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EMPLOYMENT LAW BULLETIN

NOVEMBER 2018

Welcome to our November employment law bulletin.

November's cases include another "gig economy" decision, this time in the EAT, suggesting again that the courts will look behind the wording of a written contract to examine the reality of working arrangements. In *Addison Lee v Lange and others*, so-called "independent contractor" private hire drivers were found to be workers.

The EAT held in *Awan v ICTS UK* Ltd that an employer was in breach of contract when dismissing an employee who had been off sick for two years for incapability as he was entitled to long-term disability benefits if he continued to be employed.

In *George v London Borough of Brent*, the EAT has clarified that it is unfair for an employer not to offer a trial period for an alternative role when a contractual redundancy policy includes such a right.

The Court of Appeal held in *Pinaud v British Airways* that a part time member of air crew had, on the face of it, been discriminated against on the grounds of her part-time status as she was required to be available for work for more than 50% of the time but received only 50% of full time pay.

Finally, may I remind you of our forthcoming events:

- **Employment Breakfast Briefing**
  What's new in Employment Law, Leeds, 4 December 2019
  For more information or to book

- **Charity Workshop**
  Capital Fundraising for Charities, Leeds, 5 December 2019
  For more information or to book

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Wherever you see the BAILII logo simply click on it to view more detail about a case

Can an employee be dismissed for incapability if their contract provides long-term disability benefits?

Incapability dismissal may be unfair and discriminatory if employee is contractually entitled to income when incapacitated by permanent disability

In Awan v ICTS UK Ltd, the EAT held that an employee with permanent health insurance (PHI) benefits in his contract could have been unfairly dismissed and discriminated against on the ground of disability when he was dismissed for incapability.

Mr Awan, an Internal Security Co-ordinator working at Heathrow, TUPE transferred from American Airlines to ICTS. His contract included six months full sick pay. After that period, if sickness continued, the employee was entitled to two-thirds of full pay until return to work, retirement or death. The contract stated that Mr Awan could be dismissed on notice. It did not expressly state that he could be dismissed for incapability.

Canada Life, the new insurer providing long-term disability benefits following the transfer, refused to cover any employees who were already off sick at the time of the transfer (such as Mr Awan). The old insurer, Legal & General agreed to continue the cover for Mr Awan only until a specified date as a gesture of goodwill. ICTS then took over the payment for a number of months but commenced a capability process which led to Mr Awan's dismissal.

Mr Awan brought unfair dismissal and discrimination arising from disability claims to an employment tribunal. The tribunal found that the employer had acted reasonably in dismissing him for incapability and that the decision to dismiss not discriminatory as it was justifiable as a proportionate means of achieving a legitimate aim.

The EAT disagreed and remitted the case to the tribunal. It held that there was a contradiction in the employment contract between the contractual entitlement to long-term disability benefits and the right to dismiss on notice. The EAT commented that, if the employer could simply dismiss for incapability, there would be no circumstances in which it was obliged to continue to pay long-term disability benefits if it preferred not to do so. Mrs Justice Simler therefore held that a term could be implied into the contract that "once the employee has become entitled to payment of disability income due under the long-term disability plan, the employer will not dismiss him on the grounds of his continuing incapacity to work.". She also held that ICTS was in breach of this implied term.

Employers should take advice before dismissing on grounds of capability where such benefits are available where employment continues. An unusual feature of this case was the fact that the employee (whose contract commenced in 1992) was entitled to receive long-term disability benefits whether or not the insurer agreed to pay out under the policy. When entering into employment contracts, employers should ensure that any such contractual benefits are made subject to the rules of the insurance policy and make clear that the employer is not obliged to pay if the insurer refuses to provide the benefit. When taking on employees in a TUPE transfer, employers such be alert to the possibility of significant liability where generous PHI benefits are part of legacy contracts.

Will a refusal to offer a trial period make a redundancy dismissal unfair?

Yes, the refusal of a contractual right to a four week trial period in an alternative role is very likely to lead to an unfair dismissal (EAT).

In *George v London Borough of Brent*, the EAT has made clear that a redundancy dismissal is very unlikely to be fair in all the circumstances where the employer fails to offer a trial period to which the employee is contractually entitled.

Ms George was employed as a library manager for the London Borough of Brent (the Council). The Council faced funding cuts and made the decision to reduce the number of its libraries from twelve to six and the number of library managers from six to two. Ms George went through a competitive process for the remaining roles, but was unsuccessful. Under the Council's contractual redundancy procedure, Ms George was offered a customer service officer role. This was at a lower grade and would have involved a change of work location. She would also have been line managed by someone who was formerly her junior and about whom she had previously made a complaint. There was a contractual right to a four week trial period in the alternative role. However, the Council wrongly stated that a trial period was not applicable in the circumstances. Ms George did not directly question this decision. She refused the role and was dismissed.

She brought an unfair dismissal claim to an employment tribunal. The tribunal found that the dismissal was fair. It found that the trial period would have made no difference to Ms George's decision to refuse the alternative role and commented that the claimant had only made the refusal of a trial period an issue for the purposes of the litigation.

The EAT disagreed. In fact, it disagreed twice, the same tribunal having dismissed the claim on the same basis after a remitted hearing. The EAT's judgment makes clear that the refusal of a contractual right to a trial period is very likely to make the dismissal unfair in all the circumstances. It comments that the tribunal wrongly focused on the claimant's attitude to the trial period and whether she would have been dismissed even if the trial period had been offered. While these would be relevant considerations at the remedies stage (as compensation can be reduced based on the likelihood that a claimant would have been dismissed even if the process was fair), they were not relevant when considering the fairness of the dismissal.

Statutory trial periods

Although this case concerned a contractual trial period, readers will be aware, there is a statutory right to a four week trial period in an alternative role if the employee will be employed in a different capacity or place or if other terms and conditions of employment differ from those of current contract. If the conditions of the legislation are met, this trial period will occur whether the parties have agreed to it or not and the employee will still be entitled to statutory redundancy pay if either party terminates the employment during the trial period. Case law also suggests that an employer's refusal to agree to a trial period when the statutory right applies would make a dismissal unfair.

Private hire drivers were workers and entitled to NMW and holiday pay

Employment tribunal was right to take a "realistic and worldly-wise" approach as written contract did not reflect the reality of the arrangement

In Addison Lee Limited v Lange and others, EAT upheld the decision of an employment tribunal that private hire drivers who were nominally self-employed were in fact workers and that the time they spent logged on to the company's system was working time.

The claimants were private hire drivers. They brought claims for National Minimum Wage (NMW) and holiday pay, both of which require worker status.

An employment tribunal found that the claimants were workers working under an overarching contract. It found that the written contract did not reflect the reality of the situation which was that the drivers were obliged to carry out some work while they were logged on and that the company was obliged to provide them with some work. It also found that the drivers had to perform the work personally.

The tribunal heard that there was considerable control of the drivers. Drivers underwent induction and training. They had to obey the Addison Lee code of conduct during and in between jobs. They could be sanctioned by being blocked from the booking system if they refused a job. They were also under an ongoing obligation to pay fees for hiring the liveried cars from an associated company from week to week. It was found that the drivers needed to work between 25 and 30 hours per week to recover the costs of hiring the vehicle.

The contract stated that the drivers agreed that they were independent contractors of Addison Lee rather than employees or workers. It stated that in some cases the driver was a sub-contractor for Addison Lee delivering a service to its account holders. Where passengers were not account holders, the company was stated to act as an agent for the driver, with the contract being between the passenger and the driver. In reality, in both cases, the driver had no knowledge of or control over the fare which was agreed between the customer and Addison Lee. The tribunal found that in reality there was no contract between the driver and the passengers and that the drivers were not in a contractor / client relationship with the company.

The EAT agreed. It held that the tribunal was entitled to reach its conclusion, applying the "realistic and worldly wise" approach set out in *Autoclenz Ltd v Belcher* [2011] ICR 1157.

This decision by the EAT follows recent cases in the EAT, Court of Appeal and Supreme Court finding that nominally self-employed people are in fact workers. Employers should be aware that there is a risk of such claims where "freelancers", "consultants" or "independent contractors" are engaged. If the person in question is not in business on their own account and if they are obliged to perform the service personally, it is likely a tribunal would conclude they are entitled to workers' rights. As well as NMW and holiday pay, these also include pension auto-enrolment, working time protections and statutory sick pay. HMRC may also question such an arrangement and demand unpaid PAYE and National Insurance Contributions.

Part-time airline worker was treated less favourably because of her part-time status

Court of Appeal holds purser paid 50% of full-time pay when available for work for more than 50% of full-time hours was less favourably treated.

The case of British Airways Plc v Pinaud concerned a long-serving member of air crew for British Airways (BA). On returning to work after a period of maternity leave, she moved from full-time to part-time hours.

Over a year, full-time crew members had to be available for work on 243 days. Part-time crew, including the claimant, had to be available for 130 days. Crew members could be required for ground duties such as training or were on standby during available days. There was no clear link between available days and hours worked and the annual basic salary did not vary with the number of hours worked.

The claimant brought a claim under the Part Time Workers Regulations 2000 on the basis that she had been treated less favourably because she had to be available for 53.5% of full-time hours but was paid only 50% of full-time salary. The tribunal found that Ms Pinaud had been less favourably treated and disregarded evidence from BA that she had not actually worked more than 50% of full time hours. It commented that she should have been paid 53.5% of full time pay over the ten years during which she had worked part-time.

The EAT agreed that the treatment was less favourable but remitted the question of justification to a freshly constituted tribunal. It determined that the tribunal should not have disregarded evidence about the actual financial impact on the claimant. An employer can justify discrimination of part-time workers if the less favourable treatment is a means to achieve a legitimate objective, is necessary in order to achieve that objective and is an appropriate way of achieving that objective. We reported on the EAT judgment in this case in September 2017. This report is available here.

The Court of Appeal agreed with the EAT. It also commented that it would be surprising (should the claimant win her claim) if Ms Pinaud were to be awarded compensation on the basis that she should have been paid 53.5 of full time pay when she had not actually worked 53.5% of full time hours. BA may well be relieved by this comment as 628 similar claims have been stayed pending the outcome of this case.

In this case the differential may seem slight, but the fact it exists means that the employer can be required to justify it.

It is important that employers consider whether their working practices might discriminate against those who work part-time; whether they could make alternative arrangements which have a less discriminatory impact on part-time workers; and whether any discriminatory practices are justifiable as a necessary and appropriate means to achieve a legitimate objective.

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