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EMPLOYMENT LAW BULLETIN

June 2018

Welcome to our June employment law bulletin.

This month we report on the Supreme Court decision in Pimlico Plumbers Limited v Smith that a nominally self-employed plumber was a worker, and so entitled to paid annual leave and protection against discrimination. It is highly fact specific, but a number of ways in which Mr Smith was required to work by Pimlico Plumbers, pointed more in favour of worker status than true self-employment.

In another employment status case the EAT has, in Hafal Limited v Lane-Angell overturned the decision of the employment tribunal, and held that a "bank-worker" had no umbrella contract over the periods of her engagement and so had insufficient continuous service to bring a claim for unfair dismissal.

In DL Insurance Services Limited v O'Connor the EAT has upheld the decision of the employment tribunal that an employer failed to justify the imposition of a written warning due to sickness absences and had therefore discriminated against the employee because of something arising in consequence of her disability. After this case, employers should give clear consideration to the legitimate reasons they might have for issuing an absence warning to a disabled employee and be particularly cautious where medical evidence suggests that warnings will have no impact on improving attendance.

In ACAS v PCS the EAT has held that the Central Arbitration Committee had jurisdiction to hear a complaint by a trade union against ACAS under the Information and Consultation of Employees Regulations. For the CAC to have jurisdiction, ACAS had to be an "undertaking" which was "carrying out an economic activity, whether or not operating for gain". The EAT considered that not all of ACAS' services constituted "economic activity" for this purpose (for example ACAS conciliation in employment tribunal cases fell into the category of the exercise of the public powers and not "economic activity"). But the EAT considered that a sufficient part of its activities were an "economic activity". For example, ACAS good practice services were an "economic activity" and neither merely ancillary nor de minimis. This sufficed to meet the definition of a relevant undertaking for the purposes of ICE Regulations.

Finally we report on two recent referrals to the European Court on transfer of undertakings. In Jadran Dodič v BANKA KOPER, ALTA INVEST the Court is being asked whether the transfer of financial instruments and other client assets and records of financial dealings between stock intermediaries is a transfer of undertaking in circumstances where the clients concerned could decline to join the new stock exchange intermediary. And in Union Insular de CC.OO de Lanzarote, the Court is being asked to rule on whether service provision change concerning a labour intensive cleaning contract amounted to a transfer of an undertaking when it took place under the terms of a collective agreement on employment in the cleaning sector in Spain.

Finally, may I remind you of our forthcoming events:

- **Recent Developments in Whistle-blowing Protection**
  Breakfast Seminar, Leeds, 7th August 2018
  For more information or to book

In conjunction with ACAS

- **Simplifying TUPE in a day: Understand the rules and avoid the pitfalls**
  A full day conference, York, 8th August 2018
  For more information or to book

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Supreme Court upholds decision that "independent contractor" was a worker

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.

EAT holds that bank worker was not an employee

In Hafal Ltd v Lane-Angell, the EAT overturned the decision of an employment tribunal and held that a "bank worker" had no umbrella contract and so could not bring an unfair dismissal claim.

Ms Lane-Angell initially worked as a volunteer "Appropriate Adult" for Hafal Ltd, a charity working to support people with mental ill health. Within this role, she assisted people detained at police stations. After about a month, Ms Lane-Angell was offered a paid role as an Appropriate Adult. Her offer letter stated that the post had no guaranteed hours and that her engagement was on a "bank basis" stating that Hafal would use her services "as and when required" and "if you are available". In practice, this meant that bank staff had to email their availability for the upcoming month to Hafal. A rota would then be prepared in line with this availability. At times when the Appropriate Adult was on the rota, they could be called up and directed to attend a police station at a specific time.

In May 2015, Hafal wrote to bank staff setting out a new minimum availability requirement of 10 shifts per month. This was in response to its concerns about being able reliably to supply the demand for Appropriate Adults to attend police stations. Hafal also operated a "three strikes rules" which meant that bank staff could be taken off the rota if they failed to respond three times to a call. The claimant missed some calls at times when she was on the rota. She was not included on the rota for January 2016 and the charity explained that this was because she had not responded to a number of calls when she was on the rota. Hafal then wrote to the Claimant to inform her that she would no longer be offered Appropriate Adult work.

The Claimant brought a claim for unfair dismissal. The employment tribunal found that Ms Lane-Angell was an employee and that she had the requisite length of service to bring the claim. This was on the basis that there was mutuality of obligation during periods when Ms Lane-Angell was not on the rota and so there was an "umbrella" contract. In other words, there was an on-going obligation on the employer to provide work and on the claimant to accept work when offered.

The EAT disagreed and substituted its view that Ms Lane-Angell was not an employee of Hafal. It held that the tribunal had overlooked the evidence of the offer letter when considering the intentions of the parties as to the relationship between them. The EAT held that the terms of this letter were unambiguous and noted that there was no suggestion that these written terms were a "sham" and so the tribunal should have taken account of the offer letter when considering the contractual relationship. The EAT held that the letter indicated that there was no mutuality of obligation as the letter clearly showed that the claimant would only provide her services to them if she was available. The EAT also considered the reality of the way in which work was offered and accepted. It noted that the tribunal had made no factual finding that Ms Lane-Angell was obliged to be available for a minimum number of shifts at any time, and certainly not in the period before 1 May 2015.

The EAT also held that the tribunal was wrong to find that the three strikes rule meant that there was an overarching obligation on the claimant to accept work. The EAT pointed out that this rule applied only after someone had provided their availability and been placed on the rota. It did not apply in unrostered periods.

As the claimant's claim required a finding that she was an employee prior to May 2015, the EAT did not make a clear ruling on whether a requirement to provide a minimum availability of 10 shifts per month would have been sufficient to create the necessary mutuality of obligation for a contract of employment to exist. Organisations should be aware that there is a risk that contracts which impose some obligation on the worker to carry out a minimum amount of work may be found to be employment contracts.

Written warning for sickness absence was discrimination arising from disability

In DL Insurance Services Ltd v O'Connor, EAT upheld the decision of an employment tribunal that an employer had failed to justify the imposition of a written warning due to sickness absences and had therefore discriminated against the employee because of something arising in consequence of her disability.

Mrs O'Connor, who was a disabled person for the purposes of the Equality Act 2010 ('the Act'), had worked for DL Insurance Services Ltd ('DL') since June 2006 in a customer support role. DL was aware of Mrs O'Connor's disability and had in the past made reasonable adjustments, such as allowing Mrs O'Connor to work flexibly and not taking any further action for past sickness absences, despite Mrs O'Connor's absences being above DL's 'trigger point' since 2013. Mrs O'Connor complied with DL's absence reporting requirements and her performance when at work was said to be good.

In 2016 however, DL decided to take disciplinary action, even though Mrs O'Connor had been led to believe that no further action would be taken. By the date of the disciplinary hearing, Mrs O'Connor's absences had totalled 65 days. This was more than six times over the company's 'trigger point'. At the disciplinary meeting, Mrs O'Connor's trade union representative asked if the 'trigger points' were adjusted for people who had long-term disabilities and why Mrs O'Connor had not been referred to occupational health or her medical records obtained from her GP, which would have been in line with DL's sickness absence policy. These questions were not answered. Despite DL accepting that all but one of Mrs O'Connor's absences were disability related, they issued Mrs O'Connor with a 12 month written warning. As a result of the written warning, Mrs O'Connor's sick pay was suspended. The decision was appealed, but DL upheld the decision.

Mrs O'Connor brought a claim for disability discrimination. The employment tribunal concluded that Mrs O'Connor had been treated unfavourably in consequence of something arising from her disability. An employer can however justify doing this under the Act, so long as they can show that the treatment was a proportionate means of achieving a legitimate aim. The tribunal referred to paragraph 5.12 of the Equality and Human Rights Commission Employment Code ("the Code"). This paragraph states that in order to show that the treatment can be justified employers "*must produce evidence to support their assertion that it is justified and not merely rely on generalisations"*.

DL's stated purpose for issuing the written warning was to ensure adequate attendance levels and to improve Mrs O'Connor's attendance. The tribunal said that DL was unclear how, given that Mrs O'Connor's absences were all disability related, the written warning could improve her attendance. The EAT held that, as DL had breached its own policy by failing to refer Mrs O'Connor to occupational health and not asking for medical evidence from Mrs O'Connor's GP, there was no evidence that DL could rely on to show that the written warning was a proportionate way of achieving the legitimate aim. DL had instead relied on their own general experiences of issuing written warnings. The EAT dismissed the argument that the legitimate aim had been achieved as Mrs O'Connor's attendance had improved since the imposition of the written warning.

The case highlights the need for employers to act with caution when dealing with and issuing warnings for disability-related absences. Employers should ensure that information on the employee's medical condition is sought and kept updated so that informed decisions can be made. They should ensure that reasonable adjustments are made to the sickness policy for disabled employees. They should also give consideration to the legitimate reasons they might have for issuing a warning for absences to a disabled employee, and be particularly cautious where medical evidence suggests that warnings will have no impact on improving attendance.

Did the Central Arbitration Committee have jurisdiction to hear a complaint by a trade union under the Information and Consultation of Employees Regulations 2004?

Yes, said the EAT in Acas v PCS.

The Public and Commercial Services Union made a complaint to the Central Arbitration Committee that ACAS had failed as an employer to consult with its employees pursuant to a negotiated agreement made in 2006 and renewed in 2015. ACAS disputed the jurisdiction of the CAC on the basis that it was not an "undertaking" within the meaning of Reg 2 of the ICE Regulations because it was not "carrying out an economic activity, whether or not operating for

gain". The CAC rejected the ACAS argument on the ground that all of ACAS activities satisfied that requirement. In the alternative, if that were wrong, a sufficient part of its activities met that test.

On appeal, the EAT agreed that the CAC had jurisdiction to hear the complaint.

It was agreed by all that ACAS, a Crown Non-Departmental Public Body, was an "undertaking" as such. This reflected the decision of Langstaff P in Moyer-Lee v Cofely Workplace Ltd [2015] ICR 133 that the word means a "legal entity capable of being the employer of employees".

In deciding whether the undertaking carried out an economic activity the EAT drew on case law of the European Court on the EU Acquired Rights Directive and the distinction made in Scattolon v Ministero dell'Istruzione, dell'Universita e della Ricerca [2012] 1 CMLR 17 between economic activity, on the one hand, and, on the other, activities "which fell within the exercise of public powers".

The EAT disagreed with the CAC's conclusion that all ACAS services constituted 'economic' activity for the purpose of Reg 2 (for example, ACAS conciliation in employment tribunal cases fell within the category of the exercise of public powers). But the EAT adopted the alternative ground for the CAC's decision, that a sufficient part of its activities were an "economic activity". For example ACAS Good Practice Services were an economic activity, and neither merely ancillary, nor de minimis. This sufficed for the purposes of the definition in Reg 2 of the ICE Regulations.

Recent referrals to the European Court on transfer of undertakings

In Jadran Dodi? v BANKA KOPER, ALTA INVEST (Case C-194/18), a case from Slovenia, the Court is being asked whether the transfer of financial instruments and other client assets and records of financial dealings between stock exchange intermediaries was a transfer of an undertaking in circumstances where the decision to join the new stock exchange intermediary would be a matter for the client itself. And in these circumstances is the number of clients who chose to use the new stock exchange intermediary relevant? Finally was any continued association by the former stock exchange intermediary as a dependent of financial promotion company relevant?

In Unión Insular de CC.OO. de Lanzarote v Swissport Spain Aviation Services Lanzarote, S.L. (Case C-167/18), a case from Spain, the Court is being asked to rule on whether a service provision change concerning a labour intensive cleaning contract amounts to a transfer of an undertaking when it took place under the terms of a collective agreement on employment in the cleaning sector in Spain. As it was pursuant to the terms of a collective agreement and therefore not a voluntary transfer, did that make a difference? Furthermore was the collective agreement applicable to the cleaning of buildings and premises in the Province of Las Palmas (which provides that when employees are taken over under the collective agreement they do not retain the rights which they acquired with the transferor undertaking) compatible with the Acquired Rights Directive?

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