SLAUGHTER AND MAY

Employment Bulletin

February 2020

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Employment Bill

A new Employment Bill, announced in the Queen's Speech at the end of last year, will contain a variety of changes to employment law:

- **Creation of a single enforcement body** to take decisions on behalf of vulnerable workers to enforce their employment rights. This proposal was first mentioned in the Government's "Good Work Plan" in 2017 and was considered as part of a series of consultation papers issued in July 2019. The Bill does not say what organisations will be encompassed in the single body but the consultation proposal suggested that it should cover some areas already enforced by other agencies, such as the national minimum wage, employment agencies, and labour exploitation, as well as some not currently enforced, such as holiday pay.

- **Ensuring tips go to workers in full**. This is likely to be a reproduction of the Bill contained in the previous Queen's Speech, in October 2019, placing an obligation on employers to pass on all tips and gratuities to workers in full and to distribute them on a fair and transparent basis.

- **A right for all workers to request a more predictable contract**. This was originally contained in the Good Work Plan and confirmed by the Government in its July 2019 consultation on "one-sided flexibility". The Government indicated then that the right would apply after 26 weeks' service. The consultation paper also discussed giving workers on zero hours and similar contracts a right to reasonable notice of work schedules, as well as compensation for shifts cancelled without reasonable notice, but it remains to be seen whether these proposals will be in the Bill.

- **Extending redundancy protections** on pregnancy and maternity. In July 2019, the Government confirmed that it would extend the period of redundancy protection, so that it would apply from the point an employee notifies their employer of their pregnancy until the date that is six months after the end of their maternity leave (see our Bulletin dated February 2019). Employers will be required to offer any woman at risk of redundancy any other suitable role in preference to others at risk. Currently, the protection applies while the employee is on ordinary or additional maternity leave.

- **Extended leave for neonatal care**. The Government's July 2019 consultation included the proposal for a new right to neonatal leave and pay, to support parents of premature or sick babies.

- **One week's leave for unpaid carers**. This proposal was made in the Conservative Party's election manifesto.

- Subject to consultation, **making flexible working the default** unless employers have good reason not to allow it. This was also in the manifesto.

- **National disability strategy:** The Queen's Speech also included confirmation that the Government will publish detailed proposals this year in the light of feedback to its July 2019 consultation on proposals to reduce job losses related to ill-health. The main proposal in the consultation was for a new right to request workplace modifications for all employees suffering from health conditions, not just those who have a disability.

Analysis/commentary: The majority of the proposals in the new Bill have been suggested by the Government at various times since the publication of the Good Work Plan in 2017. Making flexible working the default is new, however, and may make it easier for employees to challenge a refusal of their request for flexible working. The Bill has not yet been published and there is no indication of procedure or penalties for breach.

A number of other changes are scheduled to take effect in April 2020 – see our Horizon scanning section below. In addition, we are expecting the Government to finalise its proposals on workplace harassment (see below) and on the use of non-disclosure agreements in employment contracts and settlement agreements (see our Bulletin dated August 2019).

Courier was a worker despite right to substitute

Summary: The Employment Appeal Tribunal confirmed that a delivery courier working fixed slots was a "worker". Although the courier could "release" a delivery job back into the pool of couriers via a staff app, he would only be released from the obligation of performing the slot if another courier signed up for it, and he had no control over whether that would happen, or who would pick up the slot. The EAT confirmed that this particular right of substitution was consistent with worker status (*Stuart Delivery Ltd v Augustine*).

Key practice point: Employers engaging staff on casual contracts need to scrutinise terms of any substitution clauses, as these are likely to have a bearing on their status as workers.

Facts: SD connected couriers with clients via a mobile app. Couriers were able to undertake "slot" deliveries, for which they committed in advance to being available in a certain geographical zone for a certain period at a certain time. A courier who signed up for a slot would be guaranteed a minimum rate for the duration of the shift, provided that the courier remained in the zone for at least 90% of the time and refused no more than one delivery. A courier who signed up for a slot could subsequently release it to other couriers. If no one accepted the released slot, the original courier remained liable for completing it.

One courier brought claims for unauthorised deductions and holiday pay, which depended on him being a "worker". The Employment Tribunal found that he was obliged to carry out services personally for SD during the time that he was undertaking slot deliveries. The ability to release a slot did not amount to an unfettered right of substitution such as to undermine the obligation of personal performance. SD appealed.

Decision: The EAT upheld the Tribunal's decision. The substitution arrangements were consistent with personal service and therefore the courier was a worker.

SD had an absolute and unfettered right to withhold consent, since only the couriers it had accepted into its pool could use the app to sign up for slots that a fellow courier wished to relinquish. The claimant had no control over who, if anyone, would accept a slot he had signed up for. The EAT said that it was not a right of substitution at all - merely a right to hope that someone else in the pool would relieve him of the obligation. The courier could therefore bring his claims in the Tribunal.

Analysis/commentary: Both the Taylor Review and the Government's response in its Good Work Plan recommended that any future status tests should place more emphasis on control and less on the right to send a substitute, reflecting new business models. There is no suggestion that the new Employment Bill will contain anything on worker status and so, in the meantime, substitution continues to play a key role in cases. If the right to substitution is limited in any significant respect, or if it is rarely exercised in practice, then this can tip the balance towards worker status. By contrast, an unfettered substitution right was crucial to a finding of self-employed status in another courier case – the decision of the Central Arbitration Committee that Deliveroo riders were not workers for union recognition purposes. However, this issue is going to be considered in another trade union recognition case – one of a group of upcoming cases on employment status (see our Horizon scanning section below).

Draft Code of Practice on workplace harassment

On 14 January 2020, the Equality and Human Rights Commission (EHRC) issued "technical Guidance" on sexual harassment and harassment at work. The EHRC subsequently described the Guidance as a draft version of a statutory code of practice, presumably to be finalised when the Government has completed its consultation on workplace harassment. When it is a statutory code, tribunals will be obliged to take it into account where relevant.

A separate short guide for employers sets out seven steps that the EHRC advises employers to take to make sure they are preventing and responding to sexual harassment at work:

- Develop an effective anti-harassment policy.
- Engage staff regularly - conduct regular "1-2-1s" and maintain open door policies.
- Assess and mitigate risks in the workplace – consider factors such as power imbalances and lone working.
- Consider using a reporting system that allows workers to raise issues anonymously or by name.
- Train staff on sexual harassment.
- Act immediately on a harassment complaint.
- Treat third party harassment as seriously as other workplace harassment.

The Guidance itself is over 80 pages long. Key points for employers to note are:

- A section on steps an employer can take to prevent harassment which will meet the "all reasonable steps" defence to harassment claims in the Equality Act 2010. The Guidance stresses that it may be reasonable to have taken a particular step even if it might not have prevented the harassment - employers have to weigh up effectiveness against factors such as the cost and potential disruption.

- There is a comprehensive section on third party harassment. This states that, whilst there is currently no specific protection against third party harassment under the Equality Act 2010, employers should take reasonable steps to prevent it. The EHRC also points out that there are other potential remedies for third party harassment - indirect discrimination, discrimination in the way employers react to harassment, and health and safety at work regulations.

- The Guidance sets out what should be included in harassment policies, noting that they should be reviewed annually and their effectiveness evaluated. Employers should have a different policy to cover sexual harassment or, if they have just one policy, it should clearly distinguish between the different forms of harassment. The Guidance also recommends that employers should provide opportunities for employees to raise issues with them, even where there are no warning signs of harassment. A centralised record of complaints is another recommendation. The Guidance also covers recommended content of anti-harassment procedures and how to deal with requests not to take action.

Analysis/commentary: The Guidance provides a reference point for employers reviewing their anti-harassment policies. Compliance would undoubtedly be an advantage if they need to rely on the "all reasonable steps" defence to a harassment claim. Some of the recommendations in the section on anti-harassment procedure raise complicated issues – for example, the suggestion that wherever "*appropriate and possible*", if a complaint is upheld then the complainant should be told what action has to be taken to address this.

Shortly after the Guidance was issued, the Government Equalities Office announced that they are conducting a survey of workplace harassment and that this will influence their response, to be published in the Spring, to their consultation on workplace harassment. The consultation discussed the possibility of an enforceable duty to prevent harassment and the re-introduction of third party harassment as a specific form of unlawful discrimination under the Equality Act 2010 (see our Employment Bulletin dated August 2019).

Suspension was a breach of trust and confidence

Summary: The High Court held that an employee was entitled to an injunction overturning her suspension and allowing her to return to work to perform most of her duties. It was strongly arguable that suspension, which had the effect of enabling the employee to return to work only if she undertook restricted duties, was a breach of the implied duty of trust and confidence (*Harrison v Barking, Havering & Redbridge University Hospitals NHS Trust*).

Key practice point: Employers contemplating suspension to investigate behaviour or performance must consider if suspension is necessary, or whether there might be an alternative, and document their consideration.

Facts: H was Deputy Head of Legal Service for the Trust, a role that involved managing claims and advising on a variety of legal issues. H was suspended from work in August and November 2019 due to concerns about the quality of her casework. The Trust subsequently told her that she could return to work but that it would not be appropriate for her to carry out inquest or advisory work. She applied for an interim

injunction, allowing her to perform the majority of her normal duties, although she voluntarily agreed not to undertake clinical negligence casework.

Decision: The High Court granted the injunction. There had been no justification for the suspension and restrictions on her duties.

The implied duty of trust and confidence between employer and employee meant that any decision to suspend H from her normal duties would be a breach of contract if exercised on unreasonable grounds. The measure adopted by the Trust to address the identified risk had to be proportionate to that risk. The concerns raised, even if well founded, were insufficient, individually or cumulatively, to justify suspension from all normal duties. The Trust claimed that it had considered alternative measures, but they were not identified.

It was strongly arguable that the manner in which the Trust had treated H amounted to a breach of implied duty of trust and confidence. There was clear evidence that excluding her had caused significant personal distress and was to her detriment professionally, and that allowing her to return to her normal duties would enable her to regain her health. The balance of convenience was therefore overwhelmingly in favour of the grant of an injunction.

Analysis/commentary: It has become clear in recent cases that suspensions can be challenged by injunction, even though this will result in reinstatement, something courts are generally loath to order. This case demonstrates that a suspension must be a proportionate response, with a good reason supported by evidence. Otherwise, it is likely to be seen as damaging the relationship of trust and confidence, enabling the employee to resign and claim constructive dismissal.

Horizon scanning

What key developments in employment should be on your radar?

Date	Development
11 March 2020	Budget 2020
April 2020	Annual updates to employment rates and limits
6 April 2020	All termination payments above £30,000 threshold will be subject to employer class 1A NICs
6 April 2020	Written statement of terms to be provided to employees and workers from day one of employment, and to contain extra details
6 April 2020	Threshold for valid employee request for information and consultation will be lowered from 10% to 2% of employees

6 April 2020	Abolition of the opt-out of the equal pay protections of the Agency Workers Regulations (the "Swedish derogation")
6 April 2020	Change in reference period for calculating holiday pay for workers with variable remuneration, from 12 to 52 weeks
6 April 2020	Extension of off-payroll working rules to private sector - client rather than intermediary will be responsible for determining whether IR35 applies

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

- **Employment status**: *B v Yodel Delivery Network Limited* (CJEU: whether couriers have worker status under the Working Time Directive); *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers); *IWGB v CAC* (Court of Appeal: whether couriers are workers for trade union recognition purposes)

- **Data protection**: *Wm Morrison Supermarkets Plc v Various Claimants* (Supreme Court: whether employer was vicariously liable for deliberate disclosure of co-workers' personal data by rogue employee; *Dawson-Damer v Taylor Wessing LLP* (Court of Appeal: correct response to subject access request)

- **Discrimination / equal pay**: *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction); *Leicestershire Police v Hextall* (Supreme Court: entitlement to enhanced shared parental pay); *Asda Stores v Brierley* (Supreme Court: whether workers in retail stores could compare themselves with those working in distribution depots for equal pay)

- **Trade unions**: *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Unfair dismissal**: *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits)

- **Vicarious liability:** *Barclays Bank plc v Various Claimants* (Supreme Court: whether employer vicariously liable for assaults by doctor engaged to carry out pre-employment assessments).

Padraig Cronin
T +44 (0)20 7090 3415
E Padraig.Cronin@slaughterandmay.com

Phil Linnard
T +44 (0)20 7090 3961
E Phil.Linnard@slaughterandmay.com

Lizzie Twigger
T +44 (0)20 7090 5174
E Lizzie.Twigger@slaughterandmay.com

Katherine Flower
T +44 (0)20 7090 5131
E Katherine.Flower@slaughterandmay.com

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