Rollits LLP

Employment Law Update

February 2021
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I would like to welcome you to our latest Newsletter. It has been an extremely busy 12 months for the Employment team as we navigated our way through all the employment issues relating to the Covid-19 pandemic, vaccines, virtual Employment Tribunal hearings, prepared for IR35 and recent changes to the gig economy. It has been a challenging year for all of us and we really appreciate your instructions and support throughout 2020.

As it was impossible to deliver face to face seminar and in-house training to clients during lockdown we have started to deliver online seminars and webinars to clients. We have delivered this service in the form of remote bespoke in-house training and sessions to all clients collectively via Zoom. We are looking to deliver more sessions on-line in the coming year so please get in touch if there are any specific employment issues that are keeping you awake at night where we can help with advice or training. We also hope to be returning to face to face sessions by the end of 2021 after the recent announcement.

Watch this space and be poised to hit the un-furlough button. We will be here to help no matter what, so please **get in touch if you need us**.

Ed Jenneson

Uber and the gig economy

Vulnerable workers must be protected

The decision handed down on Friday 19 February 2021 has confirmed that courts will intervene to protect those engaged in the gig economy in order to safeguard workers who are not genuinely self-employed. The Uber case identified some key characteristics in order to help recognise when worker status should be inferred such as when workers were providing a personal service which was dependent, subordinate and controlled. These factors indicated that the drivers were obliged to perform work in a certain way and therefore mutuality of obligations existed.

It was found that the Uber drivers had no ability to negotiate their own terms, pay or working conditions and they were controlled by Uber. This did not genuinely reflect a self-employed relationship as there was no bargaining power or commercial relationship in existence between Uber and the drivers. As a result of the subordinate relationship, the courts concluded that these workers ought to be protected with basic employment rights including national minimum wage and holiday pay.

What about the contract?

It was confirmed by the courts that the usual rules regarding contracts do not apply. What this means is (similar to the IR35 position) the courts will disregard the written contract and carefully analyse what happens in practice.

In terms of the contractual provisions, the court went a step further and said that any clause which was deemed to be "contracting out" of the law, could not be relied upon. This means that any clause seeking to limit the relationship to a self-employed relationship and a clause indemnifying the company regarding any claims brought by the worker would not be enforceable on public policy grounds.

Is there a requirement to be vulnerable?

Whilst vulnerability is not written into the statute, the court did recognise the fact that there will be some circumstances where worker status would not be inferred even when a personal service was being provided. Examples would be experienced consultants who were able to negotiate their own terms and not be controlled in the same way. That being said, it is possible for senior people to be workers if they are sufficiently controlled.

What next?

We are often asked to produce a contract to ensure that the relationship is genuinely self-employed. The Uber case has confirmed that it is not possible to create such a contract in isolation as the courts will consider what happens in practice. We therefore recommend that working arrangements are carefully considered and anyone engaged on a self-employed basis is properly assessed using the control, personal service and mutuality of obligations test.

Ed Jenneson

Preparing for changes to IR35 legislation and "*Deemed Employment*"

Changes to the IR35 legislation will come into force from 6 April 2021. The legislation, also known as the "*off-payroll working rules*" and "*deemed employment*" is relevant to a business if it receives services from an individual worker through an intermediary company. The intermediary is very often the worker's own Personal Service Company (PSC). IR35 legislation aims to ensure that workers providing services through a PSC, who would have been an employee without the PSC, pay the same tax and National Insurance contributions as employees.

Current off-payroll working rules

If you are a client in the public sector, it is already the client's responsibility to decide the employment status of a worker engaged through a PSC. This has been the case since 2017 and the position for public sector clients will remain unchanged following the implementation of the new rules.

If you are a client in the private sector, it is currently the PSC's responsibility to decide the worker's employment status for each contract. This will change from 6 April 2021 if you are a medium/large company.

The new rules from 6 April 2021

The onus will move from the PSC and become the responsibility of **medium and large** sized private sector businesses to determine the employment status of workers engaged through PSCs. The medium/large sized business will be responsible for deducting, and accounting for, income tax via PAYE and NICS on any worker which is deemed to be an employee (*for tax purposes only**) under the IR35 regime.

Who will this apply to?

A business will be a medium/large sized business if they meet two or more of the following conditions:

1) the business has an annual turnover of more than £10.2 million;
2) the business has a balance sheet total of more than £5.1 million (balance sheet total being defined as the total amounts shown in the Company's balance sheet before deducting any liabilities); or
3) the business has more than 50 employees.

If the two of the above three criteria are not met, the PSC will continue to remain responsible for determining the worker's employment status and deciding if the rules apply. If the parent company of a group is defined as medium or large for the purposes of the IR35 rules, their subsidiaries will also have to apply the off-payroll working rules.

Steps to assess a worker's IR35 status

In order to undertake the assessment it will be necessary to consider a wide range of factors that need to be considered. The recent ruling in Uber is relevant to this as it confirms what we already thought which is that the contractual relationship between the parties is determined by what happens in practice rather than the actual contract in place. The following are some factors to consider:

- the control the client has over the worker;
- whether the worker provides their services on a continuing or one-off basis;
- if there is a personal service being provided;
- if the contract provides for the right to substitute the worker;
- if mutuality of obligations exists;
- if the PSC/worker has its own financial risk; and
- does the PSC/worker use the client's equipment.

Online CEST tool

In order to assist with the above assessment, there is an online tool known as CEST which has been created by HMRC. The tool has been widely criticised in terms of accuracy although if this tool is used (which we recommend), we advise that you save the result. It is our understanding that if you have answered the questions accurately and you are given the result which states "outside IR35", this result will assist with any future claim by HMRC that the individual should have been treated as an employee (*for tax purposes only**).

Status Determination Statement and timing

When the assessment has been done, a Status Determination Statement (SDS) should be provided to the worker and the PSC, irrespective of whether the IR35 legislation applies. When producing the SDS, it is important to keep a detailed record and clear reasons supporting the decision made.

For contracts that take effect after 6 April 2021, the SDS should be issued before entering into the contract, or at least before the services are performed under the contract. For existing contractual relationships, the SDS must be issued before the first payment is made on or after 6 April 2021.

"Reasonable care" must be taken when making a determination about the worker's employment status. Failure to provide an SDS or to take reasonable care in coming to a determination, can result in the worker's tax deductions and National Insurance contributions becoming the client's responsibility. The client would also be responsible for any interest or penalty charges incurred. It is not clear what "reasonable care" will amount to although as referred to above, please use the CEST tool and save the result. We would also recommend a detailed analysis of what happens in practice (or what is expected if the contract has not yet started).

The right to challenge

It is possible for a worker or "deemed employee" to challenge the determination. If the worker does challenge, the client would be required to consider the reasons provided by the worker or intermediary for their disagreement with the determination. The client would then need to decide within 45 days whether to issue a new status determination or remain the same. It is important to keep detailed records of decisions and disagreements.

Ed Jenneson

Tax purposes only?

***** *IR35 states that "deemed employment" for a worker is relevant for the purposes of tax legislation only. However, as the test for determining IR35 status is effectively "borrowed" from the employment status test (very recently considered the Uber case); if a decision is reached that the worker is in fact "inside IR35", it naturally follows that there will be implications in respect of worker (or possibly employment) status. This process is therefore very relevant for employment law purposes as well as tax purposes.*

The danger of recruiting like for like

Mr McClements, 50, had applied for a role as a project manager at Guy's and St Thomas' NHS Trust in London. During the interview process he was scored by the selection panel as the highest performing candidate, however following this scoring process the panel went on to discuss who would be the "best fit" for the team. In notes presented to the Tribunal, it was clear that comments had been made questioning whether Mr McClements was "too experienced" and "too senior" and it was also commented that he was "very different" to the previous post-holder, a woman in her 20s. Subsequently, a decision was made to appoint a much younger female candidate.

In a telephone call to Mr McClements in which he was notified by the Trust that he had been unsuccessful in his application for the role, the Tribunal heard that he was informed that members of the team may feel "uncomfortable" asking him to do certain tasks and that given Mr McClements' maturity it was "better to employ someone at an early stage of their career as they would then progress to develop their career over a longer period elsewhere in the NHS." During this call Mr McClements was also reassured that he had "so much more to give than other applicants".

It was on the basis of the comments made during this telephone call and the comments regarding the "best fit" for the role made in the selection

In December 2020, the Employment Tribunal ruled that an NHS Trust must pay compensation of £5000 plus interest in respect of injury to feelings to job applicant Mr Neil McClements on the basis that they had discriminated against him on the grounds of both age and sex, following their decision not to recruit him into a young female dominated team.

panel's notes, combined with the fact that Mr McClements had achieved the highest score of all the applicants, that the Tribunal found there was enough evidence to support a conclusion that the Trust had discriminated against Mr McClements on the grounds of both age and sex.

This case shows the danger of employers falling into the trap of hiring people who are similar to themselves, either consciously or subconsciously. The Equality Act 2010 states that discrimination in recruitment is unlawful and this applies throughout all stages of the recruitment process, including the wording in any job advertisements, the employer's conduct during any interviews and the ultimate decision of which candidate to recruit.

Therefore, employers should ensure that all selection grounds for potential employees are objective and are not based on or connected to any protected characteristics covered by the Equality Act, such as gender, age, disability or religion (amongst others).

If you require any support with ensuring that your business's recruitment processes comply with current equality laws our team would be more than willing to assist.

Lucy Trynka

Brexit time to act

At 11pm on 31 December 2020, the transition period for the UK leaving the EU ended which also marked the end of free movement under the EU, and therefore bringing EU citizens living and working in the UK under UK immigration controls.

EU, EEA or Swiss citizens who arrived in the UK prior to 31 December 2020, and their family members, can apply to the EU Settlement Scheme to continue living in the UK after 30 June 2021. The deadline for applying is **30 June 2021**.

Successful applicants who have lived in the UK for a continuous 5-year period (continuous residency) and meet the eligibility criteria, will be awarded with 'settled' status. This means they can continue to live and work in the UK as long as they want and will also be able to apply for British citizenship, if eligible.

For those applicants that do not have the 5 years' continuous residence when they make their application, they will usually be given a 'pre-settled' status. This means successful applicants will be able to continue to work and live in the UK for a further 5 years from the date of their pre-settled status. They can subsequently apply to change this to settled status once they meet the 5 year continuous residency requirement. This must be done prior to their pre-settled status expiring.

Employing EU, EEA and Swiss citizens

Employers that employ EU, EEA or Swiss citizens may continue to do so by undertaking the same right to work checks as required previously and relying on the same documents (i.e. passports, National ID card etc.) until 30 June 2021.

The immigration guidelines are very clear that Employers should not ask their EU, EEA or Swiss employees for evidence on whether or not they have applied under the EU settlement scheme prior to 30 June 2021, as it could be perceived as a discriminatory step. Employers are also not required to undertake any retrospective right to work checks after 30 June 2021.

Our advice would be to ask EU, EEA or Swish nationals that you employ on or after 1 January 2021 to produce evidence of their residency in the UK prior to 31 December 2020 (e.g. bank statement, utility bill etc.) This would minimise the risks of employing anyone without the right to work in the interim period between January and June 2021.

If individuals do not apply under the EU settlement Scheme or if their application is rejected, they would be classed as illegal workers if they continue to work. Employers may be faced with significant civil fines for knowingly employing an illegal worker, which may also be a criminal offence.

Therefore, on or after 30 June 2021, subject to further immigration guidelines, there will be an obligation on employers to check their EU, EEA and Swiss workers have the right to work and to continue to reside and work in the UK.

From 1 January 2021, the new immigration points based system will apply to both EU and non-EU nationals that wish to live and work in the UK post 31 December 2020, and they will need to have a visa to be able to do that.

For employers that wish to employ individuals from outside of the UK, they are required to hold a sponsorship licence in order to be able to issue a Certificate of Sponsorship to those said individuals. Employers cannot refuse candidates due to their right to work or for the reason of the employer not holding a sponsorship licence. All applicants must be assessed based on their merits and not their immigration status.

Practical steps for employers

- Raise awareness amongst your workforce about the changes to the UK immigration system and the EU Settlement Scheme
- Encourage your eligible workforce to apply under the EU Settlement Scheme
- Ensure you have robust HR system and procedures in place – right to work checks must be taken prior to the commencement of employment
- Consider whether you need to apply to become a sponsor depending on your recruitment needs and the current make up of your workforce
- Consider the procedure and cost implications of becoming a sponsor if you decide this is the right step for your organisation
- Ensure your HR personnel are up to speed with the changes in the UK immigration system.

Nilu Love

What can constitute harassment?

Network Rail Infrastructure Limited ("Network Rail") has been found guilty in the Employment Tribunal of harassment based on race due to its failure to investigate alleged racist language.

The case of *Mr Lewis V Network Rail* considered complaints under the Equality Act 2010 of direct discrimination and also harassment. Mr Lewis had been continuously employed by Network Rail since 15 March 2005 as a signaller. Mr Lewis identified as Black British and relied on colour as the aspect of "race" to form his protected characteristic.

Mr Lewis claimed that he had been directly discriminated against by Network Rail due to it subjecting him to a disciplinary process following an incident on 24 July 2018 and issuing him with a final written warning following this disciplinary process. Mr Lewis also claimed harassment alleging that Network Rail failed to investigate an alleged racial insult made by a colleague.

On 24 July 2018, Mr Lewis gave permission to a member of the public to cross a railway line when he ought not to have done so because a train was approaching the crossing. Mr Lewis did not report the incident in accordance with Network Rail's procedures and it only came to light when the member of the public's husband complained directly to Network Rail.

The matter was investigated by Network Rail and Mr Lewis was invited to a disciplinary hearing and ultimately issued with a final written warning. Mr Lewis appealed the sanction although the decision was upheld.

During this time an employee, Mr Cattini, raised a separate grievance claiming he had been subject to bullying and harassment. As part of the grievance investigation, Haley Giles, a colleague, was interviewed and made an allegation that Mr Cattini had made a highly offensive specific racial slur against Mr Lewis. The manager investigating Mr Cattini's grievance, Mr Groucott, did not make further enquiry in respect of the alleged comments stating that he had believed the matter had been investigated as part of a grievance that Ms Giles had previously raised.

In due course Mr Lewis became aware of the alleged comment and on 19 November 2018 he raised a grievance alleging the use by Mr Cattini of racist language about him. Mr Lewis referred to the alleged specific slur used by Mr Cattini. The manager investigating Mr Lewis' grievance, Mr Knapp, made enquiries regarding the grievance brought by Ms Giles, which had not been upheld. Mr Knapp took the

view that the alleged slur had already been investigated as part of Ms Giles' grievance. However, Mr Knapp had not had sight of the documents relating to Ms Giles' grievance and in any event, the specific comment was in fact raised by her as part of her statement for the grievance raised by Mr Cattini. Mr Knapp concluded that there was no evidence of racist language and did not uphold Mr Lewis' grievance.

In its Judgment the Tribunal considered that the incident on 24 July 2018 was a serious one and that Mr Lewis should have reported it immediately and also in writing. It found that it was entirely reasonable for Network Rail to subject Mr Lewis to a disciplinary process and was satisfied that Mr Lewis' race did not play any part in any aspect of that process. It further found that the issuing of a final written warning was not an act of less favourable treatment that related to Mr Lewis' race. Accordingly, it found that Mr Lewis' complaints of direct discrimination were not well founded and were dismissed.

In relation to the comments allegedly made by Mr Cattini, the Tribunal concluded that Network Rail did fail to adequately investigate the allegations made. The Tribunal concluded that the failure to investigate amounted to "unwanted conduct" and that it did relate to Mr Lewis' race. It stated that the matter warranted investigation and that the reason that it wasn't investigated was because of the nature of the allegation – i.e. that serious racist language was used. There was a willingness to investigate all other matters, but allegations of racism were not investigated properly. In the absence of any other adequate explanation, the Tribunal concluded that the reason why they were not investigated was because they related to race. The failure to investigate violated Mr Lewis' dignity and created an atmosphere for him that could be described as intimidating, hostile, degrading, humiliating or offensive. Accordingly, Mr Lewis' claim for harassment based on race succeeded.

This case is a stark reminder for employers that they should not seek to brush complaints under the carpet because they relate to serious or sensitive issues. Once complaints of this nature are made, they should be thoroughly investigated in accordance with the employer's procedures.

Ed Heppel

Case law update

C Howie v Holloways of Ludlow Design and Build Limited

Failure to invite an employee on maternity leave to an informal Christmas drinks party amounted to discrimination.

In the recently decided case of *C Howie v Holloways of Ludlow Design and Build Limited*, Mrs Howie was awarded compensation for injury to her feelings after her employer failed to invite her to an informal Christmas drinks party when she was on maternity leave.

Mrs Howie was employed by the company as a General Manager and in 2018 she commenced a period of maternity leave and was due to return in July 2019.

During her maternity leave the company encountered significant financial difficulties. As a consequence a decision was made not to hold a formal Christmas party.

However in December 2018, at short notice, the company arranged an informal gathering at a local pub and put £200 behind the bar. Most of the company's London based staff attended however no one thought to invite Mrs Howie.

Mrs Howie argued that because she had not been invited she had been discriminated against on the grounds of less favourable treatment because she was exercising her right to maternity leave.

Whilst the Tribunal accepted the company's evidence that the Christmas party was organised at short notice and that staff had been informed by text or word of mouth, the company acknowledged that had Mrs Howie been at work she would have been invited.

The Tribunal recognised there was no deliberate decision to exclude Mrs Howie, nevertheless it held that because Mrs Howie was not invited, the company had not thought about her and that was because she was on maternity leave. Had she been at work around that time, she would certainly have been invited. She was overlooked because she was on maternity leave and the Tribunal therefore found the complaint to be well founded and upheld the Claimant's claim of discrimination.

What can we learn?

This is a very recent case which has received national media attention in 2021. It would seem this is an unfortunate example of out of sight out of mind which was found to be discriminatory in the circumstances.

The tribunal findings highlight the importance of maintaining contact with employees when they are on maternity leave. Employees on maternity leave should be invited to any employer organised event no matter how informal its nature and this should include social events.

Employers should consider having a specific point of contact for employees on maternity leave such as the employee's manager to make sure there is communication with the employee about work related events. This should ensure situations do not arise where the employee could be subject to unfavourable treatment as a result of their absence on maternity leave.

Caroline Neadley

The UK Legal 500

Once again we are pleased to have been recognised in the latest edition of the UK Legal 500 as being in Tier One for delivering employment law services and we are very proud of this accolade.

We could not achieve these rankings without the continued and valued support from all of our clients, both established and new, and would like to take this opportunity to thank all of our clients for your continued instructions to the team.

Testimonials

"The team is great – very responsive to our needs and keen to add value wherever possible."

"The team at Rollits are exceptional at the employment law advice they offer. The team all offer us sound advice and respond in a timely manner. If one of the team is not available someone else will step in. The team are all friendly and make us feel at ease but are also very professional."

"What makes Rollits unique is their over-and-above attitude; nothing is a big issue. Their strengths are they are good listeners, happy to help and have really good knowledge in all subjects."

Rollits expands Employment team with new solicitor appointment

Lucy Trynka, who joined Rollits in September 2018 as a Trainee has moved to work in the firm's Employment team as a newly qualified solicitor.

Lucy said: "*As a trainee solicitor I really enjoyed the challenge of working across the many different areas of law and adapting to the differing needs of each discipline but I'm now enjoying being able to concentrate on the specialist work of a single department and putting my experience into practice.*"

Ed Jenneson, head of employment said "*Lucy made excellent progress during her two years as a trainee and we are confident she will make an important contribution at a time when the department's workload is expanding.*"

Information

If you have any queries on any issues raised in this newsletter, or any employment matters in general please contact:

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The law is stated as at 23 February 2021.

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