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Newsletter November 2016

UK: Employment Update

Welcome to the November Employment Update. This month we consider further (limited) developments in the world of holiday pay calculations, the sanctions that are potentially available against LLP partners who attempt to poach employees with a view to setting up in competition, a new judicial assessment process launched by the President of the Employment Tribunals, who are appropriate comparators for the purpose of an equal pay claim and lastly an inquiry into the future world of work and rights of atypical employees fall at an opportune moment in light of the Tribunal decision that Uber drivers are "workers". It's been a busy month…

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Holiday pay: clarity and yet…

It will not have escaped the attention of most employers that the question of what an employer should include in its holiday pay calculations has been the subject of considerable judicial scrutiny as a result of the ECJ's decision in *Lock v British Gas* that the Working Time Directive requires that workers should receive 'normal remuneration' during holiday and this includes commission payments. Mr Lock was a salesman and the bulk of his pay was derived from commission which he did not have the opportunity to earn whilst on holiday.

After its reference to the ECJ, Mr Lock's case returned to the Employment Tribunal and subsequently to the Employment Appeal Tribunal. Each held that it was possible to interpret the Working Time Regulations ("WTR") in a way which conforms to the ECJ's interpretation of the Directive by reading additional words into the WTR.

British Gas appealed and the Court of Appeal has now confirmed that the Employment Tribunal can read words into the WTR to give effect to the ECJ's decision that holiday pay should be calculated by reference to the worker's normal remuneration which we know can include: guaranteed overtime pay, non guaranteed overtime pay, taxable elements of travel time allowances, commission payments linked to the performance of tasks under the employment contract and remuneration relating to the professional and personal status of the worker.

Unfortunately, the Court of Appeal declined to clarify a number of other areas of uncertainty in relation to holiday pay:

in the case of bankers (and others) who receive a results based bonus annually, should their holiday pay be referable to the bonus pay?

how should holiday pay be calculated in the case of workers who are entitled to commission but only at the point in the year at which a particular turnover, profit level or other threshold trigger is attained and so may not receive any commission for several months in the year?

does voluntary overtime pay have to be included in holiday pay calculations if it is worked regularly?

do team commission payments have to be included in holiday pay calculations?

Key issues

What is the calculation reference period for working out holiday pay (is it the 12 week period immediately prior to the holiday being taken or can another reference period be used such as 12 months?)

The court declined to offer any guidance on other types of case whilst acknowledging that other types of case will raise other questions; undoubtedly true but not very helpful for employers wrestling with these issues. However, apparently British Gas intends to apply for leave to appeal to the Supreme Court and here's hoping that they will take the opportunity to provide greater clarity for employers on this issue.

[British Gas Trading Company v Lock]

LLP's forfeiture of profit share for breach of fiduciary duties

In what appears to be the first reported case on the issue, the High Court was asked to consider whether the profit share of an LLP member can be subject to the principle of forfeiture on the basis of the partner's breach of fiduciary duties.

H was a founding member of MAM LLP. The LLP Deed provided for profits to be shared amongst class A members equally, albeit that executive members received twice as much as non-executive members.

After H retired from MAM LLP, arbitration proceedings were initiated against him. The arbitrator held that H had breached his contractual and fiduciary duties that he had owed to MAM LLP by discussing with four employees the possibility of starting a new business and producing a business plan outlining his thoughts. The arbitrator concluded that as a result of this, MAM LLP had lost a substantial chance of retaining three key individuals.

The arbitrator held that it would be proportionate and equitable for H to forfeit and return to MAM LLP 50% of the profit share payments paid to him during the period of his breaches (£10,389,957) as this was in substance remuneration for the performance of H's executive duties. The arbitrator took the view that the reason why executive members received twice as much profit share as non-executive members was because they were being remunerated for the performance of their executive duties.

The High Court upheld the arbitrator's analysis that the profit share of a partner or LLP member can potentially be subject to forfeiture on the grounds that the partner/LLP member is a fiduciary.

The High Court held that there was no good reason to distinguish between profit share and other forms of remuneration where the profit share can be identified as a reward for undertaking specific duties as opposed to reflecting a pure economic interest in the firm.

It also held that the fact that the LLP Deed did not contain a forfeiture provision did not prevent the forfeiture principle applying but it considered that the forfeiture principle could be excluded by contract.

Regardless of whether an LLP agreement provides for disputes to be resolved by arbitration, it now seems clear that forfeiture of profits is potentially available as a remedy in the event that an LLP member is found to be in breach of his fiduciary obligations for example by preparing to compete, exploiting business opportunities for his/her own benefit and so on.

LLP's may wish to review the profit share language in their LLP agreements to ensure that it provides scope for the argument that it is a reward for services and therefore potentially liable to forfeiture if this is considered desirable. An express carve out of the forfeiture principle may also be considered desirable.

[Hosking v Marathon Asset Management LLP]

New judicial assessment process in the Employment Tribunal

The President of the Employment Tribunals has published new Presidential Guidance establishing a new judicial assessment procedure in the Employment Tribunal.

This new judicial assessment process is intended to provide a confidential and impartial early assessment of the strengths, weaknesses and risks of the parties' respective claims, allegations and contentions on liability and remedy.

The key features of the judicial assessment process are:

- it is not mandatory for the tribunal to offer it but if they do, all parties must freely consent;
- it is strictly confidential and non-attributable, however any judicial assessment made may be used in 'without prejudice' discussions or in judicial mediation;
- its purpose is to encourage the parties to use the services of ACAS, judicial or other mediation or other means of resolving their disputes by agreement;
- it is to be generally offered at the first case management hearing after the issues have been clarified and formal case management orders have been made;
- the assessment is made on the basis of the issues as clarified in the case management hearing. No evidence is heard;
- the factors that may render a case unsuitable for judicial assessment are: multiple claimants who do not all consent to judicial assessment, the insolvency of one or more of the parties or if High Court or other proceedings exist or are intimated;

- the Employment Judge that will conduct the judicial assessment will normally not be involved in the final hearing on liability;
- the parties are encouraged, but not obliged, to inform the Tribunal in advance of the case management hearing that they wish to have judicial assessment.

In terms of clarity of process, the Guidance does not indicate what happens in the event of non-compliance by one party; it is quite conceivable that a litigant in person may refer to something said by an Employment Judge during the judicial assessment in the substantive hearing; in such circumstance, what consequences will flow? It also unclear whether the judicial assessment can be referred to in order to support an application for costs albeit current indications suggest not.

The introduction of judicial assessment is welcome; only time will tell however whether there is take up by the parties and whether parties can be persuaded to recognize they are being unreasonable and/or unrealistic providing a potential platform for settlement.

The Presidential Guidance can be found here.

Equal pay claim: Is there a common source of terms and conditions?

Seven thousand (mainly female) claimants have brought equal pay claims against Asda ("A"). The foundation of their claims is that they were entitled to equal pay with comparators in A's distribution depots, on the grounds that their work is of equal value to that of the predominantly male comparators who are paid substantially more.

A has its own distribution operation but its stores and distribution centres are not located at the same place.

A argued at a preliminary hearing that the claims should be struck out on the grounds that the depot workers could not be comparators of the store workers for the purposes of an equal pay claim.

Under the Equality Act 2010, an equal pay comparison is only valid between the claimant and a chosen comparator if they are both employed by the same employer and work at the same establishment or if they are employed by the same employer and work at different establishments but "common terms apply" generally or between the claimant and comparator. In addition, it is not enough that the claimant and the proposed comparator are employed by a single employer, there must also be a single source i.e. a body responsible for the inequality of pay which could remedy the unequal treatment.

A argued that there were different employment regimes in the stores and depot centres and therefore no "common terms" were applicable to employees at different locations.

The Employment Tribunal found in favour of the claimants' argument that store workers employment terms were broadly similar to the depot workers (particularly given that they were both paid hourly and there were strong similarities between their respective handbooks). The Tribunal concluded that the differences between the terms of employment were not significant.

Perhaps of more significance was the Tribunal's conclusion that there was a single source of the terms and conditions; the executive board of A and the members of the subcommittees of that board exercised budgetary control and oversight over both retail and distribution and were therefore a single source. Accordingly the Tribunal held that the claimants had satisfied the Equality Act test for comparison.

The case will now proceed to consider whether or not work done by the store workers is of equal value to the work done by the depot distribution workers subject to any appeal A makes in relation to this preliminary decision.

The Tribunal's approach to the issue of whether terms and conditions have a common source highlights the potential exposure of employers more generally as in many cases separate business divisions will operate under the mandate of board oversight.

It is anticipated that the new gender pay gap reporting regime will come into force in April 2017. This is likely to focus the minds of some employees who may be prompted to scrutinise their rates of pay and compare them to colleagues whose work they regard as of equal value to their own.

Employers should also recall that any term in an employment contract or employee handbook prohibiting the disclosure of the employee's rate of pay is unenforceable if the disclosure is made for the purposes of assessing if there has been any pay inequality. In addition, subjecting an employee to detrimental treatment because they have disclosed their pay details or sought those of another employee for the purposes of exploring if there has been any pay inequality will constitute an act of victimisation under the Equality Act.

[*Asda Stores Ltd v Brierley & Others*]

Gig economy inquiry

The recent flurry of newspaper headlines on the working conditions of gig economy workers has prompted the Business, Energy and Industrial Strategy Committee to launch an inquiry into "the future world of work and rights of employees".

The inquiry poses a number of questions to which written submissions are invited. The first question is whether the term "worker" is defined sufficiently clearly in law at present. Linked to this is the question of what should be the status and

rights of agency workers, casual workers and self employed for the purposes of tax, benefits and employment law?

It has been clear for some time that greater clarity and certainty is needed around the 'employment' status of some atypical workers; individuals may be workers with some statutory employment rights such as the right to paid holiday but be treated as self employed for tax purposes; in other scenarios the individual may be regarded as an employee for statutory employment protection purposes but not for tax purposes. The case law is complex and the employment and tax tribunals do not always reach the same conclusion on employment status. This is clearly unsatisfactory all round and further clarity would be welcome.

The full inquiry terms of reference can be found here: Future world of work inquiry and written representations can be submitted until 19 December.

Uber drivers: Workers not employees

Last week the Employment Tribunal held that contrary to the position of Uber two of its drivers are "workers" and therefore entitled to paid holiday and rest breaks under the Working Time Regulations, have the right to be paid the national minimum wage and the right not to be subjected to detrimental treatment for blowing the whistle.

Uber have confirmed that this decision will be appealed; if so we can expect further guidance from the Employment Appeal Tribunal on the status of such atypical "gig" economy workers.

In the meantime, companies whose "workforce" is comprised of "gig" economy workers who are treated as self employed and outside the statutory regime applicable to workers could have a latent exposure to holiday pay and national minimum wage claims depending on the precise factual matrix.

Companies should be cautious about taking steps to dissuade individuals from pursuing claims in the Employment Tribunal based on "worker" status with the threat of reducing or removing further work opportunities. In certain cases such as dissuasive action also provides a platform for further claims.

[*Aslam v Uber BV and others*]

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