MASSERS

EMPLOYMENT LAW UPDATE

July 2016

Employment status

Taxi company Uber has been in the employment tribunal this week following claims from drivers that they are acting unlawfully in refusing them certain rights such as paid holiday and sick pay. Some drivers also claim that they are being paid less than national minimum wage.

Uber argues that its drivers are independent contractors or self employed and not eligible for these employment rights. The tribunal is hearing test cases brought by two drivers and will decide whether they are workers or genuinely self-employed. Lawyers for Uber claim that drivers can choose when they work, whilst the GMB Union says that Uber exercises a high level of control over drivers and the reality is that they are workers, not self-employed.

If the test cases succeed, Uber could potentially face huge payouts to them and other drivers. It could also have far reaching consequences for other companies who operate on the same basis.

The Guardian has reported that food delivery service Deliveroo has built clauses into its contracts of employment stating that its drivers cannot take them to an employment tribunal and if they do, they will have to pay the company's legal fees. Like Uber, Deliveroo purports that all its couriers are self-employed, meaning that they have fewer rights than workers.

Whether the clause could be enforced in practice is questionable at best and seems unlikely. Were a courier to seek to claim they were employed and therefore entitled to bring certain complaints to a tribunal, it is likely that the clause would be seen as a penalty and one which could not be relied upon.

Employment status is a tricky subject. Many companies use contracts stating that workers are contracted on a self-employed basis, however tribunals will look at the reality of the relationship in reaching a determination. Issues such as the degree of control exerted by the company and mutuality of obligation will be considered.

Guidance from EHRC on race hate

David Isaac, Chair of the EHRC, has published an open letter to employers following increased reports of hate crime since the EU referendum. The letter is endorsed by the Confederation of British Industry, the British Chambers of Commerce, the Federation of Small Businesses, Acas, CIPD, the TUC and the Employers Network for Equality and Inclusion.

The letter provides guidance to employers on avoiding and dealing with race hate, to include making it clear that there is a zero tolerance approach to racism and racial harassment; ensuring employees understand the standards of behaviour expected of them; being vigilant in identifying and dealing with incidences of discrimination or harassment; and supporting line managers.

Advocate General: Hijab ban is direct discrimination

In *Bougnaoui v Micropole SA* Advocate General Sharpston has delivered their opinion that banning a Muslim employee from wearing a hijab when visiting clients amounts to unlawful

discrimination.

B was a practising Muslim who was employed by Micropole SA and wore her hijab to work and when visiting clients. A client complained, advising that there should be no headscarf worn next time and Micropole told her she was no longer to wear it when visiting clients. B refused and was dismissed.

The French Labour Tribunal dismissed B's claim and their decision was upheld on appeal. The matter was then referred to the Court of Justice of the European Union and the Advocate General concluded that the requirement that B remove her headscarf was not a "genuine and determining occupational requirement" under Article 4(1) of the Equal Treatment Directive (2000/78/EC) and that her dismissal constituted unlawful direct discrimination on grounds of religion or belief.

The Advocate General's opinion is not binding on the CJEU, who could reach a different decision. It also stands in stark contrast to the opinion of Advocate General Kokott in *Achbita and another v G4S Secure Solutions NV,* who said that a ban on wearing any visible religious, political or philosophical symbols in the workplace did not amount to direct discrimination and was a legitimate commercial choice.

Annual leave and sickness absence

In *Sobczyszyn v Skola Podstawowa w Rzeplinie* the ECJ has reaffirmed that if a worker is prevented from taking annual leave because of sickness, the leave can be carried forward.

The decision follows those handed down in previous cases, notably *Pereda*, which confirmed that if scheduled leave coincides with a period of sickness, the worker can take leave at a different time. Under EU law all workers are entitled to a minimum of four weeks' annual leave and payment in lieu can only be made on termination.

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