SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

HIGH COURT PREVENTS EMPLOYER FROM DISMISSING AND REHIRING STAFF

Summary: The High Court granted an injunction to prevent an employer from dismissing employees and re-engaging them on new terms. The employer was attempting to remove a collectively bargained contractual entitlement to enhanced pay that had been stated to be permanent when it was introduced. The Court decided that it was appropriate to imply a contractual term preventing the employer from exercising its right to terminate on notice for the purpose of removing or diminishing entitlement to the enhanced pay (*USDAW v Tesco Stores Ltd*).

Key practice point: This decision could affect employers' ability to make changes to terms and conditions if they are planning to adopt a "fire and rehire" approach, depending on what employees were told when the terms were introduced. The Court did emphasise, however, that this was an "extreme" case where the unambiguous language in the contractual term conflicted with the employer's express right to dismiss. It is also a reminder of the dangers inherent in making promises about maintaining benefits in the future.

Background: Although in principle employers are free to exercise a power in the employment contract to dismiss employees on notice, in some cases the courts have implied a term into the employment contract restricting the employer's power. In *Aspden v Webbs Poultry and Meat Group (Holdings) Ltd*, the High Court prevented an employer from dismissing an employee in order to remove entitlement to permanent health insurance, the principle being that a contract should not be construed to allow an employer to exercise a power in circumstances in which to do so would deny the very benefit which the contract envisages will be paid.

Facts: During a reorganisation of distribution centres, the employer agreed arrangements for "Retained Pay" to protect the difference in value between old and new contracts, as an alternative to redundancy payments and as an incentive to relocate. In communications to staff, the employer made clear that an individual employee's entitlement to Retained Pay would remain for as long as they were employed in their current role, that it could not be negotiated away, and that it would increase each year in line with any annual pay rise. A collective agreement with USDAW, the recognised trade union, incorporated into employees' contracts, stated that Retained Pay would remain a "permanent feature" of an individual's contractual entitlement, and could only be changed through mutual consent, on promotion, or if an employee requested a change to working patterns (when it would be adjusted).

In 2021, the employer announced its intention to remove Retained Pay. It offered a lump sum payment of 18 months' Retained Pay in advance in return for giving up the entitlement and told employees that if they did not accept they would be dismissed and re-engaged on new terms excluding Retained Pay. USDAW applied to the High Court for a declaration that employees' contracts were subject to an implied term preventing the employer from exercising its contractual right to terminate on notice and an injunction preventing the employer from terminating the contracts.

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Decision: The High Court agreed that there should be an implied term that Tesco would not exercise its right to give notice in order to withdraw or diminish the right to Retained Pay and issued an injunction preventing it from giving employees notice in order to do so. The High Court found that the clear intention was that the entitlement to Retained Pay would be permanent for as long as employees were employed in their particular role, save in the circumstances expressly set out. Applying the principle in *Aspden*, the Court decided that, on the "extreme and unusual" circumstances in which the contracts had been entered into, a term should be implied limiting the employer's right to terminate. This was on the basis of "business efficacy" – one of the limited circumstances in which terms can be implied into employment contracts.

Analysis/commentary: The Court made clear that, as recognised in cases decided after *Aspden*, the employer could still exercise its power to terminate an employee's contract for "good cause", even though the practical effect would be to bring the entitlement to Retained Pay to an end. An employee who, for example, was genuinely redundant, or had committed an act of gross misconduct, might be dismissed for that reason, although the Court commented that the genuineness of the reason for dismissal would undoubtedly be scrutinised in any subsequent litigation.

COURT OF APPEAL: WORKER HAD RIGHT TO PAYMENT FOR TAKEN BUT UNPAID LEAVE

Summary: The Court of Appeal decided that a worker had the right to carry forward annual leave, which he had taken but had not been paid for, and to be paid for it at the end of his employment (*Smith v Pimlico Plumbers Ltd*).

Key practice point: The decision is significant for employers of workers who have been denied the right to paid annual leave, usually on the basis that they are not workers. Workers can now carry over unpaid leave that is taken as well as unpaid leave that is not taken, for the whole period of their employment, and to claim for payment in lieu on termination. Employers should ensure they inform workers of their right, and the need, to take annual leave during the relevant holiday year, as well as making it clear that they will lose any outstanding entitlement (and any corresponding payment in lieu on termination) at the end of the holiday year or any authorised carry-over period. The decision applies to the four weeks' leave under EU law, not to the additional 1.6 weeks of statutory leave under the Working Time Regulations.

Background: Under the Working Time Regulations, workers lose the right to take accrued annual leave that has not been taken in the holiday year. (There are exceptions, notably for sickness absence.) In *King v Sash Windows Workshop*, the Court of Justice of the EU (CJEU) found that a worker who was wrongly classified as self-employed, and denied the right to paid annual leave as a result, could bring a claim for holiday pay for the whole period of his employment.

Facts: In a case that went all the way to the Supreme Court, S was found to be a worker and therefore entitled to receive paid holiday. S then claimed unpaid holiday pay that had accrued throughout his employment. Whilst he had been allowed to take periods of holiday, they had not been paid as required by the Working Time Regulations. The Employment Tribunal and EAT rejected his claim as it had not been brought within three months of the date by which the leave should have been taken and the carry forward allowed by *King* applied only in respect of untaken leave.

Decision: The Court of Appeal allowed S's appeal, deciding that the principles established in *King* applied. The Working Time Regulations should be read to mean that where an employer fails to recognise a worker's right to paid annual leave and cannot show that it allowed that leave to be taken, the worker is entitled to carry forward any leave which is taken but unpaid, and/or which is not taken, into subsequent leave years.

The Court found that, although the claim in *King* was for untaken leave, the CJEU's decision rested on broader principles. If a worker takes unpaid leave when the employer disputes the right and refuses to pay for the leave, the employer is making the right to paid annual leave subject to pre-conditions – something that the CJEU said was not permitted. Any practice that might potentially deter a worker from taking leave is incompatible with the purpose of the right to paid annual leave. Although legislation can provide for the loss of a right, in order to lose it the worker must actually have had the opportunity to exercise the right. Therefore, a worker can only lose the right to paid annual leave at the end of each leave year if the employer can show it gave the worker the opportunity to take paid annual leave, encouraged the worker to take it and informed the worker that the right would be lost at the end of the year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of untaken leave. A claim for payment must be made within three months of the termination date.

As this was a claim under the Working Time Regulations, the two-year backstop for claims for unlawful deductions from wages did not apply. (From July 2015, a two-year backstop period was introduced for most unlawful deductions from wages claims, which means that tribunals cannot consider deductions where the relevant date of payment was more than two years before the presentation of the complaint.) However, the Court of Appeal made some non-binding comments about unlawful deductions claims, casting further doubt on the *Bear Scotland* case. That case had decided that a "series" of deductions, for the purposes of the time limits for unauthorised deductions from wages claims, was broken by a gap of three months or more between underpayments. The Court of Appeal's view was that a three-month gap does not automatically break the series; whether there is a series should depend on whether there is a sufficient link between deductions.

Analysis/commentary: Brexit has no effect on the issues in this case. The litigation started before 31 December 2020 and (more importantly, for future claims), the duty to interpret national law so far as possible to achieve the result required by the Working Time Directive continues to apply to UK legislation (the Working Time Regulations) passed before then. As yet, there is no indication that the Government intends to legislate to change the position.

CAB DRIVER USING APP WAS NOT A WORKER

Summary: The Employment Appeal Tribunal (EAT) confirmed that a cab driver working through an App was not a worker of the App operator. The operator was a client or customer of the driver's business and the driver did not therefore meet the definition of "worker" in Section 230 of the Employment Rights Act 1996. The driver could provide his services as little or often as he wanted, could dictate the timing of those services, was not subject to control by the operator and did a relatively small proportion of work through the App compared to work he did on his own account (*Johnson v Transopco UK Ltd*).

Key practice point: Crucial to the EAT's decision that the claimant did not have worker status was the finding that, despite the imbalance in bargaining power between the parties, this was not an economically dependent relationship. If, as is typical in gig economy cases, the services provided by the workers are tightly defined and controlled by the "employer", the reality of the situation is more likely to point to worker status. That was the position in the *Uber* case last year, where the Supreme Court said that the determination of worker status should take into account the purpose of the legislation - to give protection to vulnerable individuals in a weak bargaining position (see our Employment Bulletin dated March 2021).

Background: The definition of "worker" in Section 230 of the Employment Rights Act 1996 says that if an individual works for someone else on the basis that the other party is a customer or client of the individual's business or profession, the individual is not a worker.

Facts: Transopco operated an App which connected black cab drivers and passengers. J used the App for about nine months. Throughout this period, he continued to source work independently of the App as a self-employed black cab driver regulated by Transport for London (TFL). Even when the App was switched on, he was under no obligation to accept any jobs and was free to market his services and pick up passengers in preference to jobs on the App. The Employment Tribunal found that J was not a worker of the App operator.

Decision: The EAT confirmed the Tribunal's decision. The Tribunal had been entitled to conclude that J and the App operator contracted with each other as two independent businesses and that the operator was a customer of J's business, in accordance with Section 230. Although the operator was clearly more powerful (in scale and financial terms) than J, this was not material when weighed against other factors.

The conclusion that J's work for the operator formed a part of his own business and it was not a dependent work relationship was evidenced by the proportion of the time spent by J and income earned via the App (less than 15% of his overall income from cab driving) and his rates of declining jobs offered and cancelling jobs accepted. The EAT noted that the fact that some incentives and risk-sharing were offered by the operator to reflect the risks associated with using its platform, or generally to enhance its financial attractiveness as an option, did not automatically point to worker status.

The EAT pointed out that the fact that a claimant runs their own business will not necessarily prevent worker status, as the "employer" has to be a client or customer of that business to meet the Section 230 exception. In this case,

however, the Tribunal had concluded that the essence of J's business activity was picking up passengers and driving them to where they wanted to go, however those passengers were obtained. Jobs obtained from the App involved "materially the same" activities as J's own business, even if using the App did not fall within the TFL regulations.

Analysis/commentary: The EAT noted that the nature of the worker status test, containing an element of factual subordination or dependency, means that different outcomes in different cases involving the same App could not be ruled out. The (small) amount of the claimant's total business activities that he carried out for the App operator was relevant.

EMPLOYER NOT VICARIOUSLY LIABLE FOR INJURY CAUSED BY WORKPLACE PRANK

Summary: The Court of Appeal confirmed that an employer was not vicariously liable for the injury caused to an external contractor by one of its employees as a consequence of a practical joke. There was an insufficient connection between the employer/employee relationship and the employee's actions for it to be reasonable for the employer to be vicariously responsible (*Chell v Tarmac Cement and Lime Ltd*).

Key practice point: There is a well-established two-stage test for employers' vicarious liability for the actions of their personnel: (1) that there was a sufficient relationship (employment or a relationship "akin to employment") between the employer and the person who committed the negligent act; and (2) that the act was sufficiently closely connected with that relationship. Both limbs are factual tests.

Facts: C was employed by Roltech and his services were contracted out to Tarmac for work at a site controlled and operated by Tarmac. Tarmac employed its own fitters to work alongside those supplied by Roltech. There were tensions between the two sets of fitters. As a prank, H, one of the Tarmac fitters, used a hammer to hit a pellet target, causing a loud explosion as a result of which a Roltech fitter, C, suffered injuries. C brought negligence claims against Tarmac directly and as vicariously liable for H's actions.

Decision: The Court of Appeal confirmed the decision of the County Court rejecting the claims. The facts demonstrated that there was not a sufficiently close connection between the act which caused the injury and H's work to make it fair, just and reasonable to impose vicarious liability. The Court of Appeal's reasons included:

- The pellet target, the cause of the injuries, was not Tarmac's equipment. It was no part of H's work to use pellet targets.
- H did not have a supervisory role in respect of the work that C was carrying out and was not working on the task on which C was engaged at the time.
- The risk created was not inherent in the business. The business provided the background and context for the risk but that of itself was insufficient to create the necessary close connection, particularly in the absence of other factors.

The Court also confirmed that Tarmac was not liable directly to C because of a breach of its duty to take steps to prevent a foreseeable risk of injury. C had argued that the tension between the two sets of employees made the injury reasonably foreseeable. The Court found that those tensions did not support any suggestion of threats of violence and there was no indication that H might behave in the way he did. In addition, even if a foreseeable risk of injury could be established, there was no breach by Tarmac. It would be unreasonable to expect an employer to have in place a system to ensure that employees did not engage in horseplay. It was sufficient that the site rules stated, "no one shall intentionally or recklessly misuse any equipment" - a warning against exactly what happened.

Analysis/commentary: A similar approach was taken in another recent case, *Isma Ali v Luton Borough Council*, where a Council was not vicariously liable for the actions of an employee who had accessed a client's files on the Council's IT system and disclosed data to the client's husband, with whom she was having a relationship. The Court held that the employee's conduct was not so closely connected with acts that the employee was authorised to do that it should be regarded as done in the ordinary course of employment. While access to the data was by way of the employee's role at the Council, accessing these particular records was not part of her work. In addition, she was obliged to tell her line manager if she had a personal connection to any clients on the system. If she had followed the correct process, her access to those files would then have been restricted.

HORIZON SCANNING

What key developments in employment should be on your radar?

4 April 2022	Deadline for gender pay gap reporting
2022	Legislation expected to provide for: • Entitlement to one week's unpaid leave for employees who are carers • Extension of redundancy protections for mothers • Neonatal leave and pay • Extension of permissible break in continuous service from one week to one month • Right to request a more predictable contract • Single enforcement body for employment rights • Tips to be retained in full by workers

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status:** *Angard Staffing Solutions Ltd v Kocur* (Court of Appeal: agency workers' rights); *Nursing and Midwifery Council v Somerville* (Court of Appeal: whether an irreducible minimum of obligation is a prerequisite for worker status); *HMRC v Atholl House* (Court of Appeal: whether the IR35 rules applied to a presenter providing services through a personal services company)
- **Employment contracts:** *AMDOCS Systems Group v Langton* (Court of Appeal: whether employer was obliged to pay PHI escalator payments no longer covered by its insurance policy)
- **Discrimination / equal pay:** *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010)
- **Trade unions:** *Mercer v Alternative Future Group* (Court of Appeal: whether protection from detriment for trade union activities extends to participation in industrial action)
- **Unfair dismissal:** *Rodgers v Leeds Laser Cutting Ltd* (EAT: whether, for automatic dismissal for a health and safety reason, the serious and imminent danger must be directly linked to working conditions)
- **Whistleblowing:** *Kong v Gulf International Bank* (Court of Appeal: whether dismissal for questioning colleague's competence on the subject matter of a protected disclosure was automatically unfair).

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