SLAUGHTER AND MAY/

NEWSLETTER

JULY 2022

EMPLOYMENT BULLETIN

QUICK LINKS

RIGHT OF SUBSTITUTION DID NOT PREVENT WORKER STATUS

Summary: The Employment Appeal Tribunal (EAT) held that a dentist working for a dental practice was a worker for the purposes of bringing employment claims. A right to appoint a locum was not an unfettered right of substitution and therefore did not prevent there being the personal service necessary to fall within the worker definition (*Sejpal v Rodericks Dental Ltd*).

Key practice point: It is now clear that, after last year's Supreme Court decision in *Uber*, the determination of worker status is largely a question of interpretation of the definition in Section 230 of the Employment Rights Act 1996; essentially, whether the work was carried out under a contract to perform services personally. The correct approach is to ascertain the true nature of the agreement and apply the statutory test in accordance with its purpose - to protect the party in the weaker bargaining position. Only a genuine and unfettered right of substitution is likely to prevent a finding of worker status. This decision shows that the *Uber* approach is applicable to all worker status cases, not just those involving "gig economy" workers.

Facts: The claimant worked as a dentist at a dental practice under a contract which provided that if she failed to use the practice facilities for any reason for a continuous period of more than 14 days, she had to arrange a locum, acceptable to the NHS Trust and to the practice. When the practice closed, she brought claims to employment protection rights that depended on her having "worker" status, defined in Section 230 as work under a contract to perform work or services personally for an employer who is neither a customer nor a client. The Employment Tribunal decided that she was not a worker for the purposes of Section 230 because she had a right of substitution and therefore the requirement for personal service was not satisfied.

Decision: The claimant's appeal succeeded. The EAT found that there was a contract between the claimant and the practice and a requirement for personal service, as specified by Section 230. She was not entitled to provide a locum until she had been absent for 14 days and the contract contained an express requirement that a replacement had to be acceptable to the practice. The fact that elements of the agreement resulted from regulatory requirements did not prevent them from being taken into account in considering whether there was an unfettered right of substitution. The Tribunal accepted that she had never in fact provided a locum.

The EAT also criticised the Tribunal's conclusion that the wording of the contract should be given primacy unless it was a sham. According to the Supreme Court in *Uber*, the correct approach is to ascertain the true nature of the agreement and apply the statutory test in accordance with its purpose - to give protection to vulnerable individuals in a weak bargaining position. (Please see our Employment Bulletin March 2021 for details of the *Uber* decision).

However, the Tribunal had failed to assess whether the practice was a client or customer of a profession or business carried on by the claimant, which would exclude worker status.

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This question had to be answered by a different Tribunal before a decision on worker status could be made.

Analysis/commentary: Despite a number of recent cases, the issue of what is meant by an "unfettered" right of substitution has not been resolved. In the *Deliveroo* courier case, riders who had a right to send any other individuals to take their place were found not to be workers (for trade union recognition purposes). By contrast, in a more recent case, *Stuart Delivery Ltd v Augustine*, the Court of Appeal decided that a courier's limited right to notify other couriers who were already working for the organisation that he was prepared to release a slot was not a sufficient right of substitution to preclude worker status (see our Employment Bulletin November 2021).

However, these cases on substitution rights may no longer be as helpful if, as the EAT in this case suggested, *Uber* means that, despite there being a contractual term providing an unfettered right of substitution, the predominant purpose of the agreement may still be personal service. The EAT went further and suggested that personal service need not even be the predominant purpose of the agreement, if the true agreement is for the provision of any personal service.

EMPLOYMENT TRIBUNAL DECIDED THAT SYMPTOMS OF LONG COVID WERE A DISABILITY

Summary: A Scottish Employment Tribunal decided that an employee suffering from the symptoms of long Covid had a disability for the purposes of the Equality Act 2010 and could therefore bring disability discrimination claims. Although the impact varied over time, overall there was a substantial long-term adverse effect on the employee's ability to undertake day-to-day activities (*Burke v Turning Point Scotland*).

Key practice point: This was not a decision of the Employment Appeal Tribunal, so it is not binding on other employment tribunals. However, it illustrates that, although long Covid is not automatically deemed to meet the disability definition, and each case will depend on its facts (and the particular symptoms), the long-term effects of the condition are likely to mean it will constitute a disability. Employers should, therefore, take a cautious approach in sickness management procedures and consider whether reasonable adjustments may be appropriate. It is also worth noting that, for the purposes of the definition of disability, it is well established that there is no need for a formal medical diagnosis to identify the existence of an impairment.

Background: Section 6 of the Equality Act 2010 defines disability as a physical or mental impairment which has a "*substantial and long-term adverse effect*" on the ability to carry out normal day-to-day activities.

Facts: B contracted COVID-19 in November 2020. Although his initial symptoms were relatively mild, he suffered from other effects that lasted many months after the initial infection had ended. He provided various fit notes from his GP over the period of his absence, giving varying reasons for absence including "*fatigue*", "*post viral syndrome*" and "*after effects of long Covid*". Nevertheless, two occupational health reports considered that it was unlikely that he had a disability. In August 2021, B was dismissed on grounds of ill health because of his continuing absence from work. He brought various claims before the Employment Tribunal.

Decision: At a preliminary hearing, the Tribunal held that B had a disability. He suffered from the physical impairment of long Covid or post viral fatigue syndrome and, although the impact varied over time, overall there was a substantial and long-term adverse effect on his ability to undertake day-to-day activities. Even though the GP's notes of the telephone appointments did not particularise all the symptoms described, the Tribunal did not take that as evidence that the symptoms did not exist. The reasons given for absence on the fit notes were in keeping with B suffering from the impairment. B's sick pay had ceased, so there was no financial benefit to remaining off work and his 20 years' unblemished service did not suggest that he was likely to over-exaggerate illness. In any event, the employer's dismissal letter had noted the symptoms of extreme fatigue and expressed the view that he remained too ill to return to work.

ILL-HEALTH DISMISSAL FOLLOWING UNSATISFACTORY TRIAL WAS DISABILITY DISCRIMINATION

Summary: The Employment Appeal Tribunal (EAT) confirmed that a dismissal for long-term sickness absence was discrimination arising from disability because the dismissal was not objectively justified. The fact that a trial at an alternative work location had not been carried out reasonably was relevant to the assessment of whether dismissal was a proportionate response by the employer to the sickness absence (*DWP v Boyers*).

Key practice point: Employers' procedures for managing long-term sickness absence will be considered in a disability discrimination claim. The process leading to the dismissal will be relevant to the question of whether the dismissal was

a proportionate response; here, the employer's failure to provide the employee with a satisfactory trial in a different role was a key factor in the success of the claim.

Facts: The employee suffered from mental impairments (constituting a disability under the Equality Act 2010) which she considered were caused by bullying and harassment at work. She was absent due to sickness for nearly a year prior to her dismissal, save for a few weeks when she underwent a trial period in a different role and location. The work trial began on 11 September, on a phased basis for the first four weeks. By 18 October, her managers had determined that the trial had not been a success and that she would have to return to her workplace. Following her dismissal, she made various complaints to the Employment Tribunal arising both from the termination of her employment and the way she said she had been treated over previous years. The Tribunal accepted that, in dismissing her, the employer was pursuing two legitimate aims: protecting scarce public resources and reducing the impact of her absence on other employees, but found that it was not a proportionate means of achieving either aim and her dismissal was discrimination "arising from disability" (under Section 15 of the Equality Act) which was not objectively justified. The employer appealed.

Decision: The EAT dismissed the appeal, confirming the Tribunal's decision that the dismissal was a disproportionate means of achieving the employer's aims, because of the failure to implement the work trial in a reasonable way. If the trial had been evaluated properly, it might have continued and ultimately allowed her to remain in employment. Therefore, it had a direct bearing on whether the outcome was justified as a proportionate means of achieving a legitimate aim.

The Tribunal had found that several aspects of the trial were not carried out reasonably. The promised weekly feedback sessions did not materialise and there were problems with IT equipment, limited training, and no contemporaneous paperwork. The trial was withdrawn without notice. Without evaluating the work trial, to decide whether it was genuinely successful or not, the employer could not show that dismissal was appropriate and reasonably necessary to achieving its aims, when balanced against the impact on the employee.

The EAT noted that it will be more difficult for an employer to show that it acted proportionately if it has provided no evidence on how, as part of the process culminating in dismissal, its decision-makers considered other, less discriminatory, alternatives to dismissal. The EAT added that it is also challenging for an employer to show that it acted proportionately if, as happened in this case, it provided no evidence on how its decision-makers thought their actions would serve its legitimate aims.

Unsurprisingly, the EAT also rejected the employer's contention that their actions were constrained by the terms of the contract of employment relating to the employee's place of work. If suitable alternative work is available somewhere other than the place the employee is contractually obliged to work, there may be a non-discriminatory alternative to dismissal, and an employer's failure to consider that alternative will be relevant.

EMPLOYERS WILL BE ABLE TO USE TEMPORARY STAFF DURING OFFICIAL STRIKE ACTION

The Government is removing the restriction on employment businesses supplying temporary workers to cover striking staff. The restriction is in the Conduct of Employment Agencies and Employment Businesses Regulations 2003. Regulation 7 prevents an employment business from supplying the employer with temporary workers to perform the duties normally performed by a worker who is on strike or taking industrial action, or the duties normally performed by any other worker who has been assigned to cover the striking worker. The restriction applies only to official industrial action (i.e. authorised by trade unions in accordance with the balloting rules). Regulations to implement the removal of Regulation 7 will come into force as soon as the Parliamentary procedure is completed.

In addition, the Government has increased the maximum damages that courts can award against a union, when strike action has been found by the court to be unlawful. The Government has increased the cap on the four levels of damages, which depends on the size of the union's membership, to reflect inflation since they were last reviewed in 1982. The new limits, which apply to proceedings that relate to an act that began on or after 21 July 2022, are:

- Fewer than 5,000 members: £40,000
- 5,000 to 24,999 members: £200,000.
- 25,000 to 99,999 members: £500,000.

- 100,000 members or more: £1million

HORIZON SCANNING

What key developments in employment should be on your radar?

2022	Extension of ban on exclusivity clauses to lower paid workers
Summer 2022	Consultation on statutory Code of Practice on "fire and rehire"
Date uncertain	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

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

- **Employment status:** *Griffiths v Institution of Mechanical Engineers* (EAT: whether trustee of professional body is worker for whistleblowing protection)
- **Employment contracts:** *USDAW v Tesco Stores Ltd* (Court of Appeal: whether implied term prevented employer from exercising contractual right to terminate on notice to remove entitlement to enhanced pay); *AMDOCS Systems Group v Langton* (Court of Appeal: whether employer was obliged to pay PHI escalator payments no longer covered by its insurance policy); *Cox v Secretary of State for the Home Department* (Court of Appeal: whether employer withdrawal of check-off arrangements was in breach of employment contract; *Benyatov v Credit Suisse Securities (Europe) Ltd* (Court of Appeal: whether employer had duty of care to protect employee from criminal conviction)
- **Discrimination / equal pay:** *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010); *Arvunescu v Quick Release Automotive Ltd* (Court of Appeal: whether claim for aiding discrimination caught by COT3 settlement agreement)
- **Trade unions:** *Morais v Ryanair DAC* (Court of Appeal: whether workers are protected from detriment for participating in industrial action during working hours); *Tyne and Wear Passenger Transport Executive v NURMT* (Court of Appeal: whether employer can claim rectification of a collective agreement)
- **Unfair dismissal:** *Fenten v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal)
- **Working time:** *Harpur Trust v Brazel* (Supreme Court: calculation of holiday pay for part-time term-time workers).

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