

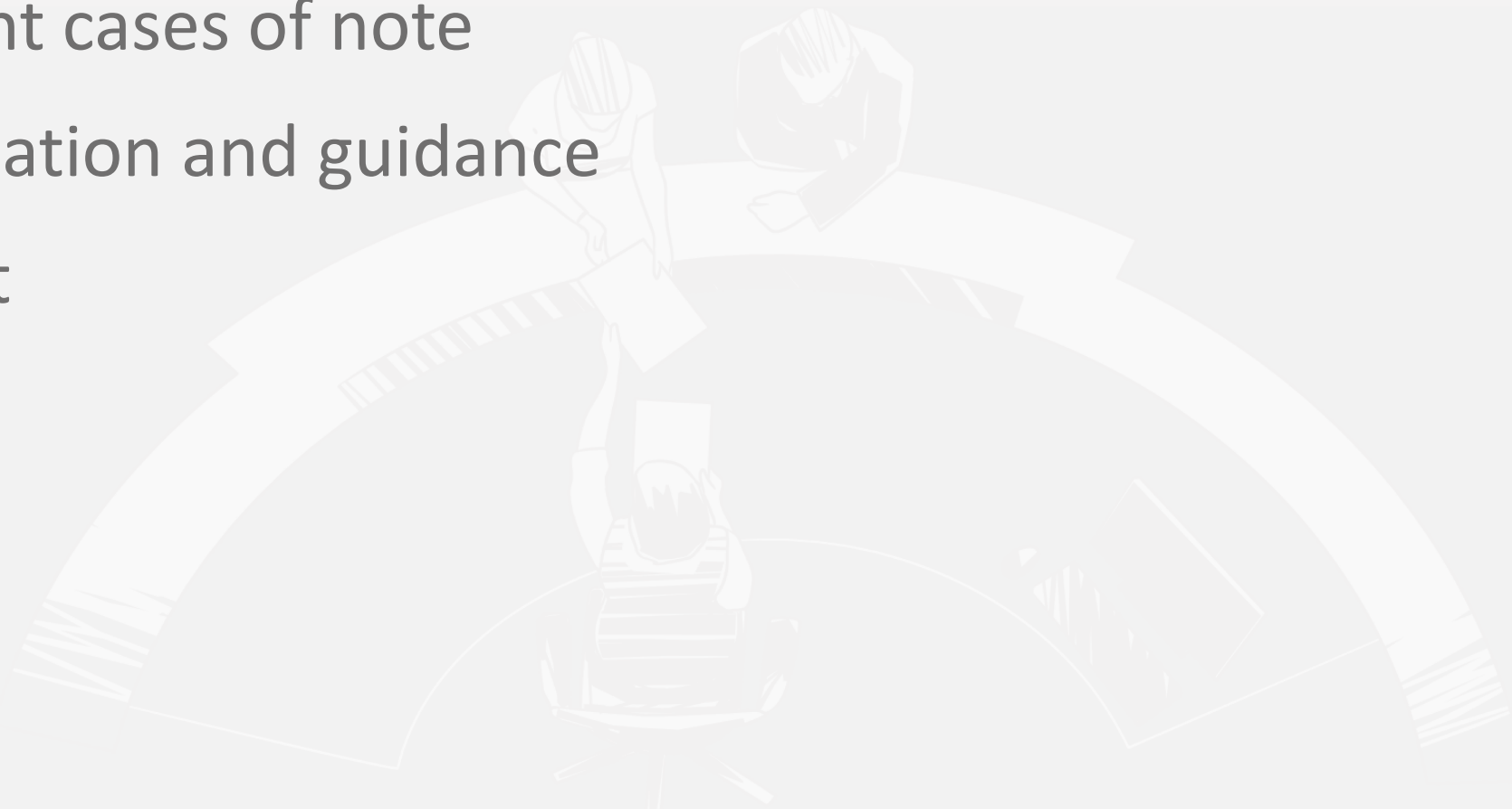


Employment update

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Session Agenda

- Recent cases of note
- Legislation and guidance
- Brexit
- Q&A



Employment Status

Uber B.V. and others v Aslam and others [2018] EWCA Civ 2748

- COA upheld decision that Uber drivers are workers
- NMW, holiday and holiday pay
- Working during any period when they are within territory and have the Uber app switched on
- Terms did not reflect the practical reality of the relationships and could be disregarded

Employment Status

Braine and others v The National Gallery ET/2201625/18

- ET - art experts working as educators for the National Gallery were workers when undertaking individual assignments
- Between assignments neither employees nor workers
- Argument that they were self employed independent contractors rejected

Employment Status

Braine and others v The National Gallery ET/2201625/18

- Training and observation
- Gallery would offer as much work as it could and distribute assignments equitably
- No right or practice of substitution or swapping assignments
- Required to confirm to Gallery stipulations – detailed written guidance

Holiday Pay

Hein v Albert Holzkamm GmbH & Co. KG (C-385/17) EU

- Construction industry collective agreement
- 30 days paid holiday calculated with reference to gross annual pay
- Remuneration for overtime of an exceptional and unforeseeable nature does not form part of normal remuneration
- Contractual overtime required "on a broadly regular and predictable basis...should be included in the normal remuneration due under the right to paid annual leave"

Holiday Pay

Flowers v East of England Ambulance Trust (UKEAT/0235/17)

- Worked “non-guaranteed overtime” or shift over-runs
- Received extra payment
- Whether overtime was “normal remuneration”
- If paid regularly over a sufficient period of time
- The tribunal was wrong to find that voluntary overtime fell outside the calculation of annual leave pay

National Minimum Wage

Royal Mencap Society v Tomlinson-Blake [2018] EWCA Civ 1641

- “*Sleep in*” workers are “*available for work*” and are not actually working
- Only entitled to NMW/NLW when they are awake and carrying out duties

Discrimination

Awan v ICTS UK Ltd UKEAT/0087/18

- EAT – implied contractual term that prevented the employer from dismissing an employee for capability during a time when he was entitled to long-term disability benefits
- International Security Co-Ordinator entitled to contractual sick pay and benefit of long-term disability benefit plan
- October 2012 certified unfit to work because of depression
- TUPE transfer December 2012

Discrimination

Awan v ICTS UK Ltd UKEAT/0087/18

- Dismissed in November 2014
- Claimed unfair dismissal and discrimination arising from disability
- EAT held contrary to the functioning of the long-term disability plan and its purpose to permit the employer to dismiss
- Implied term that employer would not dismiss once the employee become entitled to the benefit

Discrimination

Williams v Trustees of Swansea University Pension and Assurance Scheme and another

- Ill-health retirement due to disability at age of 38 – pension based on final salary
- Prior to retirement series of reasonable adjustments granted – reduced working hours by half
- Salary adjusted to new hours
- Final salary based on adjusted working hours
- Claimed that this was discrimination arising from his disability

Discrimination

Williams v Trustees of Swansea University Pension and Assurance Scheme and another

- Supreme court held nothing intrinsically unfavourable or disadvantageous about the aware of the pension
- Only entitled to a pension at all because of his disabilities
- Had he been able to work full time he would not have had an immediate right to a pension at all

Discrimination

South Warwickshire NHS Foundation Trust v Lee (UKEAT/0287/17)

- Prospective employer potentially liable for discrimination for withdrawing job offer after receiving a discriminatory reference
- Reasonable adjustment not to count disability related absence

Discrimination

DL Insurance Services v O'Connor (UKEAT/0230/17)

- Written warning for absences not justified where based on “*mere generalisations*” about the impact of absences
- Employer must still be able to explain why it is appropriate to issue a warning
- Reference to the specific circumstances of the employee’s case

Vicarious liability

*WM Morrison Supermarkets plc v Various Claimants [2018]
EWCA Civ 2339*

- Supermarket vicariously liable for actions of rogue employee who disclosed the personal information of around 100,000 colleagues on the internet
- “seamless and continuous sequence of events linked his employment to the disclosure”
- Motive irrelevant

Vicarious liability

Bellman v Northampton Recruitment Ltd [2018] EWCA Civ 2214

- Court of Appeal determined that a Company was liable for the action of its MD when the MD punched an employee twice, knocking him out and causing brain damage
 - Misused his position when his managerial decisions were challenged
 - Issue in relation to work
 - Dominant position which enabled him to assert his authority

Whistleblowing

Timis and another v Osipov [2018] EWCA Civ 2321

- Made protected disclosures related to corporate governance and compliance with foreign law
- Subject to detriments (by NEDs) and unfairly dismissed
- Unfair dismissal claim against the Company & detriment claims against the NEDs
- Conduct of NEDs in relation to dismissal amounted to a detriment - NEDs were jointly and severally liable with the Company to compensate claimant

Whistleblowing

Timis and another v Osipov [2018] EWCA Civ 2321

- COA held open to an employee to bring a claim for detriment against an individual co-worker for subjecting them to the detriment of dismissal
- Employer insolvent
- Director and officers' liability insurance

Disciplinary / Dismissal Cases (Appeals)

Afzal v East London Pizza t/a Dominos Pizza (UKEAT/0265/17)

- Employee time-limited leave to work in the UK
- Dismissed for failing to provide documentation evidencing his application to apply for permanent residence
- Employer concerned about potential criminal or civil penalties
- Not given a right of appeal - offered to re-engage as a new starter

Disciplinary / Dismissal Cases (Appeals)

- ET fair dismissal for SOSR
- EAT upheld employee's appeal
- Appeal could have established Dominos' belief that continued employment would have been illegal was wrong
- Employee could have provided documents demonstrating his application

Suspension

Mayor and Burgesses of the London Borough of Lambeth v Agoreyo [2019] EWCA Civ 322

- Experienced primary school teacher accused by a TA of using unreasonable force
- Suspended – resigned almost immediately
- Claim for breach of contract

Suspension

Mayor and Burgesses of the London Borough of Lambeth v Agoreyo [2019] EWCA Civ 322

- COA - Only test in the context of suspension is whether there was reasonable and proper cause to suspend the employee
- COA - Refused to commit to determination as to whether suspension is a “neutral act”

Legislation and guidance

- Parental Bereavement (Leave and Pay) Act 2018
- NEW* Acas guidance on employment references
- NEW* Acas guidance on age discrimination
- Mandatory ethnicity pay reporting
- Welsh Rate of Income Tax

Good Work Plan

- Legislative changes designed to improve protection for agency, zero-hours and other atypical workers
 - Increase from 1 week to 4 weeks the period required to break continuity of employment
 - Give all workers the right to 'day one' written statements of rights (covering sick leave and pay, other types of paid leave)
 - 4 fold increase in fines for employers demonstrated to have shown malicious breach of employment rights
 - Legislation to clarify the test of employment status

Brexit

- “The Future Relationship between the United Kingdom and the European Union” – no regression in employment laws

<https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>

- Technical notice on workplace rights – no deal

<https://www.gov.uk/government/publications/workplace-rights-if-theres-no-brexit-deal>

- Home office employer toolkit – EU Settlement Scheme

<https://www.gov.uk/government/publications/eu-settlement-scheme-employer-toolkit>

Any questions



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