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UK: Employment Update

This June Update considers the Advocate General Opinion that workers denied paid holiday are entitled to roll it forward and be paid in lieu on termination; if followed by the ECJ, this could have costly implications for the gig economy sector. We also consider recent developments in relation to the risk of sex discrimination claims if employers do not provide enhanced shared parental leave pay.

Accrued holiday pay: something else for gig economy employers to be concerned about?

It is unlikely to have escaped the reader's attention that a number of so called 'gig economy' cases have been pursued in the employment tribunal in recent times. A common issue in many of the cases is the employment status of the claimant(s) and whether they are 'workers' thereby qualifying for holiday pay and the national minimum wage. Workers are entitled to 5.6 weeks paid leave per annum and to be paid in lieu of accrued but untaken holiday (a 'piloh') on termination.

A recent Opinion of the Advocate General (AG) has considered the issue of the right to pay in lieu of accrued holiday for workers who were not provided with the opportunity to take paid holiday during their engagement. If the European Court of Justice (ECJ) follows this Opinion, there are potentially significant implications for gig economy businesses that have not treated their workforce as 'workers' and accorded them the appropriate statutory rights including the right to take paid holiday.

The case in question centred on K, a salesman retained on a self employed commission only contract from 1999 until his dismissal in 2012. There was no right to paid holiday in his contract and during his engagement K took some holiday but was never paid for it. He brought claims for paid holiday in the employment tribunal on the grounds that he was a worker. One of K's claims was for compensation for the holiday he was entitled to take (as a worker) for 13 years but had not in fact taken.

The AG's Opinion held that an allowance (pay) in lieu of accrued but untaken holiday is triggered on termination and covers the whole period during which the 'employer' failed to provide an adequate facility for the exercise of the right to paid holiday and ends only when paid holiday is made available. If, however, an adequate facility for the exercise of the right to paid leave was never provided then pay in lieu covers the full period of employment until the termination of employment.

By 'adequate facility for the exercise of the right to paid leave' the AG is essentially referring to the right to take paid leave. ECJ case law has held that when an employee is unable to take annual leave due to ill health absence, the four weeks of holiday guaranteed by the Working Time Directive may be carried forward for a reasonable period; a carry forward limit of 18 months was held to be reasonable. The AG was of the view that the sick leaver cases could be distinguished from the current because in the sick pay cases a facility for paid leave had actually been made available to the workers; here it had not. Therefore, to impose a carry forward limit of 18 months would be incompatible with the Working Time Directive.

For 'gig' economy businesses if this decision is followed by the ECJ it has potentially expensive implications where there are long serving members of staff who have not been given the right to take paid holiday. As long as no opportunity for paid leave

Key issues

- Accrued holiday pay: something else for gig economy employers to be concerned about?
- Is failure to pay enhanced shared parental leave pay sex discrimination?

is made available, then holiday will accrue and carry forward without limitation until such time that it is made available or the worker relationship ends (for whatever reason). Individuals that have been treated as self employed contractors who are held to be workers would be entitled to a payment in lieu of holiday that has accrued from the later of the commencement of their relationship or 1 October 1998 (when the right to paid holiday came into effect) until the termination date. The time limit for bringing such a claim is three months from the termination date (subject to any extension as a result of ACAS Early Conciliation). The claim would not be treated as a series of deductions of wages in relation to which there is a separate time limit for each occasion on which holiday pay was denied.

It remains to be seen whether the ECJ will share the AG's Opinion that in this age of service provision via digital technologies the risk of non compliance with the right to paid annual leave should not fall on the individual.

[King v The Sash Window Workshop Ltd]

Is failure to pay enhanced shared parental leave pay sex discrimination?

As has been widely reported in the press, an employment tribunal recently upheld a claim of direct sex discrimination in relation to an employer's failure to pay enhanced Shared Parental Leave (SPL) pay. The employer, R, operated an enhanced statutory maternity pay (SMP) scheme but did not enhance SPL pay. Under R's SMP scheme mothers received an enhanced rate for 14 weeks of maternity leave. C's partner was suffering from post natal depression and therefore elected to return to work after her two weeks of compulsory maternity leave; C wanted to take shared parental leave to care for their child.

C argued that it was sex discrimination for R to pay occupational SMP pay to its employees taking maternity leave for 12 weeks after the 2 weeks of compulsory maternity leave but not to pay men the same rate if they took SPL during the same 12 week period. It was argued that the absence was for the same purpose, the care of the child, so there should be no difference in treatment in terms of pay during that period.

The employment tribunal held that C could compare himself with a woman taking 12 weeks maternity leave and could claim sex discrimination by reference to the more favourable treatment that was given to a female colleague on maternity leave; it held that the reason why C was treated less favourably was his sex.

The tribunal judgment referred to the guidance in the Government Technical Guide to SPL and SPL Pay which states that employers are free to top up the statutory SPL pay scheme. The Technical Guide also expressly states that it is entirely at the discretion of employers, whether they wish to offer occupational schemes but that it could amount to sex discrimination if only the mother was offered enhanced SPL pay.

Many employers have taken comfort from this Guide that it is not unlawful if they do not provide enhanced SPL pay even though they do offer enhanced SMP. So what does this decision mean for employers?

Arguably the decision could be challenged on a number of grounds. The Tribunal held that there was no material difference between a woman on maternity leave and a man on shared parental leave but did not refer to competing ECJ decisions on the question of the special status of the first 14 weeks of maternity leave. One of the ECJ cases held that the special protection status of the 14 weeks of maternity leave mandated by the Pregnant Workers Directive (the "Directive") was not lost when the mother assigned part of it for co-parenting purposes. This ECJ decision appears to support the argument that the first 14 weeks of maternity leave is a period of special protection and accordingly any enhanced pay received during such maternity leave comes within the exception for the special treatment of pregnant employees. This would therefore, preclude a claim of sex discrimination in relation to a different level of SPL pay in the same period.

A second possible area of challenge is that having decided that the man could compare himself with a woman on maternity leave (other than the two weeks of compulsory leave) the Tribunal then seemed to leap to the conclusion that the unfavourable treatment (i.e. lack of occupational SPL pay) was because of C's gender. It is not immediately apparent how this conclusion was reached given that any woman on shared parental leave would have been treated the same way. How could the tribunal conclude that the reason for not paying occupational SPL was the gender of fathers taking SPL? The policy could have been purely financial.

Although widely reported it is important to note that this is a first instance decision that has no binding precedence. Neither does it necessarily indicate judicial thinking; indeed the Leicester Employment Tribunal recently held that it was **not** discriminatory to offer enhanced SMP but only statutory SPL pay as a woman on maternity leave was not an appropriate comparator for a man on SPL.

If a claim of sex discrimination succeeds, the worst case scenario for employers in most cases is, broadly speaking, that an order of compensation will be made against them equivalent to the difference in

the SPL and maternity leave pay plus a small amount for injury to feelings. However, if the employer acts inappropriately in the context of any grievance or claim brought by an employee about the inequality of treatment this could result in a larger injury to feelings award, or, a separate award for victimisation. In this case the Tribunal also upheld claims of victimisation made in relation to the way that C was treated after he raised his grievance alleging sex discrimination in relation to the SPL pay scheme (or lack thereof).

Until judicial clarity is provided on the question of whether enhanced SPL pay schemes should match enhanced maternity pay arrangements, employers who do not want to revise existing arrangements should deal with any individual claims and grievances on a case by case basis, seeking legal advice where appropriate to manage the process and document any agreements reached. It is also important to ensure that any employee that raises an issue is not subjected to detrimental treatment by colleagues and line managers otherwise this will provide a potential platform for claims of victimisation and potentially constructive dismissal depending on the behaviour complained of.

It is understood that this decision and that of the Leicester tribunal are being appealed.

[*Ali v Capita Customer Management Limited*]

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