Katten
KattenMuchinRosenman UK LLP

Employment Matters

New Cases Highlighting When "Gig Economy" Workers Are Entitled to Employment Rights

The "gig economy" is characterised by work performed on a short-term/temporary basis, in contrast to more traditional long-term roles. As the "gig economy" has grown, so too has the case law governing the employment rights of those working in that sector. In the UK, these people are either "employees" (i.e., having full employment rights), "workers" (having some employment rights—e.g., not to be discriminated against, the right to vacation and sick pay, and to be paid the minimum wage) or "self-employed" (having very limited rights). Traditionally it was thought that short-term workers were self-employed and as such did not have employment rights. Following an Employment Tribunal decision against Uber in October, though, two cases this year have further clarified the area.

In *Pimlico Plumbers v Gary Smith*, despite the claimant plumber's employment contract expressly referring to the claimant as self-employed, the Court of Appeal on the facts decided he fulfilled the "worker" criteria. Both this case and the *Uber* judgment highlight the willingness of the courts to look beyond the words used in such contracts to the actual circumstances. In particular, the fact that the claimant was generally required to perform the work himself and that he was required to be available for work a minimum of 40 hours-per-week were significant.

The Employment Tribunal in *Dewhurst v CitySprint* recently similarly found that a courier with CitySprint was a worker and not self-employed.

These cases put a spotlight on the business model under which operatives are intended to appear to clients of the business as working for the business, but at the same time the business itself seeks to maintain that there is a legal relationship of independent contractor rather than employer and employee or worker.

What Should Employers Do Next?

If you seek to retain workers on short-term contracts or on a temporary basis, and you are assuming that they do not have employment rights (e.g., you do not give them paid vacation), then it might be prudent to seek legal advice on the set up and your workers' rights.

Rejecting Lengthy Holiday for Religious Festivals Was Not Religious Discrimination

The claimant in *Gareddu v London Underground Ltd* had for several years taken five weeks' leave in the summer to visit family and attend religious festivals in Sardinia. In 2015, following a change of manager, an application for five weeks' consecutive leave for the summer was refused. When he was told that now a maximum of three weeks' holiday could be taken consecutively, he raised an unsuccessful grievance on the grounds of religious discrimination. Following that, he brought a claim in the Employment Tribunal.

His claim was ultimately unsuccessful as his attendance record did not support his claim that he attended the same 17 festivals each year. In actual fact he had spent 9 days at festivals, and the remaining time with his family. However, the judgment demonstrates that had the facts been different and his claim had been accurate, he could have been entitled to take the additional time-off, and it could have been discrimination to deny this to him.

What Should Employers Do Next?

If your employees ask for additional vacation to attend religious festivals, then you should review such a request on a case-by-case basis. Ordinarily it ought to be possible for employees to take this holiday as part of their usual annual vacation entitlement. If it is not for some reason, then in the right circumstances it could be a protected act for the employee to request the time off.

Draft Guidance Published on Gender Pay Gap Reporting

The UK Government and the conciliation service, ACAS, have together produced draft guidance on how to comply with the new gender pay gap reporting regulations from April 2018. The new regulations come into effect on 6 April 2017, and require employers with at least 250 employees to publish certain gender pay gap information on their websites by 4 April 2018.

The new obligations will require the reporting of the difference between male and female average hourly pay, bonuses and weekly working hours, as at a snapshot date (broadly, being the payroll cycle in which 5 April falls). The first such snapshot date is 5 April 2017, and therefore, even though the reporting obligation is over a year away, the data on which to base that reporting is coming very soon.

The guidance explains what the gender pay gap is and how it may be perpetuated; industry sectors such as finance, energy and construction are identified as having greater discrepancies in gender pay.

The mandatory reporting is broken down into four stages by the guidance. Employers must: 1) extract the "essential information" (i.e., pay, bonuses and weekly working hours); 2) calculate the relevant averages (mean and median); 3) make a supporting statement (confirming the information's accuracy, and also include an explanatory narrative); and 4) publish the results and statement on the employer's own website and on a (still to be designated) government website.

A fifth step, but not legally required, is also given: implement plans to manage gender pay.

The draft guidance is available in full here.

What Should Employers Do Next?

Employers with or who are close to having 250 or more employees should consider the impact of these regulations and how they will report on the required information, as well as whether the 5 April snapshot date will provide an inaccurate impression of any gender pay gap in its workforce.

Gross Negligence Can Constitute Gross Misconduct

In *Adesokan v Sainsbury's Supermarkets Ltd*, the Court of Appeal decided the claimant employee's failure to act represented gross negligence. The claimant was a Regional Operation Manager for Sainsbury's, a senior post responsible for 20 stores. He became aware that the HR Manager had sent an email undermining the integrity and validity of Sainsbury's process for assessing staff engagement in his region, called the "Talkback Procedure". The email encouraged store managers to only have the "most enthusiastic colleagues fill in the survey". Upon becoming aware of this, the claimant failed to take adequate steps to remedy the situation.

A disciplinary hearing found that his failure to act was "tantamount to gross misconduct" and so he was summarily dismissed. He brought a claim for breach of contract (i.e., that his employer was not permitted to terminate his employment summarily, without notice, and that he was therefore entitled to notice pay).

Often a failure to act will not on its own be sufficiently serious to justify summary dismissal for gross misconduct. However, as the claimant held a senior post and was in charge of implementing the Talkback Procedure in his region, his inactions had so undermined the trust and confidence of the employment relationship as to justify Sainbury's termination of his employment without notice.

What Should Employers Do Next?

Gross misconduct can take many forms, and it is not necessarily just the conduct that is set out in an employer's handbook (although employers can be helped or hindered in equal measure by such a list in a misconduct policy, e.g., if termination is for some reason not on such a list). Employers should not be overly prescriptive but should instead have regard to all the circumstances, including the employee's seniority and whether or not it is plainly obvious that the conduct complained of is something which the employee should not have done. Recording a full justification of why the decision was reached would also assist the employer, particularly if termination is to be without notice.

Trade Union Act 2016 Main Provisions in Force on 1 March 2017

As previously reported, the major provisions of the Trade Union Act 2016 will come into force on 1 March 2017.

The Act's key provisions in force from 1 March are:

- 50 percent turnout requirement for all strike ballots;
- requirement that 40 percent of those entitled to vote support industrial action ballots for important public services, such as medical, firefighting, education, transportation and border control;
- new rules on information that must be included on the ballot paper; and
- restriction on deduction of union subscriptions from wages in public sector.

What Should Employers Do Next?

As with any new legislation it may take unions and employers some time to understand the new provisions. Employers would be wise to scrutinise ballots which are called after 1 March 2017 to ensure that all of the requirements have been fulfilled.

For more information about these issues or if you would like to discuss an employment-related matter, please contact: Christopher Hitchins at +44 (0) 20 7776 7663 or Sarah Bull at +44 (0) 20 7770 5222.

Reply Address: Paternoster House, 65 St Paul's Churchyard, London EC4M 8AB

Tel: +44 (0) 20 7776 7620
Fax: +44 (0) 20 7776 7621
Website: www.kattenlaw.com/london
Email: info@kattenlaw.co.uk