

## Workplace Law

In this month's edition of Workplace Law, we would like to introduce you to collaborative employment law a new initiative that has been set up by us with Brachers, Furley Page and Thackrey Williams. We also consider the recent Uber case decision, holiday pay including commission, the tribunal fee report and judicial assessment.

## Collaborative employment law

If you haven't already heard, together with Brachers, Furley Page and Thackray Williams (law firms in Kent) we have launched a new employment resolution service called Collaborative Employment Law (**CEL**)!

CEL is being offered by the four firms who are committed to working together to resolve employment and workplace disputes.

Lawyers within the CEL member firms have undergone internal workplace mediation training and hold an Acas Certificate of Internal Workplace Mediation or equivalent in order to offer CEL to their clients and participate in CEL.

The purpose of CEL is to:

- Resolve employment and workplace disputes in a non-confrontational way
- Deal with the resolution of employment and workplace disputes in a constructive, proactive way
- Encourage participants to think creatively and constructively to resolve their dispute
- Work to achieve a resolution of the employment and workplace dispute
- Ensure a quick and cost effective outcome
- The advantage of CEL is that it aims to avoid an employment or workplace dispute becoming adversarial and possibly spiralling down into deadlock with ensuing litigation. It allows the participants an opportunity to voice their respective concerns and interests
- From the start of the process, both parties can be clear about what they hope to achieve
- For it to work both parties must appoint CEL lawyers who will work with their respective clients to facilitate an open, honest and constructive exploration of ways in which the parties can reach a resolution of their differences
- CEL offers the parties an opportunity, through this facilitated process, to speak directly to each other about the dispute in a non-confrontational way, in a dignified and neutral environment with the specific aim of seeking an early resolution to the dispute
- There is no lengthy or aggressive correspondence or communication between the parties and in most cases, the matter should be resolved after one meeting.

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- CEL also allows the parties to be more creative and come up with their own solutions, which a court or employment tribunal would never have statutory power to deliver for example to agree for training, outplacement support or coaching to be provided or to receive a face to face apology
- The CEL process is quick, confidential and all discussions and communications will be conducted on a without prejudice basis.

### Why opt for CEL?

It provides a respectful, confidential and private forum for dispute resolution. It also allows parties in dispute to explore and understand their differences, so that they can find a solution. It is quicker, less expensive and less emotionally and commercially disruptive for both sides than traditional judicial forums

CEL is different from conventional mediation as there is no third party but the aim is the same; to collaboratively resolve workplace disputes between employer and employee.

If you would like a brochure about CEL or to discuss this further please contact a member of the team.

## Uber drivers are workers

It was announced this month that the Employment Tribunal (**ET**) has found in the Uber driver's favour and established that they are not self-employed but are indeed workers.

So what does this mean? Well, as self-employed they previously did not have employment rights. Now that they are considered workers, they will benefit from a number of employment rights (though not as many as employees). Some of the rights that they will now enjoy are the:

- 5.6 weeks of paid annual leave each year
- 48 hour maximum working week
- protection from unlawful deduction from wages
- national minimum/living wage.

The potential consequences of this case are huge. Uber has circa 30,000 drivers in London alone and had intended to increase this number to 46,000. The compensatory payments are likely to be of high, not to mention the tax implications. This finding will likely pave the way for future cases of this nature. For example, the restaurant food delivery company, Deliveroo's drivers are said to be trying to create a union and claim that they are workers.

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## Holiday pay must account for commission, Court of Appeal finds

### How should employers react?

We have looked at this point before but now the Court of Appeal have found that:

- Where workers are paid commission, this should be reflected in their holiday pay. How exactly it should be reflected is uncertain. The Court of Appeal left many questions unanswered. This is likely because British Gas is reportedly appealing to the Supreme Court, which, hopefully, will provide some clarity to the situation
- For now, it is worth remembering that this new decision relates only to the standard four weeks of holiday pay that employees are entitled to under EU law, and therefore, not the additional 1.6 weeks that UK law entitles them to, or any additional annual leave contractually agreed
- It is suggested that commission-paying employers come to their own arrangements with workers, perhaps agreeing that four weeks of their holiday pay incorporate the average yearly commission paid to that worker. This is the most sensible approach to take until, we hope, the Supreme Court clarifies things.

Unfortunately, the Court of Appeal did not provide much if any help on how and for what time period an employer should use to calculate holiday pay. The Employment Tribunal and the Employment Appeals Tribunal suggested that, in a situation like the claimant's, holiday pay should be calculated using an average pay in the 12 weeks before the holiday pay date. This is the procedure used when a worker's pay is dependent on the number of hours they work. The Court of Appeal however did not affirm this. It is quite possible that using a 12 week average calculation would produce unfairness in sectors with seasonal peaks in commissions.

The Court of Appeal declined also to speculate on what the situation should be for different types of worker earning different types of commission, for instance, bankers with large performance based bonuses, or those who get commission after their employer's profits cross a threshold. It was suggested though that the Employment Tribunal and the Employment Appeals Tribunal used too expansive a rule of when commission should be taken into account and that any rule should be limited to contractual success-based commission.

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## A snap shot of tribunal fees and what is happening to tribunal claims

### Current fees

The fees payable (purely by the Claimant) can be broken down into issuing and hearing fees, together the employment tribunal fees, the cost of which will depend on the type of claim being brought, as outlined below.

Fee	Type A claims	Type B claims
Issuing fee	£160	£250
Hearing fee	£230	£950
Total fees	£390	£1,200

### The impact of employment tribunal fees

After the introduction of the employment tribunal fees, the number of claims being issued in the employment tribunal have dropped by circa 70%. With the drop we were expecting to see the success rates for claimants increase on the basis that the vexatious claims and those with no reasonable chance of success cases would be dropped. Shantha David, Legal Officer for Unison has provided the following figures which are interesting:

Period	Success rate for claimants
2010/11	12%
2012/13	11%
<b>After the introduction of fees</b>	
2013/14	7%
2014/15	3%

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Robert Neill, Chair of the Justice Committee was also present at the Westminster Employment Forum and provided the following information which indicates that the fee structure, currently in place, does not pay for itself.

Period	Income from employment tribunal fees
2014/15	£9 million (17% of the cost)
2015/16	£8.5 million

### Access to justice

The big question now being considered is, has the introduction of an issue and hearing fee denying people access to justice?

Many will argue that it is. An individual's access to justice which has been a corner stone of English law since the Magna Carta in 1215 states:

*"To no one we will sell, to no one deny or delay right or justice".*

However there are positives and negatives to the introduction of employment tribunal fees. The reality is that £83.6 million (the cost to the tax payer of funding the tribunals) is not going to manifest itself from heaven but nor should access to justice be trampled in order to save costs.

### So what is happening to address these issues?

The fee regime is currently under review by the Justice Committee and various proposals are being put forward such as the deferral of payment of the employment tribunal fees until after the final hearing. Following which, the losing party would be made to pay the fees; this is akin to the German system. This might be sensible because the actual cost of the tribunal, would be quantifiable and perhaps a calculation could be used to assess the costs of the fees which could take into consideration the compensation payable and whether or not there was contributory fault by either party which may affect whether partial payment from the other party would be appropriate. Fees are hear to stay but we are expecting some changes.

Employment Tribunals are expensive. At our previous article shows quite how costly the process can be which is why the time has come to see if the system is really working. The President of the Employment Tribunals (England and Wales) has recently rolled out plans and on 3 October 2016 issued new guidance setting out a protocol for 'Judicial Assessment' of the claim and response at the early stages of proceedings.

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The idea is for the Employment Tribunal Judge to consider the strengths and weaknesses of the case normally once the preliminary hearing has taken place and the issues have been identified. The Judge will then make an informal assessment and give an indication of what he thinks the outcome will be.

It is hoped that parties will be encouraged to settle on the back of what the Judge has said. This will avoid the cost of taking a claim to a final hearing which can often reach tens or even hundreds of thousands of pounds. Even for a relatively low value claim, it is unlikely that a Respondent would see much change from £15,000 so there is a real incentive to take on board the Judge's opinion.

That said, there's no obligation to follow the assessment. The Judge will make it clear at the beginning that the assessment is provisional and that any indication is given without evaluating the evidence. It may well be that the Judge at the final hearing will find completely the other way.

As with Judicial Mediation, the process is entirely confidential and a Judge at final hearing will not be privy to any of the discussions that arise at this early stage.

Finally, there is no obligation to go down this route. In any event, the process is completely voluntary and both parties have to agree which often isn't likely or practical. The process is most likely to be used and successful in cases where there are litigants in person who may well not have taken legal advice yet and would find it useful to have an indicative view of the prospects of their claim. All too many times we have seen individuals issuing a claim without any understanding about what the law provides for or how it is applied. It is hoped that intervention at an early stage will help weed the claims with no prospects. But as to its true effect, only time will tell.

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### Focus On



#### Elizabeth Maxwell – Solicitor in the Employment Team

**Where have you joined us from?**

Training contract at BP Collins

**What was your first job?**

A fragrance consultant in Boots

**What was your worst experience as a pupil?**

Having to clear up old chewing gum from under the desks as punishment for talking too much

**What's your favourite film?**

Romeo and Juliet

**If you hadn't decided to be a lawyer, what would you have been?**

Bored. Probably.

**What was the first record you ever bought?**

Three Lions on a Shirt

**What's your favourite children's book?**

The Twits

**Who do you most admire and why?**

I couldn't possibly give just one answer. Sorry

**Tell us two truths and one lie**

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1. I once had lunch with Tony Blair
2. I've hugged David Beckham
3. I've run the London Marathon five times

### **Meet the team**

For more information on anything mentioned in this newsletter please contact a member of the employment team.



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