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Employment Law BULLETIN

Welcome to our May employment law bulletin.

In this month's issue we cover a number of interesting cases from the EAT and also from the Court of Appeal, in addition to our usual news items.

In *Weatherilt v Cathay Pacific Airways Limited* the EAT has disagreed with a previous EAT decision and held that an employment tribunal has jurisdiction to consider an employee's claim for unlawful deduction from wages even if that means interpreting a worker's contract in order to establish whether the sums claimed were properly due in the first place.

In *Focus Care Agency Limited v Roberts* the EAT has clarified the correct approach to be taken by an employment tribunal in considering whether hours spent on a sleep-in shift are "time work" for the purposes of calculating the National Minimum Wage.

In *Government Legal Service v Brookes* the EAT has held that a job candidate was discriminated against when a prospective employer insisted that she take a multiple choice psychometric test in the first round of its recruitment. The claimant has Asperger's syndrome. The employer knew about this and should, on the facts, have made reasonable adjustments to assist her.

In *Day v Health Education England and others* the Court of Appeal has held that it is possible for someone to be a worker of an end user organisation and to come under the extended definition of a worker of an introducer or agency and thus able to bring whistleblowing detriment claims against both organisations.

Finally, may I remind you of our forthcoming events:

Click any event title for further details.

Unemployment Law Update for Charities

• A full day conference, Leeds, 15th June 2017

In conjunction with ACAS

Simplifying TUPE in a day: Understand the rules and avoid the pitfalls

• A full day conference, Sheffield, 21st June 2017

Simplifying TUPE in a day: Understand the rules and avoid the pitfalls

• A full day conference, Newcastle upon Tyne, 28th June 2017

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1: Employer fined £40,000 for breaches of pension auto-enrolment duties

A high street shoe firm, Johnsons, was forced to pay a fine of £40,000 for continued non-compliance with its duty to auto-enrol staff in a pension.

The Pensions Regulator issued a compliance notice when the company failed to make a declaration of compliance five months after passing its staging date. As the company failed to respond to the compliance notice, an initial fixed fine of £400 was issued. Although Johnsons paid this fine, it still did not comply with its duties. The Pensions Regulator then issued an escalating penalty notice under which the fine increased by £2,500 per day until satisfactory evidence was provided that the declaration of compliance had been completed.

The Pensions Regulator finally issued County Court proceedings to recover the increasing fine. In order to avoid court proceedings, Johnsons eventually complied with its duties and paid the fine, which had increased to £40,000, along with court fees of £2,000.

The Executive Director of Automatic Enrolment for the Pensions Regulator said: "The failure by Johnsons to act, despite our repeated warnings, left it with a completely unnecessary bill that was more than 100 times the amount it was originally fined. The vast majority of employers meet their automatic enrolment responsibilities. We will use all the powers available to us against the minority who choose to ignore their duties. Our message is clear: fail to comply with the law and you may be fined. Fail to pay your fine and we may take you to court."

Employers can check their pension auto-enrolment duties on the Pensions Regulator Duties Checker. The Pensions Regulator report on this enforcement action can be read here.

2: Select Committee publishes report on gig economy

The Work and Pensions Select Committee published its report on 1 May on the effects of the so-called "gig economy" on the social and economic position of those working in it and on the welfare system.

The report states that many people who are labelled as self-employed by companies are in fact workers and that often the arrangement is designed simply to avoid the payment of employer's National Insurance contributions (NICs), auto-enrolment pension contributions and the apprenticeship levy.

Recommendations of the report include: raising NICs for the self-employed to match the level of employee NICs; encouraging the self-employed to make provision for their retirement; and making worker status the default position in employment law, so that employers have to bring evidence to prove that someone is self-employed. The equalisation of NICs for the self-employed may, of course, be difficult to achieve politically, given the negative reaction to the Government's Spring budget announcement and its subsequent u-turn on raising class 4 NICs.

This report is one of a number of current inquiries into the nature of work and the gig economy. Matthew Taylor's Independent Review of Employment Practices in the Modern Economy is expected to be published later this year and, subject to the outcome of the upcoming general election, to inform the government's industrial strategy. This review will consider the implications of new models of working on the rights and responsibilities of workers and on employer freedoms and obligations.

3: Employers' gender pay gap statistics can now be viewed online

A small number of employers have already published their gender pay gap statistics on the government's online portal. The portal allows employers to download the required information and allows the public access to that information. The webpage for each employer can include a link to the gender pay gap report on the employer's website where a narrative can be provided on the figures.

Statistics which must be reported include percentage figures for the gender pay gap and gender bonus gap and the proportion of men and women within each pay quartile.

Employers in the private and third sectors must publish their gender pay gap statistics by 4 April 2018. Employers in the public sector must publish their statistics by 30 March 2018.

4: Unlawful deduction from wages: a tribunal has jurisdiction even if the contract has to be interpreted to ascertain the amount properly payable

In our April employment law bulletin we explained that, in *Agarwal v Cardiff University* UKEAT/0210/16/RN, the EAT took the view that, in a claim under Part II of the Employment Rights Act 1996 for unauthorised deductions from wages, an employment tribunal could not consider the claim if the employee's entitlement were disputed and required the construction by the tribunal of the terms of the employment contract. If the terms of the employee's entitlement are in dispute, said the EAT, the employee must pursue an alternative remedy, by way of a contractual claim before an employment tribunal (if the employment has ended) or by a contract claim in the civil courts.

In ***Weatherilt v Cathay Pacific Airways Limited*** another division of the EAT has declined to follow this decision. Weatherilt worked for Cathay Pacific as a pilot. His terms and conditions included, in addition to his basic salary of £130,000 per annum, entitlements to Excess Flying Pay ("EFP") and Hourly Duty Pay ("HDP"). On 1st and 2nd July 2015 he was rostered to undertake flights. Sometime after he was rostered he became sick and unfit for duty. He was paid his basic salary and, also, since he was on duty at the time, his overnight allowances. He said that his sick pay should additionally have included elements of EFP and HDP. He claimed that by withholding these elements of pay Cathay Pacific had made unlawful deductions from wages. The answer to this question depended on the meaning to be attributed to provisions in the Cathay Pacific's Aircrew Conditions of Service (2008).

The employment tribunal dismissed his claim. He appealed to the EAT. On appeal Cathay Pacific raised a new point, in the light of the decision in *Agarwal*. Relying on *Agarwal*, Cathay Pacific argued that in any event Part II of the ERA 1996 did not permit the tribunal to interpret a written contract of employment or imply terms into it.

His Honour Judge Richardson however took the view that there were authorities preceding *Agarwal* which had not been put to the EAT in *Agarwal* and which supported the view that an employment tribunal could construe a contract, and also consider whether there were any implied terms in the contract, in order to determine a deduction from wages claim. These authorities, which included the Court of Appeal decision in *Camden Primary Care Trust v Atchoe* [2007] EWCA Civ 714 and the House of Lords' decision in *Delaney v Staples* [1991] ICR 331 were binding authority to this effect. *Agarwal* was therefore not to be followed, and the case of *Southern Cross Healthcare*

Limited v Perkins [2011] ICR 285, on which the EAT had relied in *Agarwal*, did not discuss or refer to Part II of the Employment Rights Act 1996: it was concerned with very different provisions in Part I of the Act. The EAT in *Weatherilt* accepted there was a degree of tension between the approach of the Court of Appeal in Southern Cross, concerned with Part I and the approach in *Delaney and Atchoe*, concerned with Part II, but in the opinion of the EAT this could be explained by the different origins, purpose and terms of the statutory provisions.

This enabled the tribunal (and then the EAT) to construe Cathay Pacific's Aircrew Conditions of Service but the EAT held that the EFP and HDP did not accrue in respect of un-rostered sickness and Mr Weatherilt's claim on the facts did not succeed.

5: Sleep-in shifts and the National Minimum Wage

The EAT has recently clarified the correct approach to be taken by an employment tribunal when considering whether hours spent on a sleep-in shift are "time work" for the purposes of calculating the National Minimum Wage.

As readers of this Bulletin will be aware, recent case law has suggested that a worker will be found to be actually working during a sleep-in shift if they are legally obliged to be on the premises throughout the night and if it would be a disciplinary matter if the worker were to leave the premises during the shift. On the other hand, workers who are not obliged to remain on the premises throughout the night and who are provided simply with a place to sleep may be found not to be actually working but to be merely available for work.

In ***Focus Care Agency Ltd v Roberts*** the EAT considered three conjoined cases. Its judgment explains that tribunals should apply a "multifactorial evaluation" considering the facts of the each case rather than there being one single question which determines whether a sleep-in shift is "time work". The EAT stated that the tribunal should accord weight to the different factors depending on the facts of the case. The EAT set out the relevant factors to be considered by a tribunal as follows:

1. The employer's purpose in engaging the worker. For example, if the employer is subject to regulatory or contractual requirements to have someone present during the night.
2. The extent to which the worker is required to be present and at the disposal of the employer: if, for example, if the worker would be disciplined if found to have left the premises during the night.
3. The degree of responsibility undertaken by the worker.
4. The immediacy of the requirement to provide services if an untoward event or emergency arises: if, for example, the worker is the person who has to decide whether to take action during the night.

The EAT's judgment reiterates previous case law and brings clarity to the factors which a tribunal needs take into consideration. Each case will, however, turn on its facts. It is not possible, for example, to state that a worker will always be actually working if they are required to be on the premises throughout the night. The nature of the work, the contract under which they are working, the obligations on the employer and the responsibility on the worker will all need to be assessed by a tribunal before determining the question.

6: Multiple choice recruitment test discriminated against candidate with Asperger's Syndrome

In ***Government Legal Service v Brookes***, the EAT held that a job candidate was discriminated against when the prospective employer insisted that she take a multiple choice psychometric test in the first round of recruitment.

Ms Brookes applied to join the Government Legal Service (GLS) as a trainee solicitor. She informed the GLS one month before the test that she has Asperger's syndrome and she requested that she be allowed to provide short narrative answers rather than choosing from a range of answers. The GLS refused. Ms Brookes took the test and failed to reach the pass mark.

Ms Brookes brought claims of indirect discrimination on the ground of disability, discrimination arising from disability and a failure to make reasonable adjustments. The GLS accepted that Ms Brookes is disabled and that it knew of her disability at the time of its refusal.

Ms Brookes' claims were successful at first instance despite the fact that the tribunal found that medical evidence was "inconclusive" on the question of whether Ms Brookes was disadvantaged by the multiple choice format because of her condition. The tribunal took into account that medical experts for each side agreed that the claimant fitted the profile of someone with Asperger's who was likely to be disadvantaged in the test because of a lack of social imagination. She was awarded £860. The GLS was ordered to apologise to her. The tribunal also made a recommendation that the GLS review its recruitment practices and consider a more flexible approach to psychometric testing.

The EAT agreed. It held that the tribunal was entitled to conclude from the evidence that, on the balance of probabilities, Ms Brookes had failed the test because of the disadvantage posed by the format of the test to someone suffering from her condition. The EAT was not convinced by the GLS's argument that the format of the test was inextricably linked to the core competency it was designed to test. It held that any inconvenience for the employer in making adjustments for Ms Brookes was outweighed by the discriminatory impact on the claimant.

Employers should be aware that discrimination claims can be brought by prospective employees. Reasonable steps should be taken to make both recruitment adverts and processes non-discriminatory. Employers should carefully consider whether particular candidates' requests for adjustments can reasonably be accommodated.

7: Whistleblowing claims may be brought against both an introducer organisation and an end-user

In ***Day v Health Education England and others,*** the Court of Appeal held that it is possible for someone to be a worker of an end-user organisation and to come under the extended definition of a worker of an introducer or agency and so to be able to bring whistleblowing detriment claims against both organisations.

Mr Day was a junior doctor. Through an application to the predecessor of Health Education England (HEE), he was placed in a training post with Lewisham NHS Trust. During his training contract, he complained to the NHS Trust and to HEE about serious understaffing at the hospital which he alleged was putting patients at risk.

Mr Day subsequently brought a tribunal claim against both the NHS Trust and HEE, alleging that he had been subjected to detriments on the ground that he had made protected disclosures. He argued that, while he was not a worker for HEE under the normal definition, he came under the extended definition of worker set out in the whistleblowing protection legislation in relation to HEE because HEE had introduced or supplied him to work for the NHS Trust and his terms of engagement were "substantially determined" by both the NHS Trust and HEE.

In a preliminary hearing, an employment tribunal held that Mr Day's terms were substantially determined by the NHS Trust and not by HEE. The EAT agreed, stating that Mr Day could not, in any event, come under the extended definition of worker because he was a worker (under the normal definition) for the NHS Trust.

The Court of Appeal did not agree and remitted the case to a freshly constituted tribunal. It pointed out that the legislation could not have been intended to exclude someone who is a worker for one organisation from having protection from detriment by another organisation in relation to which they come under the extended definition of worker. It gave the example of someone who works for an agency in the day time and also for a restaurant in the evenings. Just because she is a worker for the restaurant, she should still be protected against detriment by the agency if she blows the whistle. The Court of Appeal held that words should be added to the legislation in order to maximise whistleblowing protections where two organisations are involved.

Giving the leading judgment, Lord Justice Elias also held that the tribunal took the wrong approach by seeking to identify which of the two organisations (the NHS Trust or HEE) had the greater role in determining Mr Days' terms of engagement. He clarified that the tribunal should rather examine whether both organisations acting together substantially determine the terms, or whether, on the other hand, the individual substantially determines his own terms.

Organisations which supply individuals to an end-user organisation should be aware that the individual may be able to bring a whistleblowing claim against both the introducer and the end-user. If the introducer and the end-user, acting jointly, determine the terms and the individual does not, it is likely that whistleblowing protection will apply.

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