MAYER·BROWN

UK Employment Round-Up

December 2016

Our monthly review of key cases and new law affecting employers

We are finishing 2016 with a rundown of some of the key cases since the summer.

The Mayer Brown Employment Group wishes you a very happy Christmas.

Shared Parental Leave: The first Employment Tribunal decision

Snell v Network Rail Infrastructure Limited

Mr Snell and his wife (both Network Rail employees) informed Network Rail that they wanted to take shared parental leave ("SPL") for their child. Network Rail's policy provided that partners/secondary adopters have 39 weeks SPL paid at the statutory rate, and 13 weeks unpaid leave, with mothers and primary adopters being provided for 26 weeks at full pay.

At the Employment Tribunal, the only issue remaining was on quantum, as Mr Snell had withdrawn his direct discrimination claim and Network Rail had admitted indirect discrimination (changing its SPL policy so that both the mother and father got shared parental leave at the statutory rate only). Mr Snell was awarded damages of over £28,000, which included an injury to feelings award of £6,000.

The importance of this case is to review your shared parental leave policy to ensure that it is drafted to set out clearly what type of leave the person is taking. Network Rail's policy had not differentiated between different types of parental leave. In fact, Mrs Snell had been on maternity leave, so the key point is to ensure that a family-friendly policy makes it clear what type of leave is being taken and, therefore, what the payment is for. Clarity should also be given to what period of entitlement is being paid for. Often, shared parental leave will be taken after a period of maternity leave has been taken. The policy should reflect that shared parental leave which is taken at, say, 22 weeks after birth is at week 22, and will not be recalculated as if it is starting at week one. If we can help to review your policy, please let us know.

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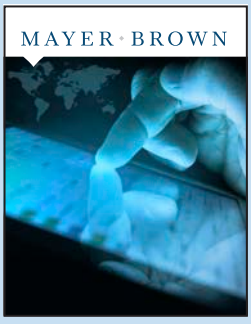

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Status and the "GIG" economy

Aslam, Farrar and others v Uber BV and others

This is a very current theme. A recent survey by Intuit suggested that, in the US, 40% of American workers would be independent contractors by 2020. There are a number of other cases waiting to be heard about independent workers and their rights.

This case turned on whether Uber drivers were "workers". The Tribunal concluded that Uber had sufficient control over the drivers to establish worker status and the drivers should be treated as workers whilst logged onto the Uber app. These periods of time would also qualify as working time under the Working Time Directive, with them being additionally classed as "unmeasured work" for the purposes of calculating national minimum wage requirements.

This is, in some ways, a surprising decision. Drivers own their cars, they are responsible for all running costs and are not required to wear a uniform. They do not need to work a minimum number of hours and the contract is between the driver and the passenger. Uber argues that its role was the provision of a technology platform which effectively enabled drivers to meet customers. However, the Employment Tribunal analysed the relationship and said that the drivers had to drive a route set by the app as this calculated the fare that they would be paid. They were paid directly by Uber, who subtracted a service fee of 20% to 25% for them using the app. Uber also dealt with any complaints. This is likely to be a "watch this space" area in the next few months.

Working Time Regulations: Workers have an automatic right to rest breaks without asking for them

Grange v Abellio London Limited

All workers with daily working time in excess of six hours are entitled to a rest break of 20 minutes.

In this case, the Claimant had originally worked eight and a half hours, with half an hour's rest. In practical terms, it was proving difficult for the Claimant to take that rest break as the job was a very busy one. The working day was changed to an eight hour day with no rest break, allowing workers to leave work half an hour earlier. The Claimant brought a claim, saying that he had been denied his entitlement to a rest break. The EAT decision made it clear that the onus was not on the worker to request a rest break. Instead, the onus was on the employer to provide one in order to give effect to the requirements of the Working Time Directive for rest breaks.

Therefore, where employers run businesses with very busy rosters, this case means that the onus is on the employer to roster in a rest break. We would suggest employers should also be reviewing the rosters to see what happens, in reality, to ensure that rest breaks are being taken.

Please speak to your usual contact in the Employment Group if you have any questions on any of the issues in this update, or contact either of the authors below.

Christopher Fisher
Partner, London
E: cfisher@mayerbrown.com
T: +44 20 3130 3724

Louise Fernandes-Owen
Global Professional Support Lawyer, London
E: lfernandes-owen@mayerbrown.com
T: +44 20 3130 3630

DSAR: The elephant in the room

DB v GMC [2016] EWHC 2331(QB)

We often see DSAR requests which appear clearly to be brought to further the Applicant's anticipated litigation. In this case, the applicant wanted to see an investigatory report by the General Medical Council into an allegation of incompetence against a doctor. The investigatory report had concluded that no further action should be taken against the doctor. The doctor, understandably, did not consent to the report being disclosed as it contained personal data about him, and he thought it would be used to bring further litigation. The GMC thought it could disclose the investigatory report without the doctor's consent due to the requirements of disclosure under the Data Protection Act. The doctor brought a judicial review application against the GMC to prevent this happening.

The High Court said that there was a need for a genuine balancing exercise to be undertaken between the Applicant's right of access to information and, in this case, the doctor's right to his own privacy.

Each case will turn very much on its own facts, and you can appreciate here the sensitivities on both sides. The High Court went on to say that if an individual refuses to consent to the disclosure of their personal data, this is an important factor to take into account. If the sole or dominant purpose behind the DSAR is to get information for litigation, then this is a weighty factor against disclosure in circumstances such as this, where consent is not being given.

The ICO's own Code of Practice suggests that a DSAR must be honoured unless it would not have been made but for the desire to get information to be used in other legal proceedings, i.e. if the sole purpose of the DSAR is litigation. Therefore, in this case, the test has been widened to the sole or dominant purpose.

Whilst this decision is unlikely to provide a defence to a business against a well crafted DSAR, which identifies legitimate reasons for the request in addition to litigation, it is a development for business where there is a sensible balance which needs to be considered, and sensitive issues on both sides.

Disciplinary process: Where a former formal final written warning that was "manifestly inappropriate" was relied upon in a dismissal

Bandara v British Broadcasting Corporation, UKEAT/0335/15

For a dismissal to be fair, it must follow a reasonable process and the employer must rely on one of five potentially fair reasons set out in the Employment Rights Act 1996.

In this case, there was a previous final written warning on file which had been relied upon by the employer when dismissing the Claimant. The Tribunal found the previous final written warning to be manifestly inappropriate based upon the employer's own disciplinary policy. However, in this case, the Employment Tribunal, despite this finding, then went on to substitute its own view on the facts as to whether the dismissal was reasonable. Instead, it should have considered whether the employer had acted as a reasonable employer and examined why the employee had been dismissed, especially in circumstances where weight had been attributed to the historical final written warning in reaching a decision to dismiss.

The key point for employers here is where there is already a warning on file, is the employer relying on that warning in a decision to dismiss? It is always worth considering whether it would be sufficient to dismiss the employee without relying on a previous warning. Alternatively, where a historical warning is taken into account, it is worthwhile explaining why it is reasonable to take that historical warning into account in reaching a decision to dismiss.

Dress Codes in the News

We had two Attorney General opinions over the summer, in relation to employers' dress codes and which religious items (if any) an employee is able to wear to manifest their religious belief. Whilst Attorney General opinions concern matters of European domestic law, the opinions are important from a UK law perspective and can indicate the direction of travel.

The first case is *Achbita and another v G4S Secure Solutions NV.* This case involved a female member of staff who told her employer (G4S) that she was going to wear a hijab because of her Muslim beliefs. G4S had a strict policy that employees in Belgium could not wear any religious symbols at work. The Attorney General found this to be a case of indirect religious discrimination (rather than direct) on the basis that this was a general rule applied by the employer equally applicable to all members of staff and all religions. The Attorney General's opinion suggested that the policy, whilst indirectly discriminatory, was capable of being justified. The Attorney General said that employers had to be permitted to have a degree of discretion in how they conduct their business, which included a right to have a dress code setting down standards for workers to behave and dress in a particular way, where they are in regular contact with clients or customers. The Attorney General's view was that a ban on hijabs was consistent with the employer's aim to be religiously neutral.

However, a second opinion, in the case of *Bougnaoui and another v Micropol Univers*, involved a ban on religious dress which prevented a Muslim IT engineer from wearing a hijab. She was asked to remove the hijab when visiting clients and was subsequently dismissed when she refused to comply with this request. Here, the Attorney General considered the ban on religious dress to be direct discrimination, and this is a crucial difference. It is far more difficult for employers to justify a direct discrimination. Finding this was a case of direct discrimination makes it far more difficult for employers to impose religiously neutral dress codes. Here, the employer's commercial interests were not felt to outweigh the rights of the employee to manifest her religion.

The decision of the European Court of Justice is awaited in these two cases, so we will keep a close eye on any developments in this area. It is unlikely, in the UK, that the UK courts would consider it appropriate for an employer's need to allow a degree of discretion in how they conduct their businesses to be a sufficient reason to justify an indirectly discriminatory policy.

Employment Legislation Timetable

2016 And Future Developments

12 February 2016	**Gender pay gap reporting:** Draft regulations published on 12 February 2016. Reporting to include bonuses and extended to cover public sector employers. Employers with 250 or more 'relevant employees' in an individual entity should report on the 'relevant date', which is 30 April in each year. 'Relevant employees' will have a wide definition to include LLP members and individuals ordinarily working in the UK under a contract governed by UK legislation. There has been a delay in the finalising of the regulations and it is now expected that the final parts of the legislation will not be in force until April 2017 (compared to October 2016, as had originally been envisaged).
15 February 2016	**Recruitment agencies:** Consultation response published on regulation of recruitment agencies and further restrictions on overseas recruitment.
7 March 2016	**Regulatory framework for individuals in financial services:** The new senior managers and certification regime was implemented, which regulates individuals working in banks, building societies and some investment firms, and is intended to align risk and reward and strengthen individual accountability in the financial services sector.
16 March 2016	**Budget 2016:** Taxation on termination payments: From 2018, termination payments subject to income tax on amounts in excess of £30,000 will be subject to employer national insurance contributions. The £30,000 exemption will remain.
31 March 2016	**Modern Slavery Act:** Organisations operating in the UK with a turnover of £36m or more, with a financial year ending on or after 31 March 2016, are to complete a transparency statement in respect of that financial year.
1 April 2016	**Introduction of the National Living wage:** £7.20 per hour for all working people aged 25 and over. Other National Minimum Wage rates to increase on 1 October 2016.
6 April 2016	**Introduction of the new flat-rate State Pension:** £155.65 a week.
6 April 2016	**Maximum compensatory award for unfair dismissal:** raised from £78,335 to £78,962. The maximum amount of a week's pay was also raised to £479.
6 April 2016	**Financial penalties for employers:** may now be imposed on those who do not pay employment tribunal awards or sums due under a COT3.
12 July 2016	**Immigration Act 2016:** came into force which introduces changes to the rules on employing illegal migrants.
7 September 2016	**Whistleblowing in financial institutions:** new rules introduced by the FCA and PRA came into force. These rules will apply to UK deposit takers with assets of £250m or greater (including banks, building societies and credit unions), PRA designated investment firms and insurer's subject to the Solvency II directive. The aim of the new rules is to encourage more employees to come forward if they suspect poor practice.

October 2016	**Ban on corporate directors:** s87 of the Small Business, Enterprise and Employment Act 2015 is due to come into force. This imposes a 'natural persons' requirement, banning corporate directors. Therefore, non legal persons, such as a company, will no longer be allowed to be a director. Directors must be human beings. There will be a transitional period of 12 months from the date of implementation to allow companies who have non natural persons as directors to be removed or replaced by a natural person.
Early 2017	**Tax-free childcare scheme:** A new government scheme to help working parents with the cost of childcare. For every £8 a parent pays into the scheme, the government will pay in a further £2. Parents can receive up to £2,000 per child per year, up until the age of 12. Parents of disabled children will receive £4,000 a year up until the child is 17. To qualify, each parent must be in work and each expect to earn at least £115 a week, and not have an income of over £100,000 a year.
Early 2017	**Brexit:** Article 50 is likely to be triggered by the end of March 2007 to commence the formal process of the UK's exit from the EU.
April 2017	**Immigration Act:** employers will lose National Insurance employment allowance for a period of one year if they are subject to a civil penalty for employing illegal workers. The will be an additional visa levy, known as the Immigration Skills Charge, on employer's who sponsor workers from outside the EEA and Switzerland. This is to be introduced in an attempt to reduce employers' reliance on migrant workers.
April 2017	**Salary sacrifice:** from April 2017, the only benefits that will continue to benefit from tax and NICs relief, if provided through a salary sacrifice arrangement, will be: enhanced employer pension contributions to registered pension schemes; childcare benefits; cycles and cyclists' safety equipment provided under the cycle to work scheme; and ultra low emission cars.
6 April 2017	**Gender Pay Gap Information Regulations 2017:** will come into force on 6 April 2017. First reports are expected to be published by 30 April 2018.
6 April 2017	**Apprenticeship levy:** due to be implemented. This will apply to all employers operating in the UK who have an annual pay bill of more than £3m. Employers' will be required to spend 0.5% of their total pay bill on the apprenticeship levy. There is a levy allowance of £15,000, so the total levy will be 0.5% of an employers' pay bill minus the allowance of £15,000. A pay bill is the total amount of the employees' earnings that are subject to Class 1 National Insurance contributions.
April 2018	**Termination payments:** as announced in the Autumn Budget 2016, amounts up to £30,000 are free from tax and NICs. Amounts in excess of £30,000 will be subject to tax and employer NICs. Payments for injury to feelings will fall outside the exemption for injury payments, except where the injury amounts to a psychiatric injury or other recognised medical condition.
November 2018	**Equalisation of state pension age:** to age 65 for both sexes by 2018. The age will increase to age 66 by September 2020.
2018	**Grandparental leave:** legislation to be introduced by 2018.