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Employment Focus

Worker status and the implications of the gig economy

Determining whether an individual is self-employed, a worker or an employee is extremely important as the rights afforded to each individual do vary. It is therefore important to apply the correct status at the outset of the relationship and then ensure that you act consistently with whatever "label" you apply.

The case of Mr Smith and Pimlico Plumbers is a further example of this which closely followed the decision in Uber which found that the Uber drivers were not genuinely self-employed (despite having all of the contractual documentation in place confirming that they were).

The facts of the case were that Mr Smith was a Pimlico Plumber for around 6 years. He was one of over one hundred plumbers who provided plumbing and other services to its customers. The key here is that Mr Smith was required to rent a Pimlico branded van, use a Pimlico mobile phone and wear a Pimlico uniform. At the outset of the relationship it was agreed that Mr Pimlico was self-employed. He even recharged Pimlico for a room in his house and paid his wife for secretarial duties. However, when the relationship ended Mr Smith brought a claim stating that he was entitled to holiday pay and the national minimum wage. He succeeded. There was a finding that he was not genuinely self employed for a number of reasons. For example, he had an obligation to perform work personally, and there was no express right to provide a substitute. In addition to this, Mr Smith was obliged to make himself available to work for a minimum number of hours per week and in fact the Pimlico manual stated that normal working hours were a minimum of 40 hours per week.

Whilst it is important to have the correct documentation in place at the outset of the relationship, the tribunal will always look at what actually happens in practice and may disregard the documentation completely as they did in the Uber case and the Pimlico case.

Ed Jenneson

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Annual Employment Seminar 2017

In May the Employment Team presented their Annual Employment Law Update. The presentation covered the following topics:

The Apprenticeship Levy
effective April 2017

Gender Pay Gap Reporting
effective April 2017

The Trade Union Act 2016
effective April 2017

Consultation on grandparental leave

The Gig Economy

Settlement Agreements and Protected Conversations

The next **Employment Law Seminar** will take place on **12 October 2017** and will focus on mental health issues in the workplace.

Shared parental leave and grandparental leave

At our recent Employment Law Review we canvassed the audience as to how many of them had received applications for shared parental leave. The take up had been very limited. This is consistent with a recent survey of North Yorkshire employees, which reported that only one in 10,000 employees have taken advantage of the entitlement to shared parental leave.

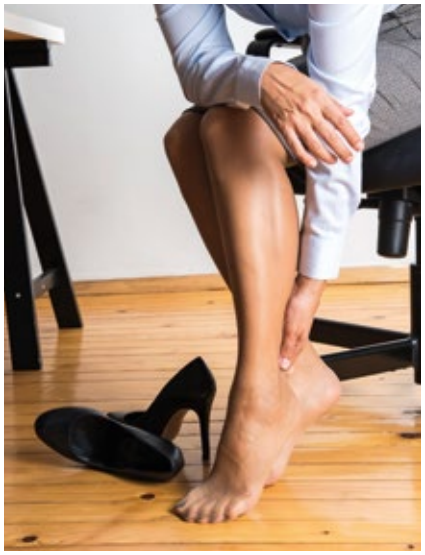
Despite the poor response to the legislation intended to help families achieve a better work life balance, the Government has plans to extend shared parental leave and pay to working grandparents by 2018. This is in response to data which suggests that grandparents take an increasingly active role in the care of their grandchildren and often seek to work part-time, flexible time or give up work altogether to care for grandchildren.

The proposed consultation is expected to cover not only the extension of the scheme to grandparents but also proposals to simplify the eligibility and notification requirements.

Donna Ingleby

Work place dress codes

The issue of dress codes in the workplace captured the public's imagination in the widely reported case of Nicola Thorp who in December 2015 arrived at work as a Receptionist wearing flat shoes and was sent home without pay by her Agency for failing to adhere to its dress code which required women to wear heels of between 2 and 4 inches to work.



More than 150,000 people signed a petition started by Miss Thorp calling for a change in the law to make it illegal to require women to wear high heels to work. In January 2017 The House of Commons Petitions Committee and The Women and Equalities Committee carried out a joint enquiry with a focus on certain work types including agency work, bar work and waitressing, retail, hotels and tourism.

Much emphasis was placed upon the failure of employers to consider the health implications for women wearing heels to work, including pain and impairment.

The report also found further evidence that female workers found dress codes requiring them to wear make up, high heels and skirts above the knee, to be "humiliating" and "degrading" and that women felt "sexualised" in the workplace. The report also concluded that gender based dress codes may also reinforce gender stereotypes which in particular, might make LGBT workers feel uncomfortable.

The reports had criticised the fact that a dress code which included a requirement to wear high heels should have been supported by a risk assessment but was very often not.

The report concluded that it considered the dress code to which Miss Thorp had been subjected, was already lawful under the Equality Act 2010 and that the law regarding dress codes was clear.

While a number of cases have highlighted the issue of dress codes, these have tended to be in cases relating to religion or belief discrimination and not in relation to the more general impact of dress codes in the workplace. The reports of the Committees concluded that dress codes that had an adverse impact on women in the workplace appeared to be commonplace.

The legal background to such matters is that direct sex discrimination occurs where a worker is treated less favourably because of their sex. In consequence, there might be a difference in treatment if men and women are required to wear different uniforms or subject to different dress codes however, as long as the standards set are equivalent and do not subject one gender to a greater detriment, the treatment will not be considered to be less favourable.

Indirect sex discrimination occurs where an employer applies a rule or practice on the face of it to all workers, such as a dress code, but those of one sex are put to a particular disadvantage. Such indirect sex discrimination can be justified but only if the rule or practice is a proportionate means of meeting a legitimate aim.

The report commented that the need to prove that a particular requirement constitutes "less favourable treatment" was noted to be a barrier to claims.

A key recommendation of the report was that the Government Equalities Office should work with the Ministry of Justice to investigate what proportion of cases fail because the Claimant could not establish less favourable treatment and also how many people were deterred from bringing claims because they felt that the law was unclear. The recommendation went on to say that where this was a significant proportion, the Government should consider adapting the "less favourable treatment" test to place greater weight on the Claimant's feelings of being discriminated against.

It was also suggested that there should be some analysis as to what proportion of claims fail because the employer was found to be pursuing a legitimate aim. If this was a significant proportion, the Government should consider changing the law to define what is permissible as a legitimate aim. The following legitimate aims were proposed:

- Health and Safety.
- To establish a truly necessary public image for example, the judiciary.
- To project a smart and uniform image.
- To restrict dress or insignia which may cause offence.

The report went further still and suggested that there should be an increased awareness campaign to help workers understand how they can make formal complaints and bring claims if they believe they are subject to discriminatory treatment at work.

It is also suggested that ACAS work with the Health and Safety Executive to publish detailed guidance for employers to give them a greater understanding how discrimination law and health and safety law apply to workplace dress codes. This report is due to be published by July 2017 and will address controversial requirements such as high heels, make up, hair, manicures and skirt length.

In general terms, both Committees concluded that there was an insufficient deterrent to prevent employers from breaching the law and that the cost of the fees themselves in bringing a claim were "a strong disincentive" to individuals who might wish to bring a claim about potentially discriminatory dress codes.

Donna Ingleby

Information

If you have any queries on any issues raised in this newsletter, or any employment matters in general please contact Ed Jenneson on 01482 337341.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice.

We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Citadel House, 58 High Street, Hull HU1 1QE.

The law is stated as at 16 June 2017.

Hull Office
Citadel House, 58 High Street,
Hull HU1 1QE
Tel +44 (0)1482 323239

York Office
Forsyth House, Alpha Court,
Monks Cross, York YO32 9WN
Tel +44 (0)1904 625790

rollits.com