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Hewitsons Employment

LEGAL UPDATE

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What's New

Holiday Pay

In Max-Planck-Gesellschaft v Shimizu, the European Court of Justice ('ECJ') has ruled that workers do not automatically lose the right to receive payment in lieu of untaken annual leave from previous leave years when employment ends.

Mr Shimizu worked for Max-Planck under a fixed-term contract. Two months before the end of his employment on 31 December 2013, Max-Planck invited him to take his remaining paid annual leave. He took 2 days off and sought payment of almost €12,000 in lieu of the rest (51 days' leave from 2012 and 2013). Max-Planck refused to pay. Under German law payment in lieu of outstanding leave on termination of employment is allowed, however, leave must be taken during each calendar year and can only be carried over in certain situations. A worker's right to leave, and subsequently to payment in lieu, therefore lapses at the end of each year. The German Federal Labour Court was unsure if this is consistent with EU law (particularly the Working Time Directive) and referred the matter to the ECJ.

The ECJ ruled that EU law prevents national law which results in an automatic loss of these rights without first assessing if the worker had a real opportunity to take the leave. The ECJ held that employers must ensure workers are in a position to take leave, should encourage them to do so and must also inform them in good time that leave will be lost if not taken within the relevant period. The ECJ held that the burden will be on employers to show they have met these obligations diligently.

Therefore a worker who has not taken his full annual leave entitlement does not automatically lose the right to paid holiday unless the employer has diligently brought to the attention of the employee that they will lose the holiday unless they take it.

Employment Status

In Addison Lee Ltd v Lange and others, the Employment Appeal Tribunal upheld the decision that drivers working for professional private hire taxi firm Addison Lee ('AL') were workers and not self-employed contractors.

The drivers had entered into agreements describing them as independent contractors. They hired cars with AL's branding on them and each driver was given a handheld device to log into when working. This assigned jobs, which drivers were expected to accept. Refusal of a job without a satisfactory reason resulted in the drivers being subject to sanctions. Drivers however choose the days and times they worked, and the contract said there was no obligation on either side to provide or do work.

The drivers brought claims for holiday pay and national minimum wage, which they would only be entitled to if they were legally classed as 'workers' and not self-employed contractors. The Employment Appeal Tribunal felt the contracts did not accurately reflect the reality of the arrangements and held that there was a mutual obligation to provide and perform work. It adopted a 'realistic and worldly-wise' approach and upheld the decision that they were workers.

This follows a string of similar cases within the last year, with Uber drivers and Hermes couriers being given worker status (although subject to appeal) as a result of which the government is expected to introduce legislation to clarify employment status and rights in this area.

Part-Time Workers

In the case of British Airways v Pinaud the Court of Appeal has found there was less favourable treatment of a part-time worker where the employer only paid an employee 50% of a full time salary for 53.5% of full time hours.

Mrs Pinaud joined British Airways ('BA') in 1985 as a cabin crew member. Following maternity leave in 2005, she switched to part-time and had to work 130 days a year. In contrast, full-time crew had to work 243 days a year. Despite only being paid 50% of full-time salary, Mrs Pinaud worked 53.5% of full-time hours (an extra 8.5 days). She claimed this was less favourable treatment under the Part-Time Workers (Prevention of Less Favourable) Treatment Regulations. 628 other BA employees brought similar claims, which awaited the outcome of this test case.

The Employment Tribunal and Employment Appeal Tribunal ('EAT') found there was, on the face of it, less favourable treatment of a part-time worker. However, the EAT disagreed with the tribunal's approach in the first instance in rejecting BA's defence that making payment to the employee in this way was objectively justified.

Upon further appeal the Court of Appeal upheld the finding of less favourable treatment and has remitted the matter to a fresh Employment Tribunal to consider whether BA can establish a defence by justifying the less favourable treatment and, if not, what the remedy should be.

Vicarious Liability

In the recent case of Bellman v Northampton Recruitment Limited, the Court of Appeal has held an employer liable for injury caused at a spontaneous afterparty following an office Christmas party.

Mr Bellman was employed by Northampton Recruitment Limited ('NR'). NR held a Christmas party

for the staff and their partners at a golf club in 2011. Mr Major, the Managing Director, oversaw the running of the party and arranged for NR to pay for food, drinks, taxis and accommodation for most guests at the nearby Hilton Hotel.

An impromptu afterparty at the Hilton was suggested for more drinks, which were mostly paid for by NR. Around half of the staff attended. After 2am, a disagreement broke out about a new employee who was being paid a lot more than the others. Mr Major, intoxicated and angry, summoned the employees to lecture them about his authority; how he owned the company and would do what he wanted. Mr Bellman (non-aggressively) challenged him, at which point Mr Major lost control and punched Mr Bellman multiple times. The injuries lead to severe brain damage.

The Court had to decide whether NR was vicariously liable for Mr Major's actions. It considered the nature of Mr Major's job and whether there was a sufficient connection between this and the wrongful conduct to hold NR accountable. Mr Major had control over NR and how he conducted his role. He did not have set hours and the business operated around the clock. Maintaining managerial authority was central to his role. Although the afterparty was separate from the planned Christmas party, Mr Major had run the first part of the evening as Managing Director, organised the taxis and arranged for NR to pay for the drinks. It was not a purely social event just happening to involve colleagues. When he lectured his employees, he was acting as Managing Director and misused his position to assert authority over his subordinates. In these circumstances, the Court of Appeal held there was a sufficient connection to hold NR liable.

WHAT TO LOOK OUT FOR

Employment Tribunal Fees May Be Re-Introduced

The Ministry of Justice has suggested it may re-introduce fees for employment tribunals. The Employment Tribunal fees were originally introduced in July 2013 and ranged between £160 and £1,200, until the Supreme Court declared the scheme unlawful in 2017. The MoJ is still refunding those who paid the fees, and had reimbursed £15.8 million by April 2018.

Although there are no immediate plans for a new fee scheme, the MoJ hopes to get the fee level right this time; and has stated that it wants to find a balance that helps fund the court system without being disproportionate and denying access to justice.

For more information about any of the topics covered in this update please contact Nicholas Hall by clicking here.