Employment Law

Case Studies

BLAKE MORGAN

Uber BV & others v Aslam & others SC February 2021 (worker status)

The Supreme Court unanimously upheld the earlier decisions of the Employment Tribunal, EAT and Court of Appeal that Uber drivers are "workers" rather than independent contractors.

As "workers" Uber drivers are entitled to the national minimum wage, paid annual leave, working time rights, protection from discrimination and when whistleblowing.

There were five specific aspects that justified the conclusion that the drivers were working for Uber:

- Uber sets the fare;
- The contract terms are imposed by Uber;
- Once logged on, the driver's choice about whether to accept requests for rides is constrained by Uber;
- Uber has significant control over the way the drivers deliver their services; and
- Uber restricts communications between passenger and driver to the minimum necessary.

Holly says "If you engage with any individuals who you treat as self-employed, now is the time to check what contracts are in place and, more importantly, how what happens in practice."

K v L EAT 2020 (dismissal for unproven criminal allegations)

The claimant was a teacher with long service and an unblemished disciplinary record. The police raided his home because of intelligence that indecent images of children had been downloaded to an IP address associated with him. The claimant's teenage son also lived at the property.

The claimant informed the school about the investigation but denied that he was responsible for the images being on the computer. He was suspended and although later charged by the police he was not in fact prosecuted

Although there was insufficient evidence that the claimant downloaded the images, he was dismissed on the grounds that:

- There would be an unacceptable risk to children if he returned to teaching
- There was a reputational risk to the Council in continuing to employ him

The ET rejected the claim for unfair dismissal but the claimant successfully appealed to the EAT.

The EAT concluded that the school did not initially mention reputational damage as an allegation and so it could not fairly dismiss him on that ground

Also, in order to dismiss the claimant for misconduct, the school had to decide whether, on a balance of probabilities, he was guilty of downloading the images. The school should not have dismissed him based on a possibility that he had downloaded them.

Holly says "No matter how serious the allegations against an employer, you must always make sure the paperwork reflects what they are accused of, and always remember to apply the right test in deciding to dismiss."

Lafferty v Nuffield Health EAT 2020 (dismissal for unproven criminal allegations)

Mr Lafferty worked as hospital porter and his duties included transporting anaesthetised patients to and from operating theatres. He had an unblemished disciplinary record. Mr Lafferty was charged with assault with intention to rape, which he denied.

He was suspended on full pay pending an investigation. Given the nature of the charges, Nuffield decided it was not appropriate to allow Mr Lafferty to return to work until after his trial.

Mr Lafferty had no information about when his trial would take place which meant that the suspension would be open ended.

Nuffield concluded that an indefinite suspension on full pay was not a proper use of charitable funds and that the risk to its reputation of continuing to employ Mr Lafferty where he had access to vulnerable patients was too great.

Mr Lafferty was dismissed for some other substantial reason and the ET held that the dismissal was fair.

The ET was satisfied that Nuffield's concerns about potential reputational damage were not frivolous or trivial but were sincerely held and Nuffield had conducted such investigation as was reasonable in the circumstances.

The EAT upheld that decision.

Holly says "Often where an employee is charged with a criminal offence, it can be more straightforward for the employer to consider dismissal for "some other substantial reason" rather than assuming it is a case of gross misconduct, especially where the employee has not been found guilty."

Kubilius v Kent Foods Ltd ET February 2021 (refusing to wear a face mask)

Reportedly, the first UK decision arising out of an employee's refusal to wear a face mask. Mr Kubilius was a lorry driver and he was responsible for making deliveries to and from Kent Food's major client.

The client's updated Covid 19 health and safety rules made it compulsory for everyone on site to wear face masks, including visitors.

On 21 May 2020, on arriving at the site, Mr Kubilius was given a face mask to wear but he repeatedly refused to wear it while he was inside the cab of his lorry, saying that face masks were not mandatory (based on the Government's guidance at the time). The client then banned Mr Kubilius from the site.

Kent Foods' staff handbook required Mr Kubilius to treat clients courteously, to safeguard their own health and safety and to follow clients' instruction regarding PPE.

Following an investigation, communications with the client and a disciplinary hearing, Mr Kubilius was dismissed for gross misconduct.

The Employment Tribunal held that the dismissal was fair: Kent Foods had conducted a reasonable investigation and dismissal was within the "band of reasonable responses" particularly when considering Mr Kubilius' lack of remorse.

Holly says "This may be the first, but it certainly won't be the last claim arising out the pandemic and it's reassuring that the Tribunal seems to have accepted that imposing Covid-19 safety protocols was a reasonable thing to have done."

Taylor v Jaguar Land Rover ET September 2020 (protection for non-binary/gender fluid people)

Ms Taylor had been an engineer with JLR for more than 20 years and had presented as male for a long time.

In 2017, Ms Taylor informed her employer that she was gender fluid/non-binary and changed the way she presented herself by wearing female clothes and using female pronouns.

She suffered from insults, abusive jokes and suffered with difficulties using toilet facilities all of which led to her resignation.

Ms Taylor brought a claim for constructive unfair dismissal as well as claims for harassment and discrimination under the protected characteristic of gender reassignment.

Jaguar Land Rover argued that Ms Taylor did not fall within the definition of "gender reassignment" which only applies to people who have undergone, are undergoing or are proposing to undergo a formal gender reassignment process.

The Judge ruled that it was "*clear that gender is a spectrum*" and that it was "*beyond any doubt*" Ms Taylor was protected. The judge said gender reassignment "*concerns a personal journey and moving a gender identity away from birth sex*".

The Employment Tribunal upheld the claims and, unusually, awarded aggravated damages as a result of Jaguar Land Rover's conduct.

Holly says "There is no doubt that this was the correct decision; however, it does highlight the fact that some of the terms and definitions used in the 10 year old Equality Act may need to be updated."

Allay UK Ltd v Gehlen EAT February 2021 (importance of EDI training)

Mr Gehlen, commenced employment on 3 October 2016 and was dismissed on 15 September 2017 because of concerns about his performance. In August 2017, he had complained to his manager about racist remarks that a colleague, Mr Pearson, had made.

The manager told Mr Gehlen to report the matter to HR (the manager did not report it himself). Two other colleagues had heard the racist remarks but took no action about them

Allay had provided equality and diversity and bullying and harassment training in January and February 2015.

Mr Gehlen brought a claim of racial harassment

Allay argued that they were not vicariously liable and put forward the "statutory defence" under section 109(4) of the Equality Act 2010, saying that they had taken all reasonable steps to prevent the harassment occurring.

The Employment Tribunal upheld Mr Gehlen's claim and rejected the "statutory defence"

In spite of the training, Mr Pearson, the two colleagues and manager all failed to properly react to the allegations of harassment. It found that the training was "***clearly stale"*** and a reasonable step would have been to refresh that training

The EAT agreed and dismissed Allay's appeal

Holly says "This case emphasises the need for regular, up to date, training on equality and diversity to be provided to all staff."

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