Employment Newsletter

October 2019

BACKHOUSE JONES

New Settled Status Scheme

Over 900,000 people have already applied to the EU Settlement Scheme and two thirds have been granted settled status with the remaining third being granted pre-settled status. In order to apply for settled status, EU citizens need at least five years continued residence in the UK. Those with pre-settled status can stay for as long as they need to build up five years of continuous residence before they can apply for settled status. It is important that employers ensure that their EU employees apply for settled or pre-settled status as soon as possible and in any event before 31 December 2020.

Once the UK leaves the EU, it has been proposed that new entrants from the EU will only be able to come to the UK for up to three months before requiring a visa. It is suggested that a new immigration system will be launched after Brexit but details are yet to be revealed.

Possible new employment rights to casual/zero hours workers

The Low Pay Commission (LPC) has recommended that a law should be introduced to protect vulnerable members of staff. These include the right for workers to be given 'reasonable notice' of their work schedules, however what constitutes reasonable notice has not yet been decided. LPC has also recommended that workers should be compensated if their shifts are cancelled or shortened without giving 'reasonable notice', irrespective of whether their hours are replaced. It has been suggested that the amount of compensation could be the value of the worker's shift in question. The consultation ends on 11 October so operators that use casual and/or zero hours workers should put forward their views as, if implemented, the changes could increase your costs.

Unexpectedly high penalty for a race discrimination

The ET has awarded damages of £30,000 to a photographer who was made redundant after just three months of working for a children's clothing company. When the photographer suggested that race discrimination had occurred, the company ignored her grievance and subsequently refused to engage in the Acas early conciliation process. The Tribunal awarded a high level of compensation for injury to feelings due to the company's string of wrongdoings after they became aware of the employee's complaint. Operators should therefore ensure that they do not ignore any discrimination complaints, even if they come from a relatively new member of staff.

Work Related Stress – Does termination take away the source of the Impairment?

The EAT in a recent case of *Parnaby v Leicester City Council* considered whether a disability discrimination claim could stand if a Tribunal did not address all four limbs of the definition of disability.

An employee is disabled under the Equality Act 2010 if they have a physical or mental impairment that has a 'substantial' and 'long-term' negative effect on their ability to do normal daily activities.

Whilst this is a legal test, with it, we consider whether employers can take steps pre-termination to assist with the test and enhance prospects of successfully defending a claim should a disability discrimination claim be permitted to final hearing.

Facts

The Claimant was impaired by depression caused by work-related stress. The Claimant could show that his mental impairment had a substantial adverse impact on his normal day to day activities (the legal test).

At the time of his dismissal that followed, which was the alleged act of discrimination, the impairment had not lasted for twelve months. This is the guide for what constitutes substantial and with this finding of fact, the tribunal held that he was not disabled because he had not met the requirement that the impairment must be long-term. As a result of this, his claim for disability discrimination could not proceed.

The Claimant appealed.

Appeal

The tribunal were found to have made an error by assuming that the likely future duration of the impairment and its impact on the Claimant would be time-limited by the Claimant's dismissal date. Essentially it was suggested that the dismissal removed the source of the impairment with it being work related stress and thus, it would not be classed as substantial or long term.

It was found on Appeal that the tribunal should have considered whether the impairment was likely to last twelve months or whether it might recur in the future. It was not open to the tribunal to assume that removing the stress (by dismissing him) would remove the impairment.

Comment

This case has been remitted back for a Tribunal to reconsider the legal test.

Work related stress is a common reason for sickness absence in the workplace. In some cases, eliminating the work related stress by terminating their employment may ultimately be the correct outcome. However, this decision should only be made after other avenues are considered; reasonable adjustments, identifying the specific source of the stress at work, regular meetings and obtaining up to date medical advice to support the decision.

When dealing with work-related stress or other long term absence conditions, it is recommended that the question of whether an employee's illness falls within the definition of Act is specifically asked. Whilst this is a legal test, most GP's or occupational health providers will give their opinion as to whether they believe the definition is satisfied or likely to be, based on their assessment.

It is important to follow this step prior to any dismissal and take advice on reasonable adjustments and likely return date at the same time before a decision to dismiss is made, particularly on absences that are deemed long term. If this is done after regular welfare meetings and at the appropriate time of the process, employers do not need to be concerned if a Tribunal subsequently finds their former employee to be considered disabled within the legal definition.

Failure to take these reasonable steps and consider if a condition falls within the definition, could lead to a premature decision to dismiss or unfair process being followed with claims presented in the Tribunal thereafter being difficult to defend.

Clarity on the horizon for Gig Economy Workers and employment status

The Watford Employment Tribunal has in the last few weeks agreed to refer a number of questions to the CJEU concerning the employment status of Yodel couriers. Amongst the questions, is whether a contractual right to use a substitute is critical when determining employment status for the purposes of the Working Time Regulations 1998. As you will be aware, employment status has been a hot topic with not only the Employment Tribunals, but with the Traffic Commissioner and HMRC in recent months.

The Facts

In the case of *B -v- Yodel Delivery Network Limited,* the claimant applied for a role with the Yodel as a neighbourhood courier delivering parcels. His standard terms were set out in a courier services agreement, which expressly provided that couriers such as himself would be self employed independent contractors and not employees or workers.

During the course of his engagement, he uses his own vehicle, own mobile phone, does not wear a uniform or have any Yodel branding on his vehicle. In addition, Yodel supply him with a handheld device which allows Yodel to issue him with instructions and monitor service performance. Under the terms of the courier services agreement, the Respondent is not obliged or required to send any parcels to the individuals for delivery, nor are the individuals obliged to accept parcels to deliver. The Claimant was told at the time of his engagement that Yodel operated on a six day week and as such, work has been made available for the Claimant on these days and he has generally accepted the same. There is a fixed rate of payment per successfully delivered parcel which varies according to geographical location. He is paid on fixed days supplemented by remittance advice notes.

Albeit the claimant is not required to perform services exclusively to Yodel and is free to substitute, he has not in fact done so and estimated that the bulk of his income in fact derived from Yodel (the other 20% coming from a separate business selling second hand vinyls). However, some of the other neighbourhood couriers operate as limited companies and partnerships, substituted the work and provided services to third party companies in addition to Yodel.

The Claimant argues that his categorisation as a ‘self employed independent contractor’ as

per his contract is not an accurate categorisation of his employment status. Ultimately, the Claimant argues that the approach of UK law to the determination of worker status may be incompatible with that of the CJEU. Furthermore, this type of work, typically referred to as 'gig economy', gives rise to problems associated with the computation of working time.

In light of the above, a request has been made for a preliminary ruling by the Court of Justice of the European Union (CJEU).

Commentary

Some of the important questions which have been referred in order to ascertain just how material commonly known indicators are when making a determination of worker status for the purposes of the Working Time Directive 2003, including:

- does the fact that an individual has the right to engage sub-contractors to perform all or any part of the work or services required of him mean that he is not to be regarded as a worker, either at all, or only in respect of any period for which he exercises the right of substitution;
- is it material that the supposed employer is not obliged to offer work to the individual in question;
- is it material that the individual in question is not obliged to work exclusively for the putative employer, but may concurrently carry out similar services for any third party, including direct competitors;
- is it material that the individual in question has not in fact availed himself of the right to perform similar services for third parties, where others engages on materially the same terms have done so.

Further, questions in relation to calculating working time have been referred in circumstances where the individual is not required to work fixed hours, but is free to determine his own working hours within certain parameters.

Most operators will recognise many of the elements of the arrangement between the Claimant and Yodel and understand that these are important considerations when considering a driver's worker status, as many HGV/PCV drivers are engaged on a self employed basis and may also appear to operate as a limited company. We anticipate that a substantive response from the CJEU in relation to the above will hopefully assist in providing some clarity for operators in determining the status of their workers, particularly for the purposes of tax and NI liabilities. We will of course follow up this case when the CJEU provides its response to the questions posed.

FOR ALL RELATED ENQUIRIES, PLEASE CONTACT OUR EMPLOYMENT TEAM ON 01254 828300

Please note: This publication does not constitute legal advice

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