SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

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GOVERNMENT GUIDANCE ON EMPLOYMENT STATUS

The Government has published a response to its 2018 consultation on employment status. It has decided against legislation but has issued non-binding guidance on employment status and rights.

The Government's assessment is that the current three-tiered employment status framework for rights (employees, workers and self-employed) provides the right balance by allowing flexibility whilst ensuring workers in more casual employment relationships have core protections such as the minimum wage and the right to holiday pay. Although respondents to the consultation were supportive of employment status reform, there was no consensus on what action should be taken. The Government has concluded that the benefits of creating a new framework for employment status are currently outweighed by the risk of cost and uncertainty for businesses recovering from the pandemic. The Government refers to the decision of the Supreme Court in *Uber* (that drivers were workers not self-employed) as having provided more clarity about the approach to take when determining employment status, "*including taking the legislation's intention of protecting vulnerable workers as the starting point, as opposed to the written contract*". It comments that the impact of the decision should be allowed to "*flow through to marketplace practices*" before considering any further interventions. (Please see our Employment Bulletin March 2021 for analysis of the *Uber* decision.)

The Government also acknowledges that greater alignment between the employment status frameworks for rights and tax could be beneficial. However, again noting the lack of consensus and the economic context, it concludes that now is not the right time to bring forward proposals for alignment.

The guidance on employment status is in three parts:

1. Guidance for HR professionals, legal professionals and other groups. This sets out key factors in determining employment status and includes a table of worker/employee rights, employee "day one" rights and employee rights with a qualifying period, together with case studies.
2. Support for individuals.
3. Checklist for employers and other engagers. This includes guidance on assessing employment status.

The new guidance is based on, and does not change, the current law. It refers in particular to the need for rights of substitution to be unrestricted if self-employed status is to be established. Part 1 sets out the three stage test for employee status:

- Personal service: here the guidance notes, "*even if there is a contractual right to provide a substitute but the parties have no intention of relying on it and/or it does not reflect how the agreement works in practice, this does not prevent personal service from being established*".

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- Control: day-to-day control of work is not a requirement, but the employer must have ultimate control by retaining a right to give instructions and for the employee to follow them or be at risk of disciplinary action including dismissal.
- Mutuality of obligation: individuals are not employees during periods when they are not working if there is no commitment to accept further work that may be offered.

On worker status, the guidance sets out the requirements of Section 230 of the Employment Rights Act 1996 (a contract, personal service, and that the person is not working as part of a profession or business) and says that "an unlimited and unrestricted right to substitution" would "strengthen arguments" for self-employed status.

Part 3 (the checklist) lists factors pointing to employment, worker and self-employed status. For self-employed, these factors include:

- significant freedom in when, where and how the individual works;
- responsibility for the success or failure of their business, and ability to make a financial loss or profit;
- ability to send someone else to do the work "without any restrictions";
- ability to negotiate the price for the work;
- use of own money to buy business assets, cover running costs, and provide tools and equipment; and
- lack of integration into the client's business (such as no company email address, or not subject to disciplinary proceedings), and ability to turn down work.

In addition to the guidance on employment status, the Government has updated its guidance on calculating the minimum wage, adding a new section on what is likely to count as "working time" for gig economy workers, such as travelling to a pick-up point and waiting for a customer after accepting a job.

Analysis/commentary: The current framework for employment status is now likely to be in place for some time. Therefore it continues to be necessary for businesses taking on staff to consider whether they are employees, workers or self-employed contractors.

EMPLOYER COULD DISMISS AND RE-ENGAGE EMPLOYEES WITH PROTECTED PAY

Summary: The Court of Appeal has allowed an appeal against a High Court injunction restraining an employer from dismissing and re-engaging employees in order to remove a contractual entitlement to enhanced pay that had been stated to be "permanent" when it was introduced. The pre-contractual statements did not justify implying a term into contracts of employment to restrict the employer's ability to dismiss (*USDAW v Tesco Stores Ltd*).

Key practice point: The Court of Appeal adopted a traditional approach to implying terms into employment contracts, finding that it is only possible to imply a term where it is necessary to give business efficacy to the contract and/or on the basis of the "obviousness" test. Nevertheless, the case is a reminder of the dangers inherent in making promises about maintaining benefits in the future. Meanwhile, we are expecting a Code of Practice on "fire and re-hire" to be issued for consultation shortly. This is likely to set out the problems for employers in dismissal and re-engagement as a method of amending terms and conditions – potential unfair dismissal claims and the need for collective consultation if the dismissals constitute a redundancy, for example.

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. In the High Court, USDAW obtained 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 (see our Employment Bulletin February 2022). The employer appealed.

Decision: The Court of Appeal allowed the appeal. The High Court should not have found, based on the pre-contractual statements, that both parties intended that the entitlement should be permanent in the sense argued for by USDAW, or that the circumstances in which the employer could terminate the contracts should be limited.

The Court of Appeal concluded that it was not clear from the pre-contractual statements what was meant by the contractual term that Retained Pay would remain a "permanent" feature. There was no evidence that anyone had considered the possibility of fire and rehire. Express terms had to be interpreted in accordance with their natural and ordinary meaning, in other words that the employer would have the right to give notice in the usual way, and that the entitlement to Retained Pay would last only as long as the particular contract. In addition, the High Court had been wrong to find it was necessary to imply a term limiting the right to terminate on notice. The proposed implied term was not capable of clear expression; it was not clear what "guaranteed for life" meant, for example. The "obviousness" test for implied terms was not satisfied – the claimants might have argued that the employees had the right to remain in post (unless the site closed) for the rest of their lives, but the employer would not have done so. The inconsistency of the proposed implied term with the express term allowing termination on giving notice was a further serious obstacle to the claim.

The Court of Appeal added that, even if the High Court had been correct in its interpretation, the grant of an injunction was not justified.

Analysis/commentary: 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 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 a benefit which the contract envisages will be paid. In this case, the High Court had found that the principle in *Aspden* applied. The Court of Appeal disagreed, but did not provide analysis, other than saying the case was "not analogous" to *Aspden*.

USDAW reports that there will be an appeal to the Supreme Court.

COURT OF APPEAL CONFIRMS DISMISSAL OF WHISTLEBLOWER FOR CRITICISING COLLEAGUE WAS NOT AUTOMATICALLY UNFAIR

Summary: The Court of Appeal confirmed that an employee who was dismissed for questioning a colleague's professional competence in relation to the subject matter of the employee's protected disclosures was not automatically unfairly dismissed under Section 103A of the Employment Rights Act 1996. The Employment Tribunal had been entitled to find that the manner in which the employee criticised her colleague was separable from the protected disclosures as the reason for dismissal (*Kong v Gulf International Bank*).

Key practice point: The Court of Appeal declined to set out principles for assessing when the reasons for dismissal can be separated from the subject matter of the protected disclosure – each case turns on its own facts - although it did indicate that "upset or criticism" caused by whistleblowing would not be sufficiently separate. Separation of reasons for dismissal from the subject matter of the protected disclosure, supported by evidence, will continue to be a key area of defence for employers against claims of whistleblowing detriment or dismissal.

Facts: K raised concerns that a legal agreement relating to a financial product did not provide sufficient protection against risk. These communications amounted to protected disclosures under the whistleblowing protection legislation in the Employment Rights Act 1996. A colleague, who had been responsible for the agreement, disagreed with K's view. A discussion and exchanges of emails followed. The colleague considered that K had impugned her integrity. K was dismissed, the termination letter explaining that her approach "*was entirely unacceptable and fell well short of the*

standards of professional behaviour expected" as well as being contrary to the bank's accepted principles of treating colleagues with dignity and respect. This had prompted a wider review identifying other incidents and leading to the conclusion that stakeholders no longer wished to work with K and trust and confidence had been lost. K's claim of automatic unfair dismissal for having made protected disclosures was rejected by the Employment Tribunal and the Employment Appeal Tribunal; she appealed to the Court of Appeal.

Decision: The appeal was dismissed. The Employment Tribunal had concluded that the principal reason K was dismissed was the seriously inappropriate way in which she had challenged her colleague's competence/integrity (which reinforced concerns that they already had about a lack of emotional intelligence in dealing with colleagues) and was not the fact that she had made protected disclosures. That was a legitimate distinction. Previous cases had adopted a consistent approach to the "separability" principle, under which tribunals are able to identify features of the conduct that are genuinely separate from the making of the protected disclosure itself. In such cases, the protected disclosure is the context for the treatment, not the reason itself. The Court commented that if that exercise were not permissible, "*the effect would be that whistle-blowers would have immunity for behaviour or conduct related to the making of a protected disclosure no matter how bad*".

The Court of Appeal went on to say that there is no objective standard against which behaviour has to be assessed to determine whether the separability principle applies, nor is behaviour required to reach a particular threshold of seriousness before it can be distinguished as separable; each case turns on its own facts.

Analysis/commentary: The claimant argued that the reason for dismissal was that her colleague was upset at being criticised, and that this should not be regarded as separable. Lady Justice Simler noted that there are likely to be few cases where employers would be able to rely on "upset or inherent criticism" caused by whistleblowing as a separate and distinct reason for treatment from the disclosure itself, unless there was a particular feature of the way it was made, such as accompanying abuse, which made it genuinely separable. She commented, "*Some things are necessarily inherent in the making of a protected disclosure and are unlikely to be properly viewed as distinct from it*".

TERM TIME WORKER'S HOLIDAY PAY SHOULD NOT HAVE BEEN PRO-RATED

Summary: The Supreme Court confirmed that, under the Working Time Regulations (WTR), a "part-year" worker was entitled to 5.6 weeks' holiday. Her holiday entitlement should not have been pro-rated to reflect actual hours of work, even though this meant that she was entitled to proportionately more holiday than other workers (*Harpur Trust v Brazel*).

Key practice point: To be compliant with the WTR, employers must ensure that permanent employees on part-year contracts receive 5.6 weeks of paid holiday per year.

Facts: B was a visiting music teacher at a school run by the Trust. She was employed under a zero hours contract and her weekly hours fluctuated. She worked mainly during the school term time - between 32 and 35 weeks. Her contract provided for 5.6 weeks' annual leave, which she was required to take in school holidays. The Trust decided that her holiday pay entitlement should be pro-rated because she worked fewer weeks than the standard working year. Relying on Acas guidance, which stated that the statutory 5.6 weeks' holiday represents 12.07% of the working year of 46.4 (52 minus 5.6) weeks, the Trust paid holiday pay of 12.07% of her annual earnings. B brought an unfair deduction from wages claim, arguing that the calculation should be based on the WTR – the average earnings over the 12-week period immediately before holiday was taken. That would result in her receiving 17.5% of annual earnings as holiday pay (if she worked 32 weeks of the year). The Court of Appeal upheld the claim and the Trust appealed.

Decision: The Supreme Court dismissed the appeal, agreeing with B's calculation. There was nothing in the WTR that allowed alternative methods of calculating pay. The WTR do not draw a distinction between full-time, part-time and part-year employees and do not enable an employer to reduce the leave entitlement of part-year employees to ensure that is a proportional to that received by others.

The WTR reflected a policy choice by Parliament as to how holiday entitlement should be calculated and paid. The fact that this resulted in a slight favouring of workers with atypical working patterns did not justify the wholesale revision of the statutory scheme.

Although, in general, EU law (which was relevant, as the case started before Brexit) requires paid annual leave to be determined by reference to work carried out by the worker, it is open to member states to make more generous provisions. Therefore, even if the WTR resulted in B being entitled to a greater amount of leave than she might be strictly entitled to under the Working Time Directive, and to a proportionately greater leave requirement than full-time workers, that was compliant with the Directive.

Analysis/commentary: The calculation of holiday pay for workers with variable remuneration changed from April 2020 – the 12-week reference period for average earnings was increased to 52 weeks.

HORIZON SCANNING

What key developments in employment should be on your radar?

Summer 2022	Consultation on Statutory Code of Practice on "fire and rehire"
2022	Extension of ban on exclusivity clauses to lower paid workers
2022/23	Legislation to provide for: • Obligations on employers to deal with tips, gratuities and service charges • Neonatal leave and pay
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 • 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:** *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:** *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Rodgers v Leeds Laser Cutting Ltd* (Court of Appeal: whether dismissal of an employee who had refused to return to work due to his concerns about exposure to COVID-19 was automatically unfair)
- **Whistleblowing:** *Catt v English Table Tennis Association Ltd* (EAT: whether a non-executive director was a worker for whistleblowing protection purposes)
- **Working time:** *Chief Constable v Agnew* (Supreme Court: whether a gap of more than three months in a series of unlawful deductions from holiday pay breaks the series).

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