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Employment Law Update

This month we talk about:

- EAT agrees that Uber driver are workers
- Tribunal fees refund scheme
- Enforceability of non-compete clause
- General Data Protection Regulation
- Calculation of "a week's pay" should include employer pension contributions
- What is a reasonable investigation?
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EAT agrees that Uber driver are workers

During 2016, a number of Uber drivers brought claims for unlawful deductions from wages relating to holiday pay and failure to pay the national minimum wage. As Uber engaged the drivers as self-employed contractors, in order to pursue the claims, it was necessary for the drivers to establish that they had worker status for employment law purposes.

The employment tribunal found that the Uber drivers were workers. We reported on this case in January. Uber appealed the employment tribunal decision and the appeal was unsuccessful. The EAT agreed that the Uber drivers were workers because they were essentially working for Uber.

A similar approach was taken by the employment tribunal in the case of *Gascoigne v Addison Lee Ltd*. In this case the employment tribunal found that a cycle courier working for Addison Lee was a worker rather than a genuinely self-employed contractor. Key in this case was the fact that the courier was required to provide personal services under the company's direction and control.

Although these decisions are not surprising, they are a reminder that businesses should ensure that they engage their staff on the correct basis.

Taylor Walton is able to assist with any concerns or queries that you may have about the employment status of your workforce.

Tribunal fees refund scheme

As we reported in August, on 26 July 2017 the Supreme Court held that the employment tribunal fee regime was unlawful.

On 20 October 2017, the government launched the initial phase of its tribunal fees refund scheme and the government has now rolled out the scheme in full. The scheme is open to both claimants and respondents who paid a fee. The scheme is also open to representatives and sponsors who paid a fee on behalf of a party to a claim. Eligible parties can apply for a refund online or by post.

Enforceability of non-compete clause

Egon Zehnder Ltd v Tillman

In this case, the Court of Appeal considered whether a restrictive covenant that prevented an employee from "being concerned or interested in" any competing business for a period of six months after the termination of employment was enforceable.

Restrictive covenants in employment contracts will be unenforceable as a restraint of trade in circumstances where the restriction goes further than necessary to protect a legitimate business interest.

In this case the Court of Appeal found that the restriction was unenforceable. The Court commented that the restriction was drafted too widely. The inclusion of the words "interested in" prevented the employee

from holding a minority shareholding in a competing business. The Court considered that the restriction was a restraint of trade and was therefore unenforceable.

In some circumstances, unlawful provisions may be severed from the rest of the terms of a restrictive covenant to leave an enforceable restriction. It is interesting to note that in this case the Court was unwilling to delete the words "or interested in" from the clause to leave a valid non-compete restriction.

This case is a useful reminder that restrictive covenants need to be carefully drafted and must not go further necessary to protect a legitimate business interest.

General Data Protection Regulation comes into force on 25 May 2018

The GDPR will be directly applicable in all EU member states with effect from 25 May 2018 and it is expected that the obligations set out in the GDPR will continue to apply post Brexit.

The GDPR makes some significant changes to the current data protection regime and it is important that employers are familiar with the obligations set out in the new legislation. During November the ICO launched a telephone advice service to address queries that businesses may have about the GDPR and it is expected that the ICO will publish a comprehensive GDPR guide by the end of the year.

Earlier this month we reported on some of the key areas of the GDPR that businesses ought to be aware of from an employment perspective. During February 2018, Taylor Walton will be running a series of free workshops focusing on the practical steps that businesses will need to take to ensure that they are GDPR ready by May 2018. To book a place, please contact events@taylorwalton.co.uk.

Calculation of "a week's pay" should include employer pension contributions

University of Sunderland v Drossou

In this case, the Employment Appeals Tribunal considered the statutory concept of a week's pay under the Employment Rights Act 1996. "A week's pay" is used as the basis for many individual statutory rights, including statutory redundancy payments and basic awards for unfair dismissal.

Prior to this case, it was widely accepted that employer's pension contributions should not be considered for the purposes of calculating "a week's pay". However, in this case the EAT stated that the wording of the relevant provisions in the Employment Rights Act 1996 is wide enough to include payments made by an employer into an employee's pension fund.

This decision increases the value of potential unfair dismissal awards and statutory redundancy payments for employees earning less than the statutory cap on a week's pay (currently £489 per week). Employers should consider this decision when making calculations of this type.

What is a reasonable investigation?

NHS 24 v Pillar

In this case the EAT considered whether it had been unfair for the employer's investigation into misconduct to take account of earlier misconduct that had not resulted in disciplinary action.

Ms Pillar was employed by NHS 24 as a Nurse Practitioner. She took telephone calls from members of the public and triaged them by asking appropriate questions to determine how to deal with their condition. She was dismissed for gross misconduct following a Patient Safety Incident (PSI) in December 2013. On this occasion she failed to ask the appropriate questions and referred a patient who had suffered a heart attack to an out-of-hours GP service instead of calling 999. She had been responsible for two earlier PSIs in 2010 and 2012. Neither of those earlier PSIs had led to disciplinary action but they were included in the report compiled by the investigating officer for the purpose of the disciplinary hearing that led to Ms Pillar's dismissal.

Ms Pillar brought a claim of unfair dismissal. She argued that it was unfair for the investigating officer to have included the earlier PSIs when they had not led to disciplinary action and this, amongst other things, rendered her dismissal unfair.

An employment tribunal held that the employer had been entitled to treat the latest PSI as gross misconduct in view of the risk to patients and that the decision to dismiss was reasonable on the basis of the material before the decision-maker (which included the two earlier PSIs). However, the tribunal found the dismissal unfair on the basis that it had been unreasonable for the investigation to include details of the earlier PSIs.

NHS 24 appealed.

The EAT overturned the finding of unfair dismissal and substituted a decision that the dismissal had been fair.

The EAT stated that case law on the reasonableness of an investigation into misconduct was generally aimed at ensuring the sufficiency of an investigation and not criticising the employer for gathering too much information. Although not ruling out that overzealous or otherwise unfair investigation could render dismissals unfair, the EAT indicated that the reasonableness of an investigation is relevant only where it results in an absence of proper information being put forward to the decision-maker.

This case is a useful reminder of the importance of conducting an appropriate and thorough investigation into incidents of alleged misconduct. It also provides helpful guidance on the extent to which past misconduct

can be taken into account during the disciplinary process.

New leave allowance for grieving parents

A Bill has been published which will entitle parents who lose a child under the age of 18 to two weeks' paid leave. Currently there is no legal obligation to allow parents paid time off to grieve.

The Parental Bereavement (Pay and Leave) Bill will entitle all employees to parental bereavement leave, regardless of their service length. Those who have 26 weeks' continuous service will also benefit from statutory parental bereavement pay, the cost of which employers will be able to recover from the Government.

If you have any questions about these or other employment issues please call:
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