SLAUGHTER AND MAY/

NEWSLETTER

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QUICK LINKS

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OWNER DRIVER FRANCHISEES WERE NOT EMPLOYEES OR WORKERS

Summary: The Employment Appeal Tribunal (EAT) confirmed an Employment Tribunal decision that owner driver franchisees who carried out parcel delivery and collection services for DPD were neither employees nor workers for the purposes of the Employment Rights Act 1996. There was a genuine right of substitution in the franchise agreement governing the parties' relationship (*Stojsavljevic v DPD Group UK Limited*).

Key practice point: The decision is helpful in identifying the key factors for determining whether there is a genuine and unfettered right of substitution, which is generally inconsistent with personal performance and therefore likely to preclude employee or worker status. However, the case was heard before (and therefore did not take account of) the decision in *Stuart Delivery Ltd v Augustine* (see our Employment Bulletin November 2021). In *Augustine*, the Court of Appeal confirmed that a courier driver was a worker; a limited right to notify other couriers who were already working for the organisation that the driver was prepared to release a slot was not a sufficient right of substitution to remove the obligation personally to perform work. A key point made by the EAT in *Stojsavljevic* was that there were conditions imposed on the substitute, not on the right to send a substitute. However, in *Augustine*, the restriction was also on the substitute – the substitute had to come from the ranks of the respondent's couriers. The (fine) distinction between the two cases would appear to be that the pool of substitutes was unlimited in *Stojsavljevic*, as long as they met the conditions, whereas the pool in *Augustine* was limited.

Facts: The claimants entered into standard form franchise agreements with DPD to operate parcel delivery services. The franchise agreement required the owner driver franchisee (ODF) to supply a driver (the ODF or another person) to perform the services. A non-contractual operating manual stipulated that the ODF had to supply a copy of the driving licence of any proposed driver and complete an application form in order for DPD to authorise the driver. DPD argued that the claimants were independent contractors; the claimants contended that they had contracted as individual drivers.

The Employment Tribunal concluded that the terms of the franchise agreement were genuine and reflected the full agreement between the parties, under which there was a genuine right of substitution, and that it did not require the claimants to perform the services. Therefore, the claimants were neither employees nor workers for the purposes of the Employment Rights Act 1996 (and, in the case of the second claimant, the Equality Act 2010).

Decision: The EAT upheld the Tribunal's decision that the claimants had a genuine right of substitution, inconsistent with employee and worker status.

The Tribunal had looked at both the written franchise agreement and the relationship between the parties as it operated in practice. It had correctly analysed whether the franchise agreement represented the true agreement between the parties, in accordance with the principle set out in *Autoclenz*, and was entitled to find that it did. The Tribunal had also correctly construed the franchise agreement itself. Although, in practice, the

claimants had only used cover drivers who were also ODFs or drivers of other ODFs, that did not detract from their broader contractual right to use any substitute of their choice at any time. There were several other ODFs at the depot where the claimants worked, operating multiple routes with multiple drivers, and there was no difference in DPD's approach to corporate and individual franchisees.

The EAT found that the existence of conditions on the exercise of the right did not amount to a fetter on the right of substitution. The case therefore fell within one of the classifications of substitution right identified by the Court of Appeal in *Pimlico Plumbers v Smith* - a right limited only by the need to show that the substitute is as qualified as the contractor – which is usually inconsistent with personal performance. The EAT explained that:

- Nothing in the franchise agreement required that the driver be of a particular type or identity. Unlike in *Pimlico Plumbers*, there was no requirement that the driver had to come from the ranks of existing operatives who were bound by the same obligations as the ODF. It did not matter to DPD whether the driver was an ODF, a previously approved driver, or a particular individual; only that the services were performed suitably, as set out in the franchise agreement, and that the driver was qualified and trained to undertake the work. That created a large pool of eligible people. The fact that substitution entailed an application procedure was irrelevant.
- The claimants could, for any reason, delegate their functions as a driver, subject to DPD being satisfied of the minimum requirements necessary for the service to be delivered to customers, namely, that the driver provided be conversant with DPD's practices and legally entitled to drive in the UK. Those were conditions imposed on the substitute, as distinct from conditions imposed on the right to send a substitute. DPD had no absolute and unqualified discretion to withhold consent (which would have been consistent with personal performance). It was not necessary for the franchise agreement to contain an express limitation of the circumstances in which authorisation would be withheld.

Analysis/commentary: Another potential problem with this decision is that the EAT relied on the classifications of types of substitution rights provided by the Court of Appeal in *Pimlico Plumbers v Smith*. The Court of Appeal in *Augustine* played down the significance of these classifications, saying that said that they were no more than examples and that it was unhelpful to shoehorn the particular facts of a case into one of the categories and then to treat that as conclusive of whether there was an obligation to provide service personally.

DIRECTOR SHAREHOLDER WAS NOT AN EMPLOYEE OR WORKER

Summary: The Employment Appeal Tribunal (EAT) confirmed that a director and shareholder of a company was neither an employee nor a worker for the purposes of the Employment Rights Act 1996. Although he worked for the company as a site manager and in other capacities and received payments described as salary, it did not follow that he fell into one of the categories of employee, worker or self-employed (*Rainford v Dorset Aquatics Ltd*).

Key practice point: There are few recent cases on the employment status of directors. The usual assumption is that executive directors will typically be employees and non-executive directors are likely to be workers or self-employed. However, on the facts of this case - a small family company, where there was little control by the company, no documentation and a right of substitution - there was no employee or worker status.

Facts: R and his brother, B, were co-directors of, and 40/60 shareholders in, a landscape company. R was the site manager and had responsibility for marketing. He decided on his own hours of work and was not under the control of B or the company. There was no written employment contract. The brothers were each paid salary, agreed between them, which was subject to PAYE and National Insurance Contributions, but this was done on the advice of company accountants for tax reasons without any input from the brothers. They also agreed between them on the amount of dividends to be paid in accordance with their shareholdings. A dispute arose and R brought claims for unfair dismissal, notice pay, unlawful deductions and holiday pay. The Employment Tribunal found as a preliminary issue that R was not an employee or a worker under the Employment Rights Act 1996. R appealed.

Decision: The EAT dismissed the appeal, rejecting R's argument that, given that the Tribunal had found that he provided services to the company in return for a salary, under an arrangement that was not a sham, it had to follow that he was an employee, a worker or a self-employed contractor. The EAT agreed with R that there is no reason in principle why someone who is a shareholder and director cannot also be an employee, even if the person has total control over the company. However, the work R did and the payments he received were not necessarily referable to one of the three

types of contract referred to in Section 230 of the Employment Rights Act 1996 - employee, self-employed and worker. It is possible for a working shareholder/director receiving payments from a company (particularly a very small one) to organise their relationship without individual contracts of employment. It was open to the Tribunal to take into account B's evidence that he would have had no difficulty with R substituting someone else to do the site manager work, although in practice this issue never arose, and the lack of control by the company over R.

Analysis/commentary: The EAT set out factors to take into account in deciding whether a director/shareholder is also an employee or worker, derived from case law, including (in addition to the points referred to above):

- Where the conduct of the parties is inconsistent with the existence of a contract of employment or is in some areas not governed by a contract, that will be an important factor pointing away from a finding that the shareholder/director is an employee. The lack of any written employment contract or other record is likely to be an important consideration.
- The fact that the shareholder/director has control of the company, or that his personal investment in it will prosper with the company, will be "part of the backdrop" but will not ordinarily be relevant.
- The payment of "salary" with payslips and PAYE/National Insurance deductions points towards employment but is not decisive in itself. It may be of little significance if, as in this case, it is organised entirely by a company accountant for tax reasons without any particular awareness on the part of the putative employee and covers only a small part of the total payments to a shareholder/director.

AGREEMENT TO ATTEND APPEAL DID NOT EXTEND FLEXIBLE WORKING DECISION PERIOD

Summary: The Employment Appeal Tribunal (EAT) found that an employee had not given his agreement to an extension to the statutory three-month time limit for deciding flexible working requests when he agreed to attend an appeal outside that three-month period (*Walsh v Network Rail Infrastructure*).

Key practice point: Employers should ensure that the employee has explicitly agreed to extend the decision period if it is not going to be possible to complete a flexible working request procedure (including any appeal) within three months. The agreed extension (and the date when it ends) should be recorded in writing, even though the legislation does not require this.

Background: Under Section 80 of the Employment Rights Act 1996, an employer must complete the flexible working process, including any appeal, within a "decision period" of three months beginning with the date of the request. The employer and employee can agree to extend the decision period. An employee can only bring a claim in the Employment Tribunal about a breach of flexible working requirements after the decision period has expired.

Facts: An employee had agreed to attend an appeal hearing that was scheduled to take place more than three months after he had made his initial flexible working request. The delay in arranging the appeal was neither party's fault. The employee claimed in the Tribunal that his application for flexible working had not been dealt with reasonably and that the process had not concluded before the decision period had expired. The Tribunal rejected his complaint because it had been made during the decision period and therefore was premature.

Decision: The EAT overturned the Tribunal's decision. It did not follow that, by agreeing to attend the appeal, the claimant had also agreed to an extension of the decision period. For a valid extension to the decision period, he would have to agree to this, and to the duration of any extension. As he brought his claim more than three months after his initial flexible working request, and no extension had been agreed, the Tribunal should have considered the claim on its merits.

Analysis/commentary: Note that the Government's consultation on the right to request flexible working, which closed last month, is considering a possible reduction in the timeframe for considering flexible working requests (see our Employment Bulletin October 2021).

COURT OF APPEAL SUGGESTS IMPLIED TERM THAT DISCIPLINARY PROCESSES WILL BE CONDUCTED FAIRLY

Summary: The Court of Appeal confirmed a High Court decision that an employer was not in breach of contract in failing to provide the employee with correspondence relating to a disciplinary investigation. However, the Court of Appeal was sympathetic to the suggestion that there could be an implied term that disciplinary processes will be conducted fairly (*Burn v Alder Hey Children's NHS Foundation Trust*).

Facts: The Trust was investigating allegations about the claimant's conduct. The contractual disciplinary procedures included a provision that the claimant had to be given the opportunity to see "any correspondence relating to the case". During the course of the internal investigation, the claimant sought disclosure of a number of documents and ultimately applied to the Court for an injunction to require the Trust not to conclude the investigation prior to disclosing the documents. The High Court rejected the claim. The claimant appealed.

Decision: The Court of Appeal upheld the High Court's decision. The words relied on did not impose a general disclosure obligation. They were concerned only with correspondence generated by the investigatory process and created no obligation to disclose correspondence on the basis only that it related to the matters which were the subject matter of the investigation. The Trust was not in breach of the contractual provisions or the established implied trust and confidence term - that the employer must not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relation of trust and confidence between employer and employee.

The appeal judges went on to make non-binding (obiter) comments that there may be a basis for a new stand-alone implied term that disciplinary processes will be conducted fairly, separate from the implied term of trust and confidence. They said this would be a "short step" building on the Supreme Court's decision in *Braganza*. In *Braganza*, the Supreme Court established the principle that employers have a duty of rationality and must exercise any contractual discretion in good faith and not arbitrarily or capriciously.

Analysis/commentary: To date, the *Braganza* principle has been applied in only a few employment cases (to operate on a seemingly unfettered discretion in a share option agreement, for example). However, given the relatively high bar for establishing a breach of the implied term of trust and confidence term, employees complaining about the conduct of disciplinary proceedings may now seek to argue that there is a freestanding *Braganza* duty of procedural fairness.

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/detriment:** *UCL v Brown* (Court of Appeal: whether disciplining a trade union rep employee for failure to comply with an instruction was a detriment
- **Working time:** *Smith v Pimlico Plumbers* (Court of Appeal: whether holiday pay back claim was out of time).

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