SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

NO APPEAL AGAINST FINDING THAT DRIVERS WERE WORKERS

Summary: The Court of Appeal has refused permission to appeal from an Employment Appeal Tribunal decision that minicab drivers were "workers" and that they should be paid for all periods during which they were logged in to the internal driver portal system (*Addison Lee Ltd v Lange*).

Key practice point: Although this was a hearing about an appeal, the Court of Appeal gave permission for the judgment to be cited in future cases. It confirms that the Supreme Court's decision in *Uber v Aslam* that its drivers were workers rather than self-employed (see our Employment Bulletin March 2021) has in effect cut off an argument that contractual provisions prevent worker status, at least in gig economy cases.

Facts: Drivers were engaged as self-employed independent contractors and their written contracts reflected this model and denied any employment or worker relationship. The Employment Appeal Tribunal confirmed that the Employment Tribunal had correctly found that the contractual provisions did not properly reflect the true agreement between the parties and that the drivers, when logged on, were undertaking to accept the driving jobs allocated to them and were workers for the purposes of working time and national minimum wage legislation. The Court gave permission to appeal but postponed the hearing pending the Supreme Court's decision in *Uber*.

Decision: The Court of Appeal decided that, in the light of *Uber*, the appeal no longer had a reasonable prospect of success. The employer tried to distinguish *Uber* on the basis that, in this case, there was an express contract with the drivers that negated any mutuality of obligation. However, the Court of Appeal found that the Supreme Court in *Uber* had reaffirmed the *Autoclenz* principle that, in determining worker status, the Tribunal is interpreting the statute rather than the contract and should disregard any contractual provisions that do not reflect reality. The Tribunal's finding that, when drivers were logged on, they were undertaking to perform driving services personally, was "unappealable".

Likewise, following *Uber*, there was no arguable error of law in the Tribunal's conclusion that, when drivers were logged on, this satisfied the definition of working time for the purposes of the Working Time Regulations.

Analysis/commentary: Worker status was also the subject of another recent Court of Appeal case (*NUPFC v The Certification Officer*), on trade union recognition. In order to be officially registered by the Certification Officer, a trade union must consist "wholly or mainly of workers". The Court of Appeal decided that the National Union of Professional Foster Carers (NUPFC) should be allowed to register, as foster carers are workers for this purpose, even though they do not have a contract of employment. We are also waiting for the judgment in another Court of Appeal case, *R (on the application of the Independent Workers' Union of Great Britain) v CAC*, heard in February, on whether delivery riders are workers and therefore entitled to trade union recognition.

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PARLIAMENTARY DEBATE ON "FIRE AND REHIRE"

The House of Commons has recently debated the use of dismissal and re-engagement of employees to effect a change to terms and conditions, known as "fire and re-hire". The debate was triggered by reports, including from the TUC, indicating that dismissal and re-engagement has increased during the pandemic. In the debate in the Commons last month, Opposition MPs urged the Government to legislate to limit the use of fire and rehire and called on it to publish an Acas report on the issue which has not yet been made public. In reply, the Business Minister, after making the point that dismissal and re-engagement may give rise to liability for unfair dismissal and potential collective redundancy issues, commented that it should only be used as an option of last resort and that it is unacceptable to use the threat of fire and rehire as a negotiation tactic. However, he added that the Government should tread carefully before interfering in commercial contractual matters between employers and employees and must allow businesses *"to take the sometimes difficult decisions that are necessary to preserve their commercial viability"*. The Government is *"carefully considering the different issues and viewpoints raised"* and will set out steps in due course.

Meanwhile a Private Members' Bill, containing a proposed amendment to the Employment Rights Act 1996 to add the re-employment of a worker on less favourable terms and conditions to the definition of unfair dismissal, fell away following the end of the 2019/21 Parliamentary session last month. It is not clear if it will be reintroduced in the new session. At the time it had its First Reading last year, the Government said they could not support the Bill but remained open to looking at the issue and "further protections".

NON-COMPETE COVENANTS FOR RECRUITMENT CONSULTANTS WERE NOT TOO WIDE

Summary: The Outer House, Court of Session (the equivalent of the High Court in Scotland), upheld non-compete covenants preventing recruitment consultants from working in the construction sector anywhere in the UK for six months. The covenants were no wider than necessary for the protection of the former employer's legitimate business interests (*Apex Resources Limited v MacDougall*).

Key practice point: In distinguishing the facts from a recent case where non-compete covenants in the contract of a financial adviser were found to be too wide, the Court indicated that the extent of regulation in the financial services sector, such that it is in any event difficult for clients to move with an employee, may make it hard for employers in that sector to justify the need for non-compete covenants.

Facts: Former employees of Apex, a recruitment consultancy in the construction sector, challenged an injunction granted to enforce non-compete covenants in their contracts after they had left to join a competitor agency in the same sector. The former employees were prohibited from being employed in:

- any business or activity which was carried on by Apex on the date of termination of their employment and in which they were directly concerned at any time in the period of 12 months before that date;
- in which they would be operating in competition with Apex and/or so as to harm or interfere with Apex's goodwill;
- in the UK;
- for a period of six months after termination of employment.

The former employees argued that the restrictions were wider than necessary, relying on *Quilter Private Client Advisers Limited v Faulkner*, where the High Court declined to enforce restrictive covenants in the employment contract of a financial adviser because they were drafted too broadly and were therefore in restraint of trade (see our Employment Bulletin January 2021).

Decision: The Court upheld the covenants. The whole value of Apex's business lay in the strong and consistent personal relationships that individual employees had built up over time with clients and the covenants were no wider than necessary to protect those legitimate business interests.

The terms of the restrictive covenant in *Quilter*, and the factual context, were very different. In financial services, there are detailed regulatory obligations to be followed to take on a new client (such as the need to confirm identity and source of funds) and these create difficulties for a leaving customer, who may be obliged to repeat those

procedures with a new service provider. By contrast, there is a far greater ease of movement by clients from one recruitment agency to another.

The Court also accepted Apex's argument that a non-compete was reasonably necessary notwithstanding the existence of a non-solicit covenant. (Courts will sometimes find that protection from a non-solicit covenant is sufficient to protect the employer's interests, unless the employer can show that the covenant is difficult to police.) In the financial services sector, the use of mandates (authority from departing clients to release funds from the old to the new adviser) means that there are detailed records of clients moving and hence it should be easy for the former employer to detect possible breaches of non-solicit covenants. In recruitment, mandates are not used to pass files from one agency to another, so a non-compete may be needed in addition to a non-solicit clause.

There were also differences in the terms of the covenants. In *Quilter*, the duration was nine months and the non-compete clause also precluded the former employee from doing any business with new clients of her new employer. In this case, the restrictions were limited to the particular clients the former employees had as Apex's consultants.

Analysis/commentary: Restrictive covenants are enforceable only if they go no further than reasonably necessary to protect the employer's legitimate interests. What is reasonably necessary depends on the circumstances, including the nature of the business involved. Meanwhile, consultation on the Government's proposals to have mandatory compensation for, or alternatively a ban on, non-compete covenants (see our Employment Bulletin December 2020) closed at the end of February. The Government has not indicated when it will respond.

EARLIER ACTS CAN MAKE "LAST STRAW" CONSTRUCTIVE DISMISSAL DISCRIMINATORY

Summary: The Employment Appeal Tribunal found that an Employment Tribunal should have considered whether a constructive unfair dismissal was also discriminatory, even though the events that rendered the constructive dismissal discriminatory were outside the limitation period for a discrimination claim and the "last straw" event for the purposes of the constructive dismissal claim was not discriminatory (*De Lacey v Wechseln Ltd*).

Key practice point: This decision confirms that there can be cases in which the constructive dismissal is, overall, discriminatory, even though the last straw incident was not.

Facts: A trainee hair stylist claimed that her employer had engaged in a course of discriminatory conduct from May 2015 (when she informed her employer that she was pregnant) until she resigned and claimed constructive dismissal in January 2017. The Employment Tribunal found that the claimant had been constructively dismissed, for the purposes of a claim of unfair dismissal, as a result of a course of conduct which included two matters in 2015 (the conduct of a skills test and an incident of cold-shouldering) and which culminated in a "last straw" incident (being forced to clear up dog mess in front of other trainees) in January 2017. The Tribunal also found that the claimant had established sex/maternity discrimination in relation to the two matters in 2015, but, as the claims were out of time in relation to those incidents, did not go on to decide that they were acts of sex discrimination. The claimant appealed against this finding.

Decision: The EAT allowed the appeal and sent the case back to the Tribunal to determine whether the constructive dismissal was unlawful sex discrimination. A "last straw" constructive dismissal may amount to unlawful discrimination if some of the matters relied upon, even though not the last straw itself, are acts of discrimination. The Tribunal should have decided whether the two matters in 2015 were acts of discrimination and, if so, whether they sufficiently influenced the constructive dismissal to mean that the constructive dismissal itself amounted to sex discrimination. If the constructive dismissal was discriminatory, then the claim for discrimination would be in time, even though the events that rendered the constructive dismissal discriminatory were themselves outside the limitation period. In a discriminatory constructive dismissal, time runs from the date of the acceptance of the repudiatory breach, not from the dates of the discriminatory events, if earlier.

Analysis/commentary: The essence of the "last straw" doctrine is that the last straw need not be something of major significance in itself and need not even amount to a breach of contract, when looked at on its own. The significance of the last straw is that it tips things over the edge so that the entirety of the treatment suffered by the employee amounts to a repudiatory breach of contract. It follows that a constructive dismissal may be unlawful discrimination even if the last straw was not itself discriminatory.

STATUTORY DEFINITION OF "SUBSTANTIAL" TAKES PRECEDENCE IN ASSESSING DISABILITY

Summary: The Employment Appeal Tribunal held that, when determining whether an impairment has a "substantial and long-term adverse effect" for the purposes of the definition of disability in the Equality Act 2010, precedence must be given to the statutory definition of "substantial" as "more than minor or trivial" (*Elliott v Dorset County Council*).

Key practice point: The decision is a reminder of the low threshold for establishing that the adverse effects of an impairment are "substantial" and a warning about over-reliance on Guidance rather than the legislation. The message is that, unless the effect is trivial or insubstantial, it will be substantial.

Facts: During the course of disciplinary proceedings for alleged false recording of working time, the employee's union representative suggested a referral for assessment, as a result of which he received a diagnosis of autism spectrum disorder. At a preliminary hearing in a disability discrimination claim, the Tribunal found that he was not disabled for the purposes of Section 6(1) of the Equality Act 2010 because his impairment did not have a "substantial and long-term adverse effect" on his ability to carry out normal day-to-day activities.

Decision: The EAT allowed the claimant's appeal. Section 212 of the Equality Act 2010 defines "substantial" as "more than minor or trivial". The Tribunal had relied too heavily on the statutory Guidance on the definition of disability and the Equality Act 2010 Code of Practice – the simple Section 212 definition takes precedence over the Guidance and Code.

The EAT made other points emphasising the wide scope of the definition of disability:

- The adverse effect is on the ability to carry out normal day-to-day activities, not on the day-to-day activities themselves. Dealing with change at work, being flexible about procedures and communicating with managers are all day-to-day activities.
- The Tribunal had relied on a section in the Guidance which says that a coping or avoidance strategy can alter the effects of an impairment to the extent that they are no longer substantial, without considering whether the claimant's coping strategies might break down in certain circumstances, such as under stress. In addition, Schedule 1 of the Equality Act 2010 says that "measures" should be disregarded in assessing whether an impairment has a substantial adverse effect. Although this provision is intended to make it clear that the effects of medical treatment should be ignored, "measures" are not limited to medical treatment. Coping strategies that may prevent an impairment from having a substantial adverse effect might also be "measures" that should be disregarded.

HORIZON SCANNING

What key developments in employment should be on your radar?

1 July 2021	Employers to contribute to the Coronavirus Job Retention Scheme
30 September 2021	Scheduled end of the Coronavirus Job Retention Scheme
5 October 2021	Deadline for reporting 2020 gender pay gap data

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

- **Employment status:** *IWGB v CAC* (Court of Appeal: whether couriers are workers for trade union recognition purposes); *Stojsavljevic v DPD Group* (EAT: whether individuals working under franchise agreements were workers); *Stuart Delivery Limited v Augustine* (Court of Appeal: whether delivery courier with right of

substitution is a worker); *Professional Game Match Officials Ltd v HMRC* (Court of Appeal: whether referees were employees for tax purposes)

- **Discrimination / equal pay:** *Efobi v Royal Mail Group* (Supreme Court: test for shift of burden of proof); *Forstater v CGD Europe* (Employment Appeal Tribunal: whether views on transgender women were protected as a philosophical belief); *Lee v Ashers Baking Co* (European Court of Human Rights: whether refusal to provide cake supporting gay marriage is discrimination in provision of goods and services)
- **Redundancy:** *Gwynedd Council v Barratt* (Court of Appeal: whether selection procedure on restructuring was fair)
- **Vicarious liability:** *Chell v Tarmac Cement and Lime* (Court of Appeal: whether employer vicariously liable for consequences of employee's practical joke in the workplace)
- **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:** *Chief Constable of the Police Service of Northern Ireland v Agnew* (Supreme Court: backdated holiday pay claims); *East of England Ambulance Service v Flowers* (Supreme Court: whether holiday pay must include regular voluntary overtime).

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