TAYLOR WALTON SOLICITORS

NeTWork

June 2018

Employment Law Update

This month we talk about:

- Cases on employment status
- *DL Insurance Services Ltd v O'Connor* – sickness absence warnings
- Women on Boards
- *Afzal v East London Pizza Ltd t/a Dominos Pizza* – rights to appeal dismissal
- Time off for Public Duties

Cases on employment status

There were two decisions relating to employment status in June 2018:

Pimlico Plumbers case - the Supreme Court has held that a plumber was a worker for the purposes of the Employment rights Act 1996 and the Working Time Regulations 1998, as well as being an employee under the extended definition of the term in the Equality Act 2010.

Despite the plumber's contract labelling him as an independent contractor and the presence of a limited right of substitution, personal service was the dominant feature of the contract. Further information about the facts of this case and employment status generally can be found in our article titled *Are your staff employees, workers or contractors?* published on our website and dated 13th of January 2017.

In *Leyland and others v Hermes Parcelnet Ltd*, an employment tribunal decided that couriers were workers, despite being classed as self-employed.

The tribunal held that the couriers were controlled by Hermes and had an obligation to perform services personally. It was a "dependent work relationship" in which the couriers had little autonomy. While the couriers had a right to substitute a "cover" (someone already on the books of Hermes), or to find a "substitution" (someone of the courier's choice), Hermes retained the right to veto the courier's choice of cover and the couriers were under an obligation to ensure a certain standard of personal service in relation to the substitution. Further, evidence suggesting that the couriers "negotiated" pay rates was not credible. Again, personal service was a dominant feature of the contract and therefore the couriers were workers.

These cases are useful reminder of the circumstances were worker status is likely to arise. Where business are engaging contractors to perform work personally, careful thought should be given to whether the nature of the arrangements remains appropriate.

DL Insurance Services Ltd v O'Connor – sickness absence warnings

In this case, the Employment Appeal Tribunal considered whether an employer had failed to objectively justify its decision to issue a sickness absence warning in a claim for discrimination arising from disability. Discrimination arising from disability occurs where an employee is treated unfavourably because of something arising in consequence of their disability. Employers may be able to objectively justify any such unfavourable treatment on the basis that it is a proportion way of achieving a legitimate aim.

Mrs O'Connor had a disability, resulting in high absence levels over a number of years. According to the EAT, Mrs O'Connor's employer, had adopted a very careful approach in this regard and had treated her with great

sensitivity and sympathy, effectively permitting her to have a much longer period of sickness absence than the strict terms of its sickness absence policy would have allowed. By 2016, the employer considered that it was appropriate to issue a written warning for the 60 days' absence that Mrs O'Connor had had in the previous 12 months. This also meant her contractual sick pay ceased for future absences.

Women on Boards

On 27 June 2018 BEIS and the Government Equalities Office published a press release in relation to progress made by FTSE 350 companies in meeting the Hampton-Alexander Review target of having at least 33% of board positions held by women by the end of 2020.

They note that if progress matches the same gains made over the last three years, then FTSE 100 companies are on track to meet the 2020 target. However in relation to FTSE 350 companies, while the number of women on boards has increased to 25.5%, around 40% of all appointments will need to go to women over the next 2 years for the FTSE 350 to meet the 33% target. They also note that there are still 10 FTSE 350 companies with all-male boards.

FTSE 350 companies are urged to accelerate their progress.

It is stated that the 2018 Hampton-Alexander Report will be published on 13 November 2018.

Afzal v East London Pizza Ltd t/a Dominos Pizza – rights to appeal dismissal

In this case, the Employment Appeal Tribunal considered whether an employee who was dismissed for failing to provide evidence of his continued right to work in the UK should have been given the right to appeal.

Mr Afzal had been granted time-limited leave to work in the UK which was due to expire on 12 August 2016. Under immigration rules, as long as he applied for a document evidencing his right to permanent residence (which would continue his right to work) by 12 August, he could continue working while his application was being considered.

On 12 August 2016, Mr Afzal sent the employer an email purporting to attach evidence of his application which his employer could not open. Concerned about potential criminal or civil penalties for continuing to employ Mr Afzal, the employer dismissed him. No right of appeal was given. Instead, when it received evidence of his right to continue working, the employer offered to re-engage him as a new starter. Mr Afzal claimed unfair dismissal.

The employment tribunal held that Mr Afzal had been dismissed for some other substantial reason, namely the employer's genuine belief that his continued employment was prohibited by statute. It had been reasonable for the employer to hold this belief (given the lack of evidence) and for it to act decisively on 12 August (given its concern about penalties).

The tribunal considered that it was unnecessary to offer Mr Afzal the right of appeal, the outcome of which could have been his reinstatement. The tribunal held that there was "nothing to appeal against" since the relevant question was whether the employer had reasonable grounds to believe that Mr Afzal had made a valid application by 12 August and once that date had passed, "there was no basis for the employer to back-calculate a belief it did not have on 12 August". Mr Afzal appealed.

The EAT held that an appeal could have established that the employer's belief that Mr Afzal's continued employment would have been illegal, while genuine, was wrong. Mr Afzal could have provided documents demonstrating his in-time application and the employer could have accepted assurance from Mr Afzal's solicitor (as it had done in another case) or it could have obtained a notice from the Home Office Employer Checking Service. If his continued right to work had been established, Mr Afzal could have been reinstated and the employer would not have been exposed to criminal or civil liability for doing so.

The case was remitted to the employment tribunal to reconsider this point.

Time off for Public Duties

The Time Off for Public Duties Order 2018 has been made and will come into force on 1 October 2018.

The Order amends section 50 of the Employment Rights Act 1996 to extend the range of civic duties for which employees are entitled to take unpaid time off work. The right will be made available to the following groups of volunteers in the criminal justice system:

- Lay Observers (those who monitor conditions in court custody and in cellular vehicles).
- Independent Prison Monitors (those who monitor conditions in Scottish prisons).
- Immigration Visiting Committees (those who monitor conditions in Immigration Removal Centres).
- Short Term Holding Facilities Visiting Committees (those who monitor conditions at immigration facilities at ports and airports)

If you have any questions about these or other employment issues please call: Heather Cowley (Partner & Head of Employment Law Department) on 01582 731161. Alternatively you can contact Heather via email at heather.cowley@taylorwalton.co.uk