has complied with data protection law. The Court of Appeal commented that insurance could be the answer for data controllers, although there are likely to be limits on the extent to which any such public liability or cyber insurance policy would cover legal costs and/or damages awards. Of course, each claimant will still need to prove that he or she has suffered loss as a consequence of the breach before any financial compensation is awarded.

Supreme Court upholds decision that "independent contractor" was a worker…and other recent "gig economy" cases

In Pimlico Plumbers Ltd v Smith, the Supreme Court agreed that a nominally self-employed plumber was a worker and so entitled to paid annual leave and protection against discrimination.

Mr Smith was engaged by Pimlico Plumber for over five years. His contract stated that he was an independent contractor, that he was in business on his own account, that he was under no obligation to accept work and that the company was under no obligation to offer him work. The contract stated that he would not be paid if a customer failed to pay for the job and he was responsible for ensuring that liability insurance was in place. Mr Smith was registered for

VAT, submitted invoices to Pimlico Plumbers and filed his own tax returns as a self-employed person.

Pimlico Plumbers terminated the contract around four months after Mr Smith suffered a heart attack. He brought claims including those for unfair and wrongful dismissal (for which employee status is required), holiday pay and disability discrimination (for which worker status is required).

The employment tribunal found that Mr Smith was not an employee, but that he was a worker. The EAT agreed. On further appeals, the Court of Appeal and Supreme Court also agreed with the decision of the tribunal on worker status.

The decision is highly fact-sensitive and focused on whether Mr Smith was required to perform the work personally (which would suggest worker status) and whether Pimlico Plumbers was in the position of a client or customer of Mr Smith (which would suggest that he was self-employed). Important factors in the finding of worker status were as follows.

Mr Smith had to perform the work personally. He had only a very limited right to arrange for a substitute to perform the work when he could not or was unwilling to take on a job. Although the written contract did not include the right to send a substitute, Mr Smith could in practice arrange for another plumber working for Pimlico to carry it out. However, this person was under the same obligations to Pimlico as Mr Smith.

Pimlico Plumbers was not a client or customer of Mr Smith. The court found that there was an umbrella contract. Pimlico Plumbers were found to have an obligation to offer Mr Smith work, if the work was available. Mr Smith had an obligation to keep himself available for Pimlico work for up to 40 hours over five days a week, even though he could turn down a particular assignment. It found that the company exercised significant control over Mr Smith, including making him wear a branded uniform, drive in a branded van and carry a Pimlico Plumbers ID card. There were also restrictive covenants in the contract which prevented him from working as a plumber in the Greater London area for a period of three months after termination of employment.

This decision simply confirms the current case law position on worker status. It is important that organisations are aware of the possibility that so-called contractors may be found to be employees or workers in a tax or employment tribunal and the consequent risks of employment law claims or demands for PAYE and NICs arrears. HMRC provides a helpful on-line tool for checking employment status for tax purposes.

The recent EAT decision in *Addison Lee Limited v Lange* and others published in November follows this decision. The claimants, who are private hire drivers, were found to be workers and entitled to holiday pay and NMW even though their contracts stated they were independent contractors. There was found to be an overarching contract between periods which the drivers spent logged on to the system. But the judgment made clear that the claimants would have been found to be workers even if an overarching contract had not been found. For further details of this case, please see the November edition of this bulletin here.

In December, the Court of Appeal upheld the decision of the employment tribunal and EAT in the case of Uber BV and others v Aslam and others that Uber drivers are workers. In this case, the court held that the written contractual documents did not reflect the reality of the relationship between the drivers, the passengers and the company. The Court of Appeal held that there was no contract between the drivers and the passengers and Uber was not acting as an intermediary for the drivers, as argued by Uber. Rather, the drivers were working for Uber

in providing a driving service to Uber customers. Our report of the EAT decision in this case appeared in our November 2017 edition available here.

Interestingly, Lord Justice Underhill (who coincidently gave the leading judgment in the Mencap case cited above), disagreed with the majority and stated that the written documents were not a sham but reflected a real intermediary arrangement which was common in the private hire sector. The Court of Appeal has given Uber permission to appeal to the Supreme Court. The Supreme Court's decision will be awaited with interest.

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