Employment Update

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Featured in this edition

A word from the Editor
Catherine Urquhart

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The 'Gig Economy' and employment law: 'Uber' tricky

Gillian Crew

Companies such as Uber, Deliveroo and SportsDirect have been making the headlines over their working conditions in 2016. Matthew Taylor, the former policy chief under Tony Blair, has been commissioned by Theresa May to undertake a review of "non-standard work arrangements".

With the rise of the "gig economy" it is estimated that 4.8 million people fall under the umbrella of "self-employed", ranging from the truly self-employed freelancer to the lowly paid zero-hours contractor. That is a lot of people who are not enjoying traditional employment law rights, such as holiday pay and sick pay.

How does employment law rise to the challenge of the gig economy? The answer is of course through the perennial "employment status" question of whether someone is an employee, a worker or truly self-employed under section 230 of the ERA 1996. The test is of course well known: issues of personal service, control, and mutuality of obligations are considered. In theory the traditional factors and case law are more than flexible enough to deal with the gig economy.

The application is of course more tricky, as illustrated by the much anticipated Uber case, which potentially influences the employment status of potentially up to 40,000 drivers in the United Kingdom.

In the "Uber" case, *Aslam & Others v (1) Uber BV (2) Uber London Ltd and (3) Uber Britannia Ltd* 2202550/2015, two Uber drivers have claimed that they were in fact workers of Uber and not self-employed contractors. They said that they satisfied the traditional "control" test. Once they have accepted a job they are not notified of the destination, and they face punitive measures if they don't perform well enough, for example, following a customer complaint. They say sums of money are frequently deducted from their pay, often without advance warning.

Uber denies that they were workers and says that it simply provides a platform. Uber argues that there are more than 30,000 drivers in London and 40,000 in the UK using its app, and that many do so because they can work flexibly. The firm says drivers, whom they call "partners", can "become their own boss". The firm says it is a technology company that provides an app to put drivers in touch with customers. It doesn't set shifts or minimum hours, or make drivers work exclusively for Uber, it says. It adds that in September UberX (the most basic private car service that Uber has to offer) drivers made £16 an hour on average, after Uber's service fee, and that only 25% logged in for 40 or more hours per week. ■

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Evaluate that!

Michael Salter

A new scheme aims to weed out poor claims. Michael Salter explains

Since October 2016, tribunals have been given the power to offer parties "Early Neutral Evaluation" of their claims. The idea is that after the case management element of a Preliminary Hearing the Employment Judge, if the parties agree, gives a totally confidential evaluation of what they perceive to be the prospects of success of a claim or defence to a claim based on the material they have before them and the issues as identified in the PH.

Whilst the comments of the EJ in ENE could be used in without-prejudice discussions or in any later judicial mediation, the views expressed are strictly confidential. Unlike in a judicial mediation, however, the EJ in ENE is not facilitating a settlement, but rather they are giving their views of the claims.

What does this mean for the parties? Firstly, I consider that there may be an increase in the number of PHs held in person, as ENE is only likely to work when the parties are in front of the tribunal. In some cases a telephone PH could involve ENE, but it's hard to see how useful this would be.

Secondly, PHs are likely to be listed for at least two hours in order to give all parties and the EJ time to engage in the ENE process as well as undertake all the other aspects of a PH. Thirdly, it may mean that Respondents "front load" their work so that Grounds of Resistance become more detailed and longer in order to provide the EJ with as much material as possible to help get the Respondent's case across at ENE.

Fourthly, the confidential nature of the discussion may be more apparent than real as, one suspects, if the EJ gives an assessment of the prospects of success that one party agrees with, then after the PH that party would draft a "costs warning letter" adopting and adapting the essence of what the EJ states as their own assessment of the prospects of success.

ENE will only take place if both parties agree to it. However, some EJs are well known for adopting "robust case management" at PHs and will give their opinion and views on claims and compensation in any event. Such expressions of opinion fall outside the ENE scheme and so are not restricted by the scheme's procedural rules. One interesting anomaly is that the EJ who conducts ENE is unable to hear any final hearing in that claim, whereas an EJ who merely gives "robust case management" advice is not automatically prevented from hearing the case later on. The exclusion of an EJ from hearing the final hearing may also affect how quickly cases can be heard, as at tribunals which have only a small number of EJs available, the removal of the EJ who has conducted the ENE from the pool of available judges may put further pressure on the lists.

One can see possible limits on the extent to which EJs will embrace these new powers when it comes to giving assessments of liability. Although ENE is in theory available for any type of employment claim, many claims, especially discrimination and "whistleblowing", are so fact-sensitive that a claim that can look weak on paper could easily succeed once the parties' witnesses give evidence at the hearing. Indeed, it's the very fact-sensitive nature of these claims that leads to strike-outs and deposit orders being rare beasts here. EJs may feel they are unable to give evaluative assessments of the prospects in such cases.

One thing does appear to me to be useful however, which is that ENE can be used for assessment of remedy. A judge could give a very clear steer to a claimant as to the real value of their claim and could take the opportunity to explain the Vento bands, regarding injury to feelings awards, to litigants in person, and such matters as the powers to award interest, and the little-used power to make a financial penalty (s12 Employment Tribunal Act 1996).■

Has it happened to you?
Please do not hesitate to contact me if you wish to discuss anything raised in this article. I would be especially interested to hear of any ENE stories you may have as this new scheme gets under way.
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Holiday pay: the saga continues...

Thomas Kirk

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When employers calculate holiday pay, they must include compensation for any results-based commission that would ordinarily be earned by the worker. So held the Court of Appeal in the hotly anticipated appeal of *Lock and another v British Gas Trading* [2016] EWCA Civ 983.

Mr Lock was a British Gas salesman who was paid a basic salary as well as variable commission. His commission did not depend on the time worked but the outcome of his work, i.e. whether he achieved sales or not. Because Mr Lock would not earn commission whilst on annual leave, he would lose income by taking leave. He accordingly brought a claim for lost holiday pay.

His claim was delayed whilst a reference was made to the European Court of Justice. The result was a finding that, since Mr Lock's commission was directly linked to the work he carried out, it should be taken into account when calculating holiday pay. The matter then returned to the Employment Tribunal so it could apply the ECJ ruling to UK law.

The Employment Tribunal gave effect to the conclusion of the ECJ and, aided by the EAT's decision in *Bear Scotland & others v Fulton & others* [2015] ICR 221 (concerning bonus payments), used a similar means to imply additional words so as to interpret the Working Time Regulations 1998 in a way compatible with EU law.

The Tribunal's decision was upheld on appeal to the EAT in a judgment of Singh J.

On British Gas's appeal, the Court of Appeal rejected its contention that such an interpretation was strained and impermissible. Sir Colin Rimer held that a presumption operated that the UK government intended the WTR to fulfill entirely its obligations under the Working Time Directive, even those requirements which were not apparent at the time of its enactment but which only became clear by later elucidation by the ECJ.

To imply the necessary words into the WTR did not, the Court of Appeal said, amount to the judiciary repealing or amending legislation but was rather an example of the court providing a conforming interpretation to legislation that implements a directive.

Frustratingly, Rimer LJ would not be drawn into other difficult practical questions, such as how these principles are to be applied to cases such as bankers' bonuses.

The case of a banker who receives a single, large, results-based bonus at the end of the financial year in March presents an unanswered problem: is such a worker entitled on his summer holiday to holiday pay that includes an element referable to his bonus, even when this might skew the picture of his normal pay? And which reference period is to be used?

These are amongst many questions that await further clarification. Meanwhile, British Gas has applied for permission to appeal to the Supreme Court whilst near to a thousand claims wait in the wings. The story, it seems, is far from over... ■

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Gillian Crew

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Employment Judge Snelson, at London Central Employment Tribunal, disagreed with Uber's submissions in fairly strident terms, describing Uber's case that the drivers were not their workers in general as "The lady doth protest too much, me thinks". In summary, despite Uber's best endeavours, he found that Uber is in the business as a supplier of transportation services. The drivers provided the skilled labour through which Uber delivered its services. The drivers provided their work personally and satisfied the definition of section 230(3)(b) of the ERA.

The key findings were: (1) there was a contradiction in the Rider Terms between the fact that Uber purports to be the driver's agent and its assertion of "sole and absolute discretion" to accept or decline a booking; (2) Uber interviews and recruits drivers; (3) Uber controls the key information (such as the passenger's name, contact details and intended destination) and excludes the driver from this information; (4) the fact that Uber requires drivers to accept trips; (5) Uber sets the route; (6) Uber sets conditions on the drivers, such as a limited choice of acceptable vehicles; (7) Uber subjects drivers through the rating system to what amounts to a performance management/ disciplinary procedure; (8) Uber determines issues about rebates without involving the driver whose remuneration is liable to be affected; (9) Uber accepts the risk of loss; (10) Uber handles passenger complaints; (11) Uber reserves the power to amend the drivers' terms unilaterally.

The decision is of course only the start of the story, as it is likely to be appealed. Further, there are other "gig" economy cases in the pipeline, which will no doubt lead to conflicting decisions on the facts. ■

Mind the pay gap

Catherine Urquhart

The final version of the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 has at long last been published.

Companies in the private and voluntary sector with 250 or more employees will have to publish gender pay gap information, under regulations set to come in to force on 6 April 2017. Companies will have to publish the mean and median hourly pay gap between men and women at a "snapshot date" of 5th April of each year. "Pay" includes any bonuses paid in that period.

The 2017 Regulations oblige large employers to publish the information in a report on their website by April 2018, and send evidence of compliance to the Government, for 2017 and every year thereafter. They will be obliged to keep three years' data online so that comparisons can be made.

Employers will also have to calculate and publish three other types of figures – the gender bonus gap; the proportion of men and women receiving a bonus; and the proportion of men and women working at each quartile of the organisation's pay distribution.

The new regulations, by forcing transparency upon larger companies, may go some way to putting pressure on them to adjust their salaries to narrow or eliminate the pay gap. Already some universities have increased the pay of women academics upon discovering that it was on average lower than that of male academics.

Public sector employers with 250 staff or more are also to be brought into the reporting regime: the Government recently consulted on this subject and its findings are due to be published soon. ■

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Prison chaplains and home office promotions

David Mitchell

Judgment is pending in two important cases concerning indirect discrimination heard by the Supreme Court in November. *Essop v Home Office* concerns the requirement of the Home Office for all staff to sit and pass a Core Skills Assessment ("CSA") in order to become eligible for promotion. The appellants all failed the CSA. A statistical report found that candidates from black and minority ethnic backgrounds and candidates over 35 years old were disproportionately likely to fail the CSA. The appellants brought claims of indirect discrimination on grounds of race and/or of age. The Court of Appeal, reversing the decision of the President of the EAT, held that it is necessary in indirect discrimination claims for the claimant to show why the provision criterion or practice has disadvantaged the group and the individual claimant (s.19(2)(c) Equality Act 2010).

Naeem v Secretary of State for Justice concerns an allegation of indirect religious discrimination arising from the fact that Muslim prison chaplains (only appointed since 2002) have lower average pay based on length of service than their longer-serving Christian counterparts. Both the EAT and Court of Appeal held that the claimant had not established a prima facie case. The appeal concerns whether it is necessary to show that a protected characteristic is the "material cause" of a difference in treatment (s.19(2) EqA).

The Court of Appeal's decisions in both *Essop* and *Naeem* have been the subject of widespread criticism for restricting the protection against indirect discrimination. Both these decisions are therefore likely to be overturned, in whole or in part, by the Supreme Court in 2017. ■

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