

## Workplace Law

In this month's edition of Workplace Law, we look at the continued trend of cases in relation to employment status, the tax position for termination payments, 18 rated films and the gender pay gap.

### 'Army of lawyers' fail to convince the Employment Tribunal that a worker is a contractor

The Employment Tribunal has again, following the widely reported Uber decision of October 2016, looked past a 'self-employed contractor' label and found the person in question to be a worker.

The case, *Dewhurst v CitySprint UK Ltd*, concerned a bicycle courier's claim to workers' rights. The company she works for recruited her under a document entitled 'Confirmation of Tender to Supply Courier Services.' This document makes clear that couriers work on a self-employed basis. In addition to signing this document, CitySprint couriers read and acknowledge, by ticking electronic boxes, a list of terms. These terms effectively exclude from the company-courier relationship any factors pointing towards an employer-worker situation. For instance, they outline that there is no obligation for the courier to provide services and no obligation for the company to provide work, the courier may send a suitable substitute in their place and that payment is based on jobs done. Couriers must signify their agreement to no holiday, maternity or sick pay entitlement also.

The Employment Tribunal Judge opined that this document and the recruitment process appear to have been devised by "an army of lawyers," to avoid the reality of situation being legally recognised.

The reality of the situation is that the courier typically worked 4 days a week between 9.30am and 6.30pm. During this time she is logged into the company's tracking system which is used to know her whereabouts and assign her jobs. She wears a company uniform and is told to smile at customers. The right to send a substitute is so heavily qualified that really it is only really a right to send another CitySprint courier in her place. She does not have to submit invoices for each job worked, but instead is paid according to CitySprint's own calculations.

The Employment Tribunal held that this situation fits the **Employment Rights Act 1996** definition of worker, namely one who has contract by which they agree:

*to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.*

The courier was therefore entitled to the holiday pay she claimed.

This decision is another warning to the so-called Gig-Economy, where individuals are paid per job and only work when there is work available. There is the finest of lines between a purely

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casual one-job-at-a-time arrangement and something more permanent and regular, accompanied by dependency.

Although the tribunal recognised contract words as “key pieces in the jigsaw,” the actual situation must be explored and the bar for allowing such exploration is low. Judges will not be fooled by document based constructions and will seek to bring reality to light and enable individuals to use the rights and protections of employment law.

## 18 rated films

Showing a class full of vulnerable children aged 15 and 16 year old an 18 rated movie (*Halloween*) would be cause to dismiss anyone, right? Wrong! Well partly.

In the recent case of *City of York Council v Grosset*, Mr Grosset did exactly that.

Mr Grosset, a teacher, suffered from cystic fibrosis and following a change in performance standards, he informed the Head Teacher that his workload was unreasonable. Unfortunately, his concerns fell on deaf ears and his workload did not decrease, causing him to suffer from stress which in turn exacerbated his cystic fibrosis; a vicious cycle.

Prior to being signed off, owing to his ill health, Mr Grosset showed the film *Halloween* to the children, which was subsequently discovered and he was promptly suspended. During the disciplinary process the panel for the Council did not accept the argument that it was a momentary error of judgment, owing to the stress and his cystic fibrosis. They believed that there had been several points whereby he could have stopped the film and so he was dismissed for gross misconduct.

Taking his matter to tribunal, Mr Grosset claimed unfair dismissal and discrimination arising from disability under the **Equality Act 2010**.

The tribunal sided with Mr Grosset that his judgment and mental state had been impaired because of the stress and his disability. The tribunal found that his dismissal was discrimination as a consequence of his disability which could not be justified as a proportionate means of achieving a legitimate aim (to protect the children) or ensure that the disciplinary standards were maintained.

The tribunal went on to dismiss the claim for unfair dismissal on the grounds that it fell within the band of reasonable responses. These outcomes were upheld by the Employment Appeal Tribunal (**EAT**).

The case is a warning to employers because at the time of his dismissal the Council correctly considered the medical evidence available to them, which assisted them in winning the unfair dismissal point. But by the time of the tribunal there was additional medical evidence available. This additional medical evidence showed a link between his misconduct and his disability which helped Mr Grosset to win the discrimination argument even though this evidence has not been before the Council at the time of the dismissal.

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It is also a helpful reminder to employers that, in cases dealing with disability and medical evidence, they should be mindful of how a case is progressing. In particular, the documents submitted as part of disclosure may have a significant impact on the merits of the claim and so whether a settlement should be explored.

The facts of the case are very specific and at first glance we are sceptical about the decision reached. Perhaps the Council could have satisfied themselves further by obtaining medical evidence when Mr Grosset first raised the argument that that he had an impaired mental state at the disciplinary.

The Council is seeking permission to appeal to the Court of Appeal, so watch this space.

## Taxation of termination payments

In the employment department we see countless settlement agreements intended to end an employee's contract of employment. This type of agreement has benefits for both parties and will regularly contain some form of termination payment.

Unfortunately, we see time and time again that the company attempts to make a 'lump sum payment' and labels it all as non-taxable. This will inevitably be made up of taxable and non-taxable elements and these sums should be clearly labelled so that there are no reprisals if HMRC were to review the payment (e.g. as part of a payroll audit).

### The basics

In life tax is one of the few certainties, but how tax applies to settlement agreements is often far from certain. That being said, tax does not have to be taxing, so we have set out to explain the tax treatment of some of the common payments made under settlement agreements.

The starting position for considering whether a payment will attract income tax is whether it is an emolument of payment, i.e. is it "earnings" from the employee's employment. This can cover:

- salary, wage or fees; and
- gratuities or other incidental benefits of any kind.

If the payment falls within one of these categories then it will be taxable, even if made after the termination date of the employment.

If the payment does not constitute 'earnings' then up to a maximum of £30,000 can be made tax free and will not incur liability for National Insurance Contributions (**NIC**). Sums paid over and above this amount should be taxed at the employee's normal income tax rate.

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### What do we recommend?

It is always best to have a breakdown of what the payments are made up of so that you can consider the tax position of each of them. If all the payments are lumped together there is the risk that HMRC may subject the entire amount to tax. This would be to the detriment of both parties.

### Labels and typical payments

It can be tempting to state that a payment is 'ex-gratia' i.e. a payment without legal obligation, such as a 'golden handshake'. However, a payment of this nature must be exactly that, it must be made without any legal or contractual requirement as HMRC will always look beyond the labels and consider whether the payment should have been taxed.

We have listed some of the typical payments and their usual tax status below. But each termination will have its own unique set of facts, so specific advice should always be sought.

Taxable	Tax free
Consideration for entering into restrictive covenants.	Benefits in kind – these are non-taxable unless there is an established custom/practice of making such payments.
Holiday pay – even when the payment is made in arrears (i.e. after termination of employment).	Pension payments – lump sum payments into a pension scheme, provided they are made solely for the loss of pension rights.
Bonus payments – even where only part of the bonus period was worked.	Company car – the cash equivalent at the date of termination must be calculated to apportion the amount that should fall within the £30,000 exemption.
Notice pay – However this can be paid tax-free as damages for breach of contract where this is paid in lieu of notice, where no such clause exists in the contract and this is not the organisation's automatic response to terminations.	Discrimination – where the payment is made for loss of earnings or in relation to the termination, this will be taxable.

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## Mind the gap

Take a look at your boardroom. Is it men or women occupying most of those seats? If you work for a FTSE 100 company, less than 10% of directors are female. It's not much.

Take a look at the highest earners in your Company. How many of those are women? Not many if statistics released last week are anything to go by. According to figures, women hold just **12%** of jobs paying **£150,000** or more.

From parliament and the judiciary to the top jobs in business, the majority of high ranking positions are filled by men and for quite some time this problem has not been addressed. The statistics above are just some of the increasing number of shocking figures that show a disparity between the sexes.

And thanks to the introduction of gender pay reporting obligations, we are only going to become more aware of this.

In April this year, reporting on gender pay gaps is set to become compulsory for private sector and voluntary organisations employing **250** or more people under the Small Business, Enterprise and **Employment Act 2015**.

The first 'snapshot' date of pay is due to take place on 5 April 2017. Six sets of figures will be needed to calculate the figure, including the percentage difference between male and female employees:

1. In mean hourly pay on the snapshot date;
2. In median hourly pay on the snapshot date;
3. In mean bonus in the previous 12 months; and
4. In median bonus in the previous 12 months.

Companies are quickly going to have to face up to a gender pay gap. The government's hope is that with exposure comes change and the gap will get smaller. By 1997, some 27 years after the Equal Pay Act was introduced, the gender pay gap lay at **27.5%**. Seven years ago this figure was reduced to **19.8%**. The hope is that now the obligations on companies are higher, we won't have to wait decades to see that figure squashed further.

If you are concerned about how the new legislation affects you then we invite you to speak to a member of our team. In the meantime, we suggest companies look at some of the practical steps they can take to reduce this difference. Flexible working policies, providing women with leadership training, increasing the value of low paid work (which a higher number of women traditionally occupy) are just some of the ways you can start to combat the problem. Because if you don't, soon everyone will know.

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### **Meet the team**

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