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Briefing Note – December 2017

UK: EMPLOYMENT UPDATE

Flavour of the month is employment status in the 'gig' economy. This Briefing reflects on the recent case law on the 'worker' status of Uber and Deliveroo drivers and the factors that were taken into account. Following hot on the heels of these two judgments was the Framework for Modern Employment Report setting out various recommendations and a draft Bill aimed at protecting workers in the modern labour market. Finally, we report on a CJEU holiday pay decision with potentially costly implications for the gig economy.

Key issues

- Determining employment status: do the contract terms reflect reality?
- A Framework for Modern Employment: conclusions and recommendations
- Accrued holiday pay: something else for 'gig' economy employers to be worried about

Determining employment status: do the contract terms reflect reality?

The employment status of 'gig' economy workers has been the subject of judicial scrutiny in recent months as a result of a number of cases being brought against Uber, Deliveroo, Hermes, Addison Lee and Pimlico Plumbers amongst others.

The subject of the employment tribunal proceedings against Uber was whether the Uber claimants were 'workers' eligible for the national minimum wage (NMW) and holiday pay, as opposed to self employed contractors who do not benefit from such statutory employment rights.

The Employment Tribunal held that the claimants were workers and that the 'working time' during which the driver was entitled to receive the NMW was from the moment that the Uber app was switched on if the driver was in the relevant territory and was able and willing to accept an assignment.

The Employment Appeal Tribunal (EAT) upheld this decision. It confirmed that in the context of determining statutory employment rights, the employment contract is not determinative (unlike the normal commercial environment where the starting point will be the written contract); the Tribunal must determine the employment status having regard to all the circumstances including what happened in reality. It was open to the Tribunal to go behind the labels in the contract that the drivers were in business on their own account (and therefore, self employed) if this did not properly reflect the reality of the relationship.

The EAT's decision reiterates that a multi factorial test will be applied to determine employment status on a case by case basis and the degree of control exerted over the individual will be one factor that is taken into account. In this case, the Tribunal concluded that a significant degree of control was

exercised over the claimants who were required to provide their services personally, such that the claimants were workers.

The decision in relation to what amounts to working time is potentially problematic for Uber (and potentially more generally) as it now appears necessary for an analysis to be carried out to assess whether each individual driver was 'willing and able' to work when the app was turned on and they were in the relevant territory. If the drivers are holding themselves out as available to other companies at the same time with a view to accepting the first 'gig' offered should they be considered as able and willing? This is a question of fact and potentially difficult to determine.

Uber have now indicated that they are going to make a 'leap frog' application to appeal the decision directly to the Supreme Court.

In a second 'gig economy' employment status case the Central Arbitration Committee (CAC) had to consider whether Deliveroo drivers were 'workers' in the context of an application for recognition and the right to negotiate on pay, hours and holidays by the IWGU union.

The CAC found that in practice the drivers had a genuine and unfettered right to appoint a substitute to undertake their deliveries both in their contracts and as a matter of practice; it concluded, therefore, that there was no personal service obligation on the drivers which was an essential element of the definition of 'worker'. The CAC held that the drivers were not workers and accordingly the union's claim for recognition was declined.

As the modern economy gives rise to ever more creative work models, the question of employment status and the entitlement to statutory employment rights; the NMW, holiday pay, pension auto enrolment, trade union recognition and so on; is increasingly complex. There is no one size fits all formula that can be applied to determine the correct status; each case is fact specific. Indeed the employment status and what constitutes working time can vary as between colleagues in the same workforce as the Uber decision illustrates.

In the New Year the Supreme Court will hear the appeal in the Pimlico Plumber case; whether its decision will provide any further clarity for companies in determining employment status or whether it will reiterate that a multi factorial case is applicable on a case by case basis remains to be seen.

[*Uber BV v Aslam &Ors; IWGB v RooFoods Ltd*]

A Framework for Modern Employment: conclusions and recommendations

Towards the end of November a joint House of Commons committee published a Report and draft Bill that is intended to progress what it considers are the best recommendations in the Taylor 'Good Work' Report (see our Briefing here). The Government is expected to publish its response to the Taylor Report by the end of the year and is invited to consider and address the recommendations and the draft Bill in the response. Key recommendations in the Taylor Report include the following:

- *A clearer statutory definition of employments status*: this should emphasise the importance of control and supervision of workers by a company, rather than focus on substitution.

- *Worker status by default*: a worker by default model should apply to companies who have a self-employed workforce above a certain size. The threshold for applying the default status is not specified, nor is the mechanism by which companies can rebut the default worker status.

- *Non-guaranteed hours*: the Government should work with the Low Pay Commission to identify companies to be included in a pilot where employees who do not have guaranteed hours are entitled to a premium rate of pay above the National Minimum Wage and National Living Wage. Companies will be selected to be included in the pilot according to workforce size and turnover.

- *Continuous service*: many statutory rights are dependent upon a specified period of continuous service. At present continuity will usually be broken if there is a break of one week or more in employment. It is proposed that continuous service should not be broken if there is a break in service of up to one month.

- *Employment Tribunals*: tribunals should be obliged to consider the increased use of higher, punitive fines and costs orders if an employer has already lost a similar case. In addition, the Government should take steps to enable greater use of class actions in disputes over wages, status and working time.

- *Flexibility and the National Minimum Wage*: the Government should rule out introducing any legislation that would undermine the National Minimum Wage/National Living Wage.

- *Written statement of employment particulars*: employers should be required to provide a written statement to workers, as well as employees. This right should apply from day one of a new job, with the statement to be provided within seven days.

- *Information and Consultation of Employees*: at present the Information and Consultation of Employees (ICE) Regulations require an employer (with 50 or more employees) that receives a request from 10% of its employees to commence negotiations for an ICE agreement. If a negotiated agreement cannot be achieved then a default information and consultation agreement will apply. It is proposed that workers, as well as employees, should count towards the 50 'employees' needed before a company is covered by the ICE Regulations. It is also recommended that the threshold for triggering the ICE negotiation should be reduced from 10% to 2% of the workforce.

- *Ending the Swedish Derogation*: A recommendation that all agency workers should be entitled, without exception, to the same treatment as permanent employees once they have completed 12 weeks' service. At present one exception to the right to equal treatment is if the agency worker has a permanent contract with the agency and is paid by it in between assignments (a minimum of 50% of the hourly rate of the last assignment for a minimum of four weeks) (the so-called Swedish Derogation Loophole).

- *Deterrence*: It is recommended that the Government brings forward stronger and more deterrent penalties, including punitive fines, for repeat or serious breaches of employment legislation, and expands the 'naming and shaming' regime to all non-accidental breaches of employment rights by businesses and supply chains.

It remains to be seen whether the Government has the appetite to adopt any of these suggestions or any of the other suggestions made in the Taylor Report and if so, what the timeline for implementation will be. In the meantime, the multi factorial tests applied by the courts and tribunals will continue to be the means by which employment status has to be determined with all the

attendant uncertainty that can arise. Companies may elect to alter their contractual and practical arrangements to minimise the possibility of the relationship be classified as one of worker/employee.

In the Budget the Government stated that it would publish an 'Employment Status' discussion paper to explore long term reforms to cement employment rights and clarify tax. The timing of publication is not known.

[A Framework for Modern Employment]

Accrued holiday pay: something else for 'gig' economy employers to be worried about

The Court of Justice of the European Union (CJEU) has now ruled on the issue of the right to pay in lieu of accrued holiday for workers who were refused the right to take paid holiday during their engagement.

K was a salesman engaged on a self employed basis for around 13 years until his dismissal. There was no right to paid holiday in his contract and during his engagement K took some holiday but was never paid for it. K claimed compensation for the holiday he was entitled to take (as a worker) for 13 years but had not in fact taken.

The CJEU held that if an 'employer' did not allow a worker to take paid holiday it must bear the consequences. The worker is entitled to carry forward the four weeks of holiday guaranteed by the Working Time Directive indefinitely until the termination of the 'employment'.

On termination of employment the Working Time Regulations give workers the right to be paid in lieu of all accrued but untaken holiday. For 'gig' economy (and indeed other) businesses this decision therefore has potentially expensive implications where there are long serving members of staff who have not been treated as 'workers' and given the right to take paid holiday. As long as no opportunity for paid leave 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 potentially 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).

[King v The Sash Window Workshop Ltd]

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