

# Employment Law BULLETIN

## Welcome to our February employment law bulletin.

We include commentary this month on cases from the EAT to the Supreme Court.

The ‘Gig Economy’ is the catchword of the moment. In *Pimlico Plumbers Limited v Smith* the Court of Appeal considered yet another case where a person described as self-employed earned some basic employment rights upon his reclassification as a “worker” for the purposes of employment legislation. Although fact sensitive, the case is nonetheless the latest in a series of cases in which the courts have sought to critically examine the relationship between those providing services and the company which engages them.

In *FirstGroup Plc v Paulley* the Supreme Court has determined that a bus company should have taken more steps to try and ensure a wheelchair user could use a wheelchair space on the bus when a passenger with a pushchair refused to move. Although the case is concerned with discrimination in relation to the provision of a service, rather than in relation to employment, it provides useful guidance on what an employment tribunal might consider to be reasonable adjustments in a disability discrimination claim.

In *Gareddu v London Underground Limited* the EAT has held that an employer’s refusal to allow an employee to take five consecutive weeks off work in order to attend Roman Catholic festivals in his country of origin was not indirect discrimination on the ground of religion.

In *Davies v Droylsden Academy* the EAT has held that a dismissal on ground of redundancy following a TUPE transfer was not automatically unfair, since it was for an economic, technical or organisational reason entailing changes in the workforce.

## May I also remind you of our forthcoming events:

Click any event title for further details.

### Unfair Dismissal Update

- Breakfast Seminar, Leeds, 25<sup>th</sup> April 2017

In conjunction with ACAS

### Understanding TUPE: A practical guide to business transfers and outsourcing

- Full day conference, Newcastle-upon-Tyne, 9<sup>th</sup> March 2017

## Understanding TUPE: A practical guide to business transfers and outsourcing

- Full day conference, Leeds, 30<sup>th</sup> March 2017

Dr John McMullen, EDITOR [john.mcmullen@wrigleys.co.uk](mailto:john.mcmullen@wrigleys.co.uk)

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

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## 1: New Apprenticeship Levy rules in force from 6 April 2017

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The Apprenticeship Levy will be payable by employers whose total annual pay bill is over £3 million per year at a rate of 0.5% of that pay bill. Employers who are caught by the new rules will be required to report to HMRC in April and to pay their first Apprenticeship Levy payment in May 2017.

The total annual pay bill includes all payments to employees which are subject to employer Class 1 secondary National Insurance Contributions (NICs). When working out whether the total annual pay bill is over £3 million, employers must also take into account any connected companies or charities (that is, briefly, where one company or charity has control over the other).

There is a £15,000 annual Apprenticeship Levy allowance which means, in effect, that only those employers with an annual pay bill of over £3 million will have to pay and report the levy. This is because 0.5% of an employer's £3 million pay bill is £15,000, which is fully removed by the £15,000 Apprenticeship Levy allowance.

Only one £15,000 allowance is available to employers which are part a group of connected companies or charities. If an employer (or group of connected companies or charities) has more than one PAYE scheme, they can share the allowance across these PAYE schemes, by notifying HMRC of the split with their first return of Apprenticeship Levy, which will usually be at the beginning of the tax year.

There is a useful Government guide to paying the Apprenticeship Levy available [here](#). Guidance on the way apprenticeship funding will work can be found [here](#).

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## 2: Gender pay gap reporting requirement from 6 April 2017

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A new requirement for private and voluntary sector employers to report annually their gender pay gap statistics is expected to be in force from 6 April this year. New regulations which bring in a similar duty on public sector employers are expected to be in force from 31 March 2017.

Employers with 250 or more employees on the "snapshot date" (see below) will have a duty to report gender pay gap statistics. "Employees" are those working under a contract of employment, a contract of apprenticeship or a contract personally to do work. This definition is fairly broad and will include employees, workers and some contractors.

The first "snapshot date" for private and voluntary sector employers will be 5 April 2017 and the first reports will be due by 4 April 2018. An analysis of gender pay gap figures will then have to be carried out on every 4 April and an annual report published within twelve months of that date.

Employers caught by the rules must report the following figures based on employees' pay in the pay period during which the snapshot date falls. For example, this will be the week in which 5 April falls, for employees who are paid weekly. The required information is:

- Average women's hourly earnings as a percentage of average men's hourly earnings (based on both the mean and median average);
- Average bonuses for women as a percentage of average bonuses for men (based on the mean and median average);
- The percentage of women who receive bonuses and the percentage of men who receive bonuses; and
- The number of male and female employees in each quartile of the employer's pay distribution (based on rates of hourly pay).

Pay includes basic pay, allowances, leave pay (e.g. holiday, maternity and sick pay, but only where an employee is receiving full pay) and employees' pension contributions. It does not include overtime, redundancy or other termination payments, employers' pension contributions, pay in lieu of leave, expenses, benefits in kind or benefits relating to a salary sacrifice scheme.

In a change to the earlier draft of the regulations, employees are excluded from the pay reporting obligations if they receive less than full pay as a result of any period of absence during the pay period in which the snapshot date falls. This means that employers should not include in pay calculations any employees who are, for example, on reduced pay or no pay because of maternity leave or sick leave.

Bonuses include payments in the form of money, vouchers and shares related to profit sharing, productivity, performance, incentive or commission, paid in the 12 month period ending with the snapshot date. Employees who are on reduced pay because of leave from work during the period during which the snapshot date falls should still be included in the bonus pay figures.

Employers must upload the report to a government website and publish the statistics on their website. The information should be accessible to both employees and members of the public and must remain on the website for at least three years. Private and voluntary sector employers must provide a written statement confirming that the gender pay gap information is accurate. In the case of a company, this must be signed by a director. Employers can, if they wish, include annotations and narrative to give a context for the figures.

ACAS has recently published new draft guidance (available [here](#)) to assist employers in making their gender pay gap report. The guidance includes five steps for employers:

- Compile the required information, including the staff who should be counted, their ordinary pay and bonus pay in the snapshot date pay period and their working hours.
- Perform the required calculations including pay and bonus gap figures, the proportion of men and women receiving bonuses and the proportion of men and women in each salary quartile.
- Consider providing a supporting narrative to accompany the gender pay gap figures.
- Publish gender pay information on the employer's website and on the Government website.
- ACAS recommends that employers implement plans to manage any gender pay gap issues within the organisation, for example by considering the management of family friendly leave and flexible working arrangements in order to encourage the participation of women at all levels of the organisation.

The Equality and Human Rights Commission confirmed this month that it has "accepted the government's view that a company's failure to comply with the requirement to publish its pay gap will be an "unlawful act" within the meaning of section 34 of the Equality Act 2006" and stated: "if we receive evidence that a company has failed to publish its pay gap information, we may undertake pre-enforcement action, by working with them to improve their practice."

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### 3: Online database of Employment Tribunal judgments

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A searchable database of recent decisions in the Employment Tribunal is now available as part of the gov.uk website. The new database is available [here](#).

New judgments will be added to the database. It is not yet known whether judgments from previous years will be made available in this way. Currently, copies of Employment Tribunal judgments can be requested (for a fee) from the Employment Tribunal register office at Bury St Edmunds.

There are good and bad sides to this development. It may be useful to have easy access to ET judgments to gain insight into illustrative cases. But it must be borne in mind that ET judgments are not binding. Some fear open access will lead to “over-reporting” of cases, leading to an information overload. Others fear employers will search the database for the names of prospective employees who may have taken their former employer to an employment tribunal.

Employment Appeal Tribunal decisions are already accessible online through the British and Irish Legal Information Institute ([bailii.org](http://bailii.org)).

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## 4: The “Gig Economy” again: Court of Appeal finds “self-employed” plumber was a “worker”.

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In *Pimlico Plumbers Limited v Smith*, the Court of Appeal considered whether a plumber who was nominally self-employed was either an employee or a worker.

Mr Smith worked for Pimlico Plumbers between 2005 and 2011. Both he and the company considered Mr Smith to be self-employed. Mr Smith was VAT registered, submitted invoices for payment, hired a van from the company, used his own materials and tools and had to have his own liability insurance. In January 2011, Mr Smith suffered a heart attack. Pimlico Plumbers terminated his contract four months later and Mr Smith brought claims in the Employment Tribunal for unfair dismissal, wrongful dismissal, failure to pay wages during a period of medical suspension, failure to pay holiday pay and pay arrears. He also brought claims alleging disability discrimination.

At a pre-hearing review in January 2012, an employment tribunal found that Mr Smith was not an employee. The Employment Judge’s decision was based on findings that there was no legal obligation on Pimlico Plumbers to provide work to Mr Smith, either set out expressly in the contract between them or when considering the reality of the working arrangements. It was also based on the finding that there were circumstances in which Pimlico Plumbers had no obligation to pay Mr Smith for the work he had done. For example, he was required to rectify problems with his work at his own cost and where customer invoices remained unpaid after six months, Mr Smith would not be paid for his work. The Employment Judge therefore found that Mr Smith took considerable financial risk in the arrangement. She also found that both parties had intended Mr Smith to be self-employed.

The Employment Judge went on however to find that Mr Smith was a “worker”. This decision was based on findings that Mr Smith was obliged personally to perform work for Pimlico Plumbers. The judge found that there was an obligation for Mr Smith to work a minimum number of hours each week or on agreed days during the week. She found that Mr Smith had no unfettered right to substitute another person to perform the work either set out expressly in the contract or in reality.

The Employment Judge found that Pimlico Plumbers had significant control over Mr Smith. She found that Mr Smith was integral to Pimlico Plumbers’ operation and was subordinate to them. For example, Mr Smith was obliged to wear a Pimlico Plumbers’ uniform and to ensure that this was clean at all times. The Employment Judge concluded that Mr Smith was not in business on his own account and Pimlico Plumbers were not in the position of a client or customer, noting that Mr Smith was subject to a number of restrictive covenants, including one which prevented him working as a plumber in Greater London in the 3 months following termination.

In consequence of these findings, the employment tribunal found that Mr Smith could bring his claims relating to disability discrimination, holiday pay and unlawful deductions from wages. However, it found that his claims of unfair dismissal, wrongful dismissal and failure to pay during medical suspension could not be brought as these require the claimant to be an employee. The EAT agreed with the tribunal’s findings.



On further appeal to the Court of Appeal, the decision of the employment tribunal was again upheld. On the right of substitution, the Master of the Rolls, Sir Terence Etherton, clarified that the tribunal had found no evidence that Mr Smith was able to substitute an external plumber to perform the work. The fact that Mr Smith could occasionally ask another person working for the firm to carry out the work was not relevant to the right of substitution but was simply a means of work distribution within Pimlico Plumbers. The fact that Mr Smith had to have the approval of Pimlico Plumbers to the use of any external contractor indicated that any right to substitute was very limited.

The Master of the Rolls provided useful commentary on the right of substitution, clarifying how far the right would have to be fettered before it supports worker status. He commented that the following would not support a finding of worker status:

- an unfettered right to substitute; or
- a right to substitute limited only by the need to show the substitute is qualified to perform the work. On the other hand, he gave the following examples of fetters on the right which would support a finding of worker status:
  - a right to substitute only where the claimant could not carry out the work himself; or
  - a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold that consent.

This case is fact sensitive. However, it provides clarity on the key factors which will indicate worker status. These are that the claimant is obliged to perform the work personally (and hence the claimant has no right, or only a limited right, to send someone else to perform the work); the claimant is not in business on his own account and there is no customer-contractor relationship (the claimant is controlled by and integrated into the employer's business and is subordinate to the employer).

Pimlico Plumbers is reported to be considering an appeal to the Supreme Court.

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## 5: Bus company should have gone further in making reasonable adjustments for disabled passenger

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In [\*FirstGroup Plc v Paulley\*](#), the Supreme Court has determined that a bus company should have taken more steps to try to ensure a wheelchair user could use the wheelchair space on a bus when a passenger with a pushchair refused to move.

This case is concerned with discrimination in the provision of a service, rather than in relation to employment. However, it provides useful guidance on what an employment tribunal might consider to be reasonable adjustments in a disability discrimination claim.

FirstGroup had a policy of politely asking people using the wheelchair space to move, but then not taking any further steps if the request was refused and so not allowing the wheelchair user to board the bus. Mr Paulley, who uses a wheelchair, attempted to board a bus and to occupy the space for people with wheelchairs. A passenger with a sleeping baby in a pushchair refused to move from the space and Mr Paulley was not able to board the bus. Mr Paulley brought a disability discrimination claim. He alleged that FirstGroup had failed to take reasonable steps in order to remove the substantial disadvantage posed by its policy.

Mr Paulley won the case at first instance. The court found that the bus company should have positively reinforced the requirement to move by removing the non-disabled passenger from the bus. However, the bus company's appeal was allowed in the Court of Appeal. It held that it would be impractical and unfair (and so not reasonable) to expect the bus driver to enforce the requirement to the point of ejecting a non-disabled passenger from the bus.

The Supreme Court took a line somewhere between the two prior judgments. It held that the bus company policy should include at least one further step to try to enforce the requirement for a non-disabled person to give up the wheelchair space. It commented that once the first request of the bus driver was refused, further reasonable steps might include rephrasing the polite request as a requirement and stopping the bus (if it was not running late) in an attempt to pressurise the passenger to move.

Employers have a duty to make reasonable adjustments to avoid any disadvantages to a disabled employee posed by a provision, criterion or practice, a physical feature or the lack of an auxiliary aid. A tribunal will consider what steps are reasonable in the circumstances in the context of the size and resources of the employer. The greater the resources of the employer, the further the employer will be expected to go to avoid the disadvantage.

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## 6: Refusal of holiday request was not indirect religious discrimination

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In [\*Gareddu v London Underground Ltd\*](#), the EAT held that an employer's refusal to allow an employee to take five consecutive weeks off work in order to attend Roman Catholic festivals in his country of origin was not indirect discrimination on the ground of religion.

Mr Gareddu works as a Quality Engineer for London Underground. For a period of six years, he was granted five consecutive weeks' holiday in the Summer. A new manager warned him in 2013 that he would only be allowed to take three consecutive weeks' holiday in future. When, in 2015, his request for five weeks' holiday was denied, he brought a claim in an employment tribunal for indirect religious discrimination.

Mr Gareddu asserted in his witness statement that attending a series of 17 Sardinian religious festivals in and around August each year was a manifestation of his Roman Catholic belief. He claimed that he attends these festivals every year with his family and that all of these festivals had a deep religious significance for him.

The employment tribunal found that Mr Gareddu had not in fact attended religious festivals in Sardinia since 2013 due to an injury to his leg which made it inadvisable to go out in crowds. In cross-examination, the Claimant admitted that in 2013, when he was last fit to do so, he had attended only nine of the 17 festivals listed in his witness statement. The tribunal also found that the decision as to which festivals to attend was entirely dependent on the opinions of Mr Gareddu's family and friends and was not driven by any deeply held affinity with the relevant saint.

The EAT agreed and dismissed Mr Gareddu's appeal. It held that the employment tribunal was entitled to find that the Claimant was not sincere in his assertion that attending a series of 17 festivals over a five week period was of vital importance to him for religious reasons. The EAT clarified that the tribunal had not found that the Claimant's religious beliefs were not genuine, but that the requirement for five consecutive weeks off work in the Summer was not a genuine manifestation of his beliefs.

Employers can justify indirect discrimination if they can show that the provision, criterion or practice was a proportionate means of achieving a legitimate aim. The tribunal in this case did not consider whether London Underground might have been able to justify its policy that employees could take a maximum of three consecutive weeks off work. If the Claimant's requirement on religious grounds to take five weeks off had been found to be genuine, it is likely that the employer could have justified the discriminatory impact on some employees. For example, it might have been able to show that having a limit of three weeks was a proportionate means of achieving the legitimate aim of providing and maintaining a safe underground service to the public throughout the year.

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## 7: Dismissal on ground of redundancy following a TUPE transfer was for an economic, technical or organisational reason entailing changes in the workforce

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In *Davies v Droylsden Academy*, the claimant was employed by Schools Plus Limited (SPL) as a venue lettings manager. SPL provided a service to educational institutions letting the institutions' premises out of school hours. In June 2012 the claimant was appointed by SPL as the venue lettings manager of Droylsden Academy. With effect from 1st November 2014 Droylsden Academy terminated its contract with SPL, having decided to carry on the business of letting its premises on its own behalf. In other words it decided to take the contract back in house. There was no dispute before the employment tribunal that this was a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

However, the treatment of the claimant leading up to, and immediately after, this TUPE transfer was far from satisfactory. The Academy had doubts about whether there would be a place for the claimant, in her capacity as a venue lettings manager, in its own structure going forward and ventured to say that the claimant might be redundant. There was also an argument about whether the claimant was assigned to the service concerned for the purposes of her right to transfer under TUPE. In the end it was conceded that the claimant was assigned. Discussions began, pre-transfer, about the possibility of a redundancy in the future.

The claimant might have resigned at this point claiming constructive dismissal, but she did not, and the tribunal found that her employment transferred to the Academy on 1st November. But still no arrangements were made for her to take up her employment with the Academy. The employment tribunal found that the Academy had considered a redundancy procedure of sorts and had considered the pool for selection for redundancy but had concluded that the claimant was effectively in a pool of one, given the unique nature of her role in the school. In the circumstances the Academy felt it was appropriate to dismiss her by reason of redundancy. This was confirmed on 11th March 2015 and the claimant was given a redundancy payment.

The Employment Judge concluded that the transfer was not the sole or principal reason for the dismissal, but that the sole or principal reason was an economic, technical or organisational reason entailing changes in the workforce. This was because, it said, the reason for dismissal related to the claimant's role being redundant as a result of the restructure. The Employment Judge went on to find that the dismissal by reason of redundancy was fair, that the conclusion that the claimant was in a pool of one was the correct one, that the consultation conducted by the Academy was adequate, and that it had unsuccessfully looked for suitable alternative employment. The claim for unfair dismissal was rejected.

On appeal to the EAT the EAT did not disturb this finding. In particular, the EAT (Simler J) took the opportunity to analyse the process in deciding whether the reason for the dismissal is the transfer or an ETO reason entailing changes in the workforce in TUPE transfer cases.

First, she said, the onus is on the dismissing employer to establish the ETO reason. According to Simler J "an "organisational reason" can include a reason relating to the management or organisational structure of the incoming business". Secondly, the dismissing employer must show that the reason entails a change in the workforce. "That is to say, the reason must necessarily entail changes in the workforce so that if the employer's plan is to achieve such changes in the workforce and such changes are an objective of the plan, that would suffice". On the other hand it would be insufficient "if such changes are merely a possible consequence of the employer's objective or plan".



According to Simler J: “So far as the meaning of “changes in the workforce” is concerned, this means either changes in the numbers of the workforce overall or in the functions of members of that workforce. Changes in the identity of the individuals who make up the workforce do not constitute changes in the workforce itself so long as the overall numbers and functions of the employees looked at as a whole remain unchanged”.

**If you'd like to contact us please email [john.mcmullen@wrigleys.co.uk](mailto:john.mcmullen@wrigleys.co.uk)**

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