RMI Employment Law Bulletin
Spring 2021

Please note: In this bulletin we aim to keep you up-to-date on some of the latest developments in employment law and although the bulletin is not intended to provide a comprehensive summary of all the changes to the law, we hope to highlight some key areas of change for motor industry employers.

Case Law Update

- **Uber ruling and the gig economy**
- **Working time**

The Supreme Court rules in favour of the Uber drivers: are there implications for the motor industry?

In what can be seen as yet further disruption to the 'gig economy,' the Supreme Court has decided that the claimants in the Uber case (Uber & Ors v Aslam & Ors [2021 UKSC]) are 'workers,' not self-employed contractors. The ruling has far-reaching implications for businesses across the country and underscores the importance of correctly establishing a person's employment status.

Employee, a self-employed contractor, or a worker?

Under UK law, a person can generally be classed as an employee, a self-employed contractor, or a worker. Employees have the most employment rights, while self-employed contractors (or 'freelancers') have very little. Workers are a type of middle way category who enjoy some employment rights. These include the right to receive the national minimum wage, paid holiday, statutory rest breaks, protection from discrimination under the Equality Act 2010 and protection for whistle-blowers under the Public Interest Disclosure Act 1998.

Uber argued that it was simply acting as a booking agent for the drivers who in turn were working for themselves. The Supreme Court affirmed the decision of the lower courts that this position was not consistent with the reality of the working relationship. The fact that Uber calculated the fare and did not permit drivers to charge more; that Uber could penalise drivers if they rejected too many trip requests; and that Uber restricted communication between driver and passenger – were among the factors which betrayed less of a business relationship than one of subordination.

Implications for the hand car wash industry?

This has significant implications for any business that utilises significant numbers of self-employed contractors or freelancers. With between 10,000 – 20,000 hand car washes in the UK, proprietors who engage those to do the work as freelancers may need to review the working relationship to ensure that it is truly one of self-employment. Where self-employed

contractors or freelancers are deemed in fact to be workers then this will have significant financial implications with regards to National Minimum Wages as well as paid holiday entitlement.

How can I tell?

As confirmed in the Uber case, the more control one party has over the other the more likely that the weaker party will be a Worker. There is no hard and fast checklist and every case will be fact-sensitive, but practical considerations may be:

- Does the individual control the hours they work, or are they set by the business?
- Can they send a substitute to work, or are they required to attend in person?
- Can they negotiate the terms of the contract, or are they supplied with set terms?

It will also need to be remembered that even though both sides may agree that the individual will work as a self-employed person, the Supreme Court in *Uber* once again confirmed that employment status is determined by the reality of the relationship, not what it may purport to be.

In Conclusion

The ruling will be significant for Uber as it opens the way for potentially thousands of national minimum wage and unpaid holiday claims. It also has wider implications for those working right across the UK's gig economy and further claims from other industries are to be expected.

When Does Stand-By Time Qualify As Working Time?

In the recent judgment of *DJ v Radiotelevizija Slovenija*, the Court of Justice of the European Union (ECJ) has decided that periods of stand-by time will only constitute 'working time' in their entirety when, during those periods, the constraints imposed upon workers very significantly affect their ability to manage their free time.

Background

The claimant worked as a technician at a transmission station situated at the top of a mountain. He worked a shift pattern with each shift being 12 hours long. He then had 6 hours where he was on stand-by. During the stand-by period the claimant could leave the workplace, however, he had to be contactable and return to the transmission station within one hour when required.

The nature of the work and the distance between his home and place of work meant, in reality, that the claimant had to stay in the vicinity all day, with little opportunity for leisure activities. His employer provided accommodation at the station due to its remote setting, which the claimant was entitled to use.

The claimant brought a claim in which he argued that the periods when he was on stand-by were so restrictive that they were tantamount to overtime, irrespective of whether he was specifically called on to work during a stand-by period. He claimed that these periods should thus be considered 'working time' and remunerated accordingly.

The Supreme Court of Slovenia decided to refer a number of questions to the ECJ for a preliminary ruling.

Decision

The ECJ ruled that periods of stand-by time where a worker is not carrying out any actual work and is not required to remain at the workplace, may in certain circumstances amount to 'working time.' The circumstances are when the constraints imposed upon the worker during those periods objectively and very significantly affect the worker's ability to manage their free time and devote it to their own interests.

In making this assessment, the organisational difficulties that a worker may experience during stand-by time which are a result of the free choice of the worker or natural factors, are not in themselves relevant. Such an organisational difficulty would be the fact that there are limited opportunities to pursue leisure activities in the vicinity of the workplace; or, that there is a substantial distance between the worker's place of work and his freely chosen place of residence.

It is only the constraints imposed upon the worker either by the law of their state, by the employer or by a collective agreement, which may be taken into consideration. In this case, the employer's requirements that the worker had to be contactable while on standby-by and had to return to the workplace within one hour, when required, could therefore amount to such constraints. It will now be for the Supreme Court of Slovenia to decide whether any such constraint operated 'objectively and very significantly' so as to affect the claimant's ability to manage his free time.

Conclusion

This decision serves to preserve previous caselaw of the ECJ; and, as a reminder to employers in EU member states whose workers are on stand-by or 'on-call,' but who do not necessarily need to remain at the workplace during that period – those periods may nevertheless amount to 'working time' which will require to be remunerated accordingly, depending on the level and nature of the restrictions that the worker is subjected to.

This ruling may potentially be considered and/or relied upon in UK courts and tribunals following Brexit as, although EU law no longer binds the UK, the European Union (Withdrawal) Act 2018 makes provision for UK courts and tribunals to have regard to caselaw of the ECJ to the extent that it may be relevant. In this regard, it may be noted that the Working Time Regulations, which is the applicable law in the UK, was originally put in place to implement the EU's Working Time Directive, and it is that Directive on which this case is based.

Articles

What steps am I required to take around right to work in the UK checks for European nationals following Brexit for existing and new employees?

Employers must continue to carry out right to work checks for all workers before employing them, as was the case prior to Brexit:-

https://www.gov.uk/government/publications/right-to-work-checks-employers-guide

Position on right to work checks during the transition period up to 31 December 2020

European Economic Area ("EEA") nationals and their family members who continue to have a right of residence in the UK under EU law throughout the transition period do not fall within the definition of those who are required to have leave to enter or remain. This means that they do not require permission to work in the UK and an employer cannot be penalised for employing them, regardless of whether or not right to work checks have been carried out. However, as stated at the outset it is important that an employer has correctly conducted the right to work check and crucially, can evidence this as they will potentially benefit from the 'statutory excuse'. This means that if they are later found to be employing an illegal worker, they may be excused from a civil penalty and so do not receive a fine which is currently set at up to £20,000 per illegal worker.

EEA and Swiss nationals who are in the UK before the end of the transition period have until 30 June 2021 to apply for either settled or pre-settled status, which will give them the right to work in the UK.

Please see link below to the government EU settlement scheme employer toolkit:-

https://www.gov.uk/government/collections/eu-settlement-scheme-employer-toolkit

Right to work checks during the 6 month 'grace period' (1 January 2021 to 30 June 2021)

Employers can continue to use EEA and Swiss passports and national identity cards as evidence of an individual's right to work in the UK until 30 June 2021.

Employers can also use the online checking service to confirm that a candidate has settled or pre-settled status and therefore has the right to work in the UK. However, up to 30 June 2021, candidates do not have to agree to share their status using the online checking service. They can provide their passport or national identity card as an alternative.

There will be no requirement for employers to carry out retrospective right to work checks for existing EEA and Swiss national employees to confirm that they have settled or pre-settled status. In other words, if an employer has conducted a compliant right to work check for an EEA or Swiss national before 1 January 2021, it will not need to repeat this when the transition period ends.

EEA and Swiss nationals entering the UK from 1 January 2021 will not be able to apply for settled or pre-settled status. Because free movement between the UK and the EEA ends on 31 December 2020, they will require a visa to be able to work in the UK under the new immigration system. Therefore, to confirm the right to work of EEA and Swiss nationals arriving in the UK on or after 1 January 2021, employers will need to see evidence of their visa alongside their passport or national identity card.

EEA and Swiss nationals are not required to share their settled or pre-settled status prior to 30 June 2021. This may present an issue for employers with new starters between 1 January and 30 June 2021, as they may not know if the employee was already in the UK before 1 January 2021, and therefore whether or not they require a visa. The Home Office has yet to provide guidance in relation to checking the right to work of employees in this category.

Irish nationals

Note that the position will be different for Irish nationals who are generally treated as free from immigration time restrictions from the date that they enter the UK. Irish nationals can

apply for status under the EU Settlement Scheme if they want to, but there is no need for them to do so.

Covid-19: Can employees be required by their employer to get a vaccination?

With no firm end in sight to the coronavirus pandemic, it continues to significantly impact employers and the workforce. Although the vaccine is not yet available to be purchased privately, employers may want employees to take the vaccine as soon as they become eligible, under the voluntary NHS programme. A high vaccination rate would minimise the number of employees having to self-isolate and minimise the risk of employees becoming infected by workplace transmission.

Can I require a vaccination?

Under the Health and Safety at Work Act 1974, employers have a duty to ensure the health and safety of their employees so far as is reasonably practicable. To this end, requiring employees to be vaccinated against the coronavirus may seem like a reasonable request, particularly if it is difficult to employ other safety measures such as social distancing. However, the government has not made the vaccination compulsory, and there are a number of reasons why an employee may refuse a vaccine, whether, for example, due to medical or religious reasons. This may put the employer in a difficult position, both legally and in terms of employee relations.

What if an employee refuses?

An employee's refusal to comply with a reasonable management instruction *may* be grounds for disciplinary action including dismissal. An employer will have to carefully consider the individual circumstances of the employee and whether the refusal is justified. The nature of the workplace will also have to be appropriately risk-assessed and considered by the employer: it may not be reasonable to require an office worker to be vaccinated should remote working be possible; however, it may be reasonable to require vaccination of a healthcare worker, whose patients are particularly vulnerable.

At the present time it would seem likely that disciplinary action would be a risky option for the employer, but the risk will depend on the facts of the case and the disciplinary action taken.

One particular aspect is the Equality Act 2010. Employees should not receive any less favourable treatment, or be put to a detriment arising from not being vaccinated due to protected characteristics such as age, religion, philosophical belief (e.g. so-called 'antivaxers' could seek to argue that an objection to vaccination could be considered a 'philosophical belief'), pregnancy etc… If, for example, a person had a medical condition that could affect their decision to take the vaccine, any less favourable treatment towards them could result in claims of discrimination on the grounds of disability. This, of course, is only one particular example, and there are other areas of vulnerability for the employer. It is therefore important that you take advice before proceeding.

Conclusions

For now, employers should act cautiously in the mandating of a Covid-19 vaccination for the workforce. In the majority of cases, they may have to make the best of regular testing (not without its own difficulties), protective measures such as screening and sanitising stations, temperature checks and effective compliance with face coverings and social distancing rules.

This advice is general in nature and will need to be tailored to any one particular situation. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.

FCA and Discretionary Commission Ban 28 January 2021

Covid-19 has, naturally, been the focus of many businesses for some time. Unfortunately, the wheels of the world of business do keep on turning. In July, the FCA introduced significant changes regarding the use of Discretionary Commission Models within the motor industry. These changes are significant and come into force next week, so what do businesses need to know?

A Ban On Discretionary Commission Models

The FCA and consumer groups have for some time held reservations regarding the use of variable interest rates generally. In their business plan for the 2017/2018 year, the FCA therefore announced a review of the sector, publishing its report and final findings in March 2019. Following a consultation, the FCA concluded that discretionary commission models; where the broker can effectively set the interest rate, were widespread and carried an incentive for brokers to act against customers' interests. The FCA concluded that removing this incentive would protect consumers and save customers £165 million a year.

In July, the FCA announced that a ban on the use of discretionary commission models would be introduced from 28 January 2021 in order to give firms additional time to implement the new rules.

In Conclusion

Hopefully, this is not new information, as we would have expected significant work to have already been undertaken in preparation for next week's deadline. Any members who operate *any* system where commission is variable will have to closely examine their business model and ensure compliance with the FCA ban. Members will have to ensure that all staff are fully informed and trained on any new systems; a significant challenge with showrooms closed.

The FCA have stated that they will be monitoring closely how well firms comply with the ban, as well as looking closely at any alternative commission model introduced that could lead to the same harm. The FCA currently plan to carry out point of sale mystery shopper exercises to measure and monitor lenders' control over the dealer network and to ensure compliance. This work is scheduled to commence in September 2021, with a full review of the intervention carried out in 2023/24.

We would strongly advise that any new systems are monitored, and staff reviewed to ensure compliance with new systems and processes.

Further Information

Further information can be found at:

FCA Full Report (03/2018):

https://www.fca.org.uk/publication/research/our-work-on-motor-finance.pdf

FCA Final Findings (03/19):

https://www.fca.org.uk/publication/multi-firm-reviews/our-work-on-motor-finance-final-findings.pdf

FCA Policy Statement (PS20/8):

https://www.fca.org.uk/publications/policy-statements/ps20-8-motor-finance-discretionary-commission-models-and-consumer-credit-commission-disclosure

https://www.fca.org.uk/publication/policy/ps20-8.pdf

In Conclusion

Don't forget, any advice contained in the above is general in nature and will need to be tailored to any one particular situation. As an RMI member you have access to the RMI Legal advice line, as well as a number of industry experts for your assistance. Should you find yourself in the situation above, contact us at any stage for advice and assistance as appropriate.

Motor Industry Legal Services

Motor Industry Legal Services (MILS) provides fully comprehensive legal advice and representation to UK motor retailers for one annual fee. It is the only law firm in the UK which specialises in motor law and motor trade law. MILS currently advises over 1,000 individual businesses within the sector as well as the Retail Motor Industry Federation (RMI) and its members.