MASSERS

EMPLOYMENT LAW UPDATE

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Employer vicariously liable for conduct at a work after party

In *Bellman v Northampton Recruitment Ltd* the Court of Appeal considered whether a company could be liable for an injury sustained after an employee assaulted a colleague at a work after party.

Mr Bellman worked for the company as a sales manager. Following a work Christmas party the firm's Managing Director, Mr Major, arranged taxis to take staff to a hotel where they carried on drinking. The company paid for most of the drinks.

After a few hours an argument broke out between Mr Bellman and Mr Major, with the former questioning some work-related decisions Mr Major had made. It culminated in Mr Major punching Mr Bellman, causing a brain injury.

In reaching its decision the Court of Appeal took the following factors account:

- Mr Major was the MD of the company and the argument related to decisions at work. When debating those points and asserting authority he was doing so in the role of MD.
- The party was not simply a social event, but followed on from an organised work event.
- The company paid for taxis and drinks at the party.

The Court of Appeal found that there was a sufficient link between the MD's conduct and his role to establish vicarious liability.

Holiday pay – use it or lose it?

Many companies do not allow holiday to be carried forward from one year to the next except in limited circumstances, taking a "use it or lose it" approach. In *Max-Planck-Gesellchaft v Shimizu* the ECJ considered whether, in circumstances where a worker didn't exercise their right to take the minimum annual leave to which they were due, they would lose the right to be paid for that leave on termination of their employment.

On ceasing employment Mr Shimizu brought a claim for unpaid holiday accrued over the preceding two years. The ECJ held that under EU law if a worker doesn't take their holiday they will not automatically forfeit it at the end of the year unless their employer has "diligently" brought it to their intention that it will be lost. There is no requirement to force employees to take holiday, as long as their right to do so is made clear.

Worker status

In *Addison Lee v Lange & Ors* the EAT upheld the tribunal's decision that, despite contractual wording to the contrary, the claimants were in fact workers and to holiday pay and national minimum wage.

The claimants were all drivers who hired liveried cars from a company associated with Addison Lee. The drivers had to log onto a portable computer known as an XDA. Once logged in, they would be allocated work automatically. If rejecting work, they had to give a reason or face sanctions. They weren't promised a specific amount of work but were told that on average drivers worked between 50-60 hours per week and would need to work 25-30 hours to cover the cost of the vehicle hire. Their contracts provided that they were independent contractors, that they could choose when they wished to work and that there was no obligation on either side to do or to provide work.

The EAT found that the tribunal was entitled to take a "realistic and worldly wise" approach when assessing employment status. The wording of the contract was just one factor to consider and the working practices needed to be scrutinised when determining status.

Long-term disability benefit schemes and dismissal

In *Awan v ICTS* the EAT implied a term into a contract that, once entitlement to long-term disability benefits has arisen, an employer will not dismiss on grounds of incapacity.

Mr Awan's employment contract gave him the benefit of an insured long-term disability plan. Payments under the plan were contingent upon the employee remaining in employment. At first instance, a tribunal found that Mr Awan's dismissal on grounds of capability was fair and that the fact of his entitlement to benefits did not prevent his employer from dismissing him.

The EAT overturned the decision and implied a term into the contract whereby "once the employee has become entitled to payment of disability income due under the long-term disability plan, the employer will not dismiss him on the grounds of his continuing incapacity to work." To allow ICTS to dismiss Mr Awan thereby denying him the benefits which the plan envisaged would be paid would run contrary to the function and purpose of the plan.

Part time workers and parity of pay

In *British Airways v Pinaud* the Court of Appeal found that a part time worker was treated less favourably when she received 50% of full pay despite having to be available to work 53.5% of full time hours.

Mrs Pinaud worked part time, 14 days on and 14 days off. She had to be available to work 130 days each year whereas full time workers were on duty 6 days on and 3 days off, amounting to 243 days a year on which they had to be available to work. BA argued that she actually worked fewer days pro-rata than her full time comparator.

At first instance the tribunal found less favourable treatment due to the need to be available for work. It found that the treatment couldn't be justified as BA could have increased pay to 53.5% that of a full time worker.

The Court of Appeal found that on the face of it the treatment was less favourable, however the case will now be remitted to the tribunal to determine whether it can be justified following analysis of whether there are other benefits to the part time contract and of the impact of needing to be available to work. It is an important test case, with over 600 similar cases currently stayed pending its outcome.

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