Welcome

There has been a lot of publicity lately about the employment status of individuals working in the gig economy. Employees and workers have more rights than the genuinely self-employed, so individuals are pushing for this status. Recently, the Supreme Court gave its decision in the high-profile Pimlico Plumbers case. Can someone be a 'worker' even though their contract says they are self-employed?

Mr Smith worked for Pimlico Plumbers as an engineer. He had a uniform and a branded van. He had to work at least 40 hours per week and pre-book any holiday through the company procedure. However, he paid his own tax and national insurance, used his own tools and paid his own insurance. He could subcontract work only to other Pimlico operatives. He also took some financial risk in relation to fees.

Mr Smith claimed he was pushed out of the business when he asked to reduce his hours after a heart attack. He brought claims for unfair dismissal as an employee and various other claims as a worker, including a disability discrimination claim.

The Supreme Court confirmed that Mr Smith was not an employee, but he was a worker and 'in employment' (as a worker) for the purposes of discrimination law. The company exerted significant control over him, including financial control. He was well integrated into the workforce. His right to subcontract work was too limiting for genuinely self-employed status. He was not running his own business. Mr Smith was a worker and his claims will now be heard by a tribunal.

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Employee status and 'umbrella' contracts

Can an individual employed as 'bank staff', with no guaranteed hours, be an 'employee'? Ms Lane-Angell worked for Hafal assisting vulnerable adults in police detention. Her contract said there were 'no guaranteed hours' and Hafal would use her services 'as and when they are required, if you are available'. Ms Lane-Angell would communicate her availability which was put into a rota. When on the rota she was expected to work if required. There was a poorly enforced 'three strikes and off' rule where staff were taken off the rota if they missed calls whilst on duty. Ms Lane-Angell missed calls and stopped receiving work. She then claimed unfair dismissal as an employee. But was she an employee?

The employment tribunal said yes. When work was offered to Ms Lane-Angell, she had to accept it or there were potential sanctions. There was an 'umbrella' contract which existed between her and Hafal. An umbrella contract is an overarching contract of employment which spans a series of individual contracts (in this case, the shifts she worked) and links them together. Hafal appealed to the Employment Appeal Tribunal.

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The EAT agreed with the employer and said she was not an employee. The tribunal had not properly considered the original contract. The terms were clear that there was no obligation to provide or accept work. The facts showed that the 'three strikes' rule only applied when Ms Lane-Angell was on the rota. The tribunal was wrong to say there was mutuality of obligation during the periods in between shifts when there was no obligation to provide or accept work. Accordingly each break reset the 'continuity of service' clock to zero. There was no umbrella contract and she was not an employee.

This is a good result for the employer, and highlights the importance of having clear terms of engagement with workers.

ACAS guidance on overtime

Most employers use overtime at some point, to satisfy increased demands such as a large order or an unexpected increase in work. The new ACAS guidance explains the difference between voluntary and compulsory overtime. It also describes the two types of compulsory overtime:

- Guaranteed overtime is where an employer has to offer overtime and the employee must accept it;
- Non-guaranteed overtime is a halfway house where the employer doesn't have to offer overtime, but an employee must accept it if it's offered.

The guidance explains the importance of setting out clear terms in contracts of employment to avoid confusion. It also includes a reminder that overtime hours still count towards working time and the limits set by the Working Time Regulations. There are also helpful sections on using time off in lieu instead of paid overtime, dealing with part time workers and the impact of overtime on holiday calculations.

Find the guidance at http://www.acas.org.uk/index.aspx?articleid=4249.

Whistleblowing – protected disclosures

Sections 43A-43L of the Employment Rights Act 1996 protect workers who report malpractice (a 'disclosure') by their employer and are then treated badly. For a disclosure to be protected it must contain 'information' which the employee reasonably believes is in the public interest. It must also show some sort of wrongdoing (such as a criminal offence or breach of a legal obligation). Can an allegation be 'information'?

Mrs Kilraine claimed she had made protected disclosures to her employer, the London Borough of Wandsworth. She said she was then treated badly and dismissed. She brought unfair dismissal and detriment claims, based in part on making protected disclosures. The Court of Appeal had to decide whether one of Mrs Kilraine's protected disclosures had been correctly struck out for containing no information.

The Court of Appeal gave helpful guidance on the potential overlap between an allegation and information:

- 'You're breaching health and safety obligations' - these words are too general to be information. They contain no facts;
- 'There are needles all over this ward floor, you're in breach of health and safety obligations' – this is an allegation, but it also contains information (about the needles).

Context is relevant too. If an employee says 'you're breaching health and safety obligations' whilst gesturing to the needles, that combined communication could also be 'information'.

One of Mrs Kilraine's disclosures was just an allegation with no information. It had been correctly struck out. This case may help employers to differentiate between simple allegation and those comments which might qualify as protected disclosures if other parts of the legal test are met.

Disciplinary action for high sickness absence

High sickness absence can place huge pressure on a business. How easy is it to take disciplinary action against a disabled employee for high sickness absence? The Employment Appeal Tribunal has looked at this issue recently in a case where the employee was absent for 60 days in a 12-month period.

Mrs O'Connor had a disability and high sickness absence over many years. Her employer had dealt with the absence sensitively. They had accommodated significantly more absence than their policy usually allowed. But, in 2016, they issued Mrs O'Connor with a written warning and stopped her company sick pay. She brought a claim for discrimination arising from disability under section 15 of the Equality Act 2010. Less favourable treatment under this section can be objectively justified if the employer can show that what they did was a proportionate way of achieving a legitimate aim.

Mrs O'Connor won her discrimination case at tribunal. The employer appealed but the Employment Appeal Tribunal agreed with the tribunal. The employer had the legitimate aims of assuring adequate attendance levels across the workforce and improving Mrs O'Connor's attendance. However, they relied on general assumptions about what a warning might achieve. They didn't look at how it would affect Mrs O'Connor or improve her attendance. No one had spoken to Mrs O'Connor's team manager about the impact of her absence. The employer failed to follow their own policy of referring an employee to occupational health before taking disciplinary action. The warning was not a proportionate way to achieve any of the employer's legitimate aims.

This case is a reminder to employers of the difficulties in dealing with disability related absence. This case succeeded because the employer couldn't justify how the warning would achieve their stated aims. If they had followed their own procedures, and put forward different justification arguments, the outcome may have been different.

Does misconduct have to be 'gross'?

Can an employer reasonably dismiss for serious rather than gross misconduct even if there have been no prior warnings? Theoretically yes, said the Employment Appeal Tribunal this month.

Mr Barongo was dismissed from Quintiles Commercial, with notice, for failing to attend two training sessions. The dismissing officer said it was gross misconduct. On appeal, the appeals officer said it was serious rather than gross misconduct but upheld dismissal on notice. Mr Barongo brought an unfair dismissal claim. The employment tribunal found he had been unfairly dismissed. Mr Barongo had a clean disciplinary record. Once the conduct had been downgraded to serious misconduct, the only fair outcome was a warning rather than dismissal. The employer appealed.

The Employment Appeal Tribunal agreed with the employer. The Employment Rights Act 1996 says a dismissal may be fair if it is for a reason which 'relates to the conduct of the employee'. Then the employer must show it acted reasonably in all the circumstances. The Act does not say that you cannot be dismissed as a first offence for anything less than gross misconduct. The tribunal failed to apply the correct test - whether the decision to dismiss was within the range of reasonable responses.

The case will now go to a new tribunal panel so that the correct test can be applied. They may still find the decision fell outside the range of reasonable responses. The judge warned that dismissal for serious misconduct without warnings will fall outside the band of reasonable responses in most cases. Employers should be wary when dismissing for anything less than gross misconduct if an employee has no warnings on file.

Procedural unfair dismissal – right to appeal

The right to appeal is an important part of a fair dismissal process. Is it fair to deny the right of appeal where the employer mistakenly but reasonably believes that the employee no longer has the right to work in the UK?

Mr Afzal had the right to work in the UK. His current permission was due to expire. He tried to send his employer, Dominos Pizza, evidence to show permission had been extended. The company couldn't open the attachments. They were worried about fines and criminal prosecution for employing someone illegally, so they dismissed Mr Afzal without notice. He was given no right to appeal. Mr Afzal brought an unfair dismissal claim.

The employment tribunal found Mr Afzal had been fairly dismissed. The judge said that there was nothing to appeal against because the employer reasonably believed that the claimant's employment was unlawful at the time of dismissal. An appeal would not have made a difference to that reasonable belief. Mr Afzal appealed to the Employment Appeal Tribunal.

The EAT said the tribunal was wrong. If Mr Afzal had appealed, he could have presented the relevant evidence. Alternatively, Dominos could have sought confirmation of his immigration status before the appeal hearing. Mr Afzal could then have been reinstated without fear of penalty or prosecution. This was not a case like Polkey where appeal would be futile – quite the opposite. Mr Afzal had been unfairly dismissed. Employers should always offer an opportunity to appeal in the letter communicating dismissal. Failure to do so can be costly.

And Finally...

The World Cup has started and, somewhat surprisingly, England is (at the time of writing) doing pretty well. Employers are torn between enjoying the national success and managing the potential impact at work. Concerns include reduced productivity, more holiday requests and staff pulling sickies after a night celebrating or commiserating their team's result.

It isn't all doom and gloom. These events can bring people from different backgrounds and cultures together. ACAS has published guidance for employers on how to manage football fever in the office. It covers things like booking time off, dealing with sickness absence, use of IT and alcohol at work.

ACAS advise employers to adopt a flexible approach to working hours and rest breaks as a short-term measure. If staff can make up their hours at different times, they will be less likely to pull a sicky, and productivity won't take such a hit. Find the guidance at: http://www.acas.org.uk/index.aspx?articleid=2953

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