Rollits LLP

Employment Update

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New addition to the Employment Team

Following the retirement of Donna Ingleby in the summer, Rollits has strengthened the existing employment team of Ed Jenneson, Ed Heppel and Ruth Everitt with the appointment of leading employment lawyer Caroline Neadley.

Caroline joins Rollits from Humberside Police and brings with her over 15 years' experience in both the public and private sector.

She will use her expertise to advise business clients on employment legislation, tribunal claims and advocacy, and provide training to help them manage a multitude of legal issues in the workplace.

Caroline graduated from Sheffield Hallam University with law degree in 2001, before attending the College of Law, in York, to study her Legal Practice Course. In 2002, she started her career as a trainee solicitor and, immediately upon qualification in 2004 Caroline embarked upon her specialism in employment law.

In her most recent role as an employment law specialist within Humberside Police's legal department, Caroline advised chief constables and acted as Deputy Force Solicitor. She formed part of a 10-strong team of employment lawyers covering the Humber region and South Yorkshire, following the force's collaboration with South Yorkshire Police.

As a result of Caroline's appointment, Rollits now has the largest team of qualified employment lawyers in East Yorkshire, with over 40 years' experience between them.

Fees update

Key questions and answers

Why were tribunal fees challenged?

Unison, the public sector trade union, brought judicial review proceedings challenging the lawfulness of the introduction of the fee regime. Their challenge began when the fees were introduced in 2013 and finally made its way to a Supreme Court decision in July 2017.

Unison's challenge was primarily on the basis the fees regime denied the fundamental right of access to justice for many claimants who could not afford to pay the fees. Interestingly it was also argued the fees indirectly discriminated against women because fees for discrimination claims were higher than the fees for claims such as unfair dismissal and statistically women bring the majority of discrimination claims.

What did the Supreme Court decide?

The Supreme Court decision has been termed as momentous and it is without doubt one of the most significant employment cases for many years.

The unanimous decision was that the Fees Order introduced by the government was unlawful and the court swiftly quashed it!

In an expansive judgment, the court focused on the common law principles which have evolved through case law over time, ensuring access to justice for all members of society. Whilst the court accepted there were legitimate objectives behind the introduction of fees such as incentivising earlier settlements and discouraging weak or vexatious claims, the court emphasised that the Lord Chancellor was not however permitted to impose whatever fees he chose in order to achieve these objectives.

The fall in the number of tribunal claims since 2013 was so sharp, so substantial and so sustained as to warrant the conclusion that a significant number of people who would otherwise have brought claims have found the fees to be unaffordable. The court held it was clear that the fees had been set at too high a level.

Given the finding the scheme was unlawful, it was not necessary to reach a final decision on the assertion of indirect discrimination however the court nevertheless expressed the view that they considered the fees were indirectly discriminatory on the basis discrimination claims attract a higher fee, a higher proportion of women bring discrimination claims, therefore women are placed at a particular disadvantage compared with men.

What happens next?

The government was quick to accept the court's ruling. The Justice Minister, Dominic Raab, announced that the government would immediately stop taking fees and would reimburse all fees paid since 2013. It has been reported this amounts to around £32 million in revenue since the fees were introduced.

The refund scheme will be rolled out in phases over a 4 week period. As of 20 October 2017 the first people eligible for refunds will be contacted individually and invited to complete application forms. The government will also work with trade unions in respect of multiple claims involving large numbers of claimants who are eligible for reimbursement.

Individuals who have not been invited to complete an application in this first stage but have paid Tribunal fees can register an interest in applying when the full scheme is rolled out by email or post, details of which are on the gov.uk website.

As well as being refunded their original fee, applicants to the scheme will also be paid interest of 0.5% calculated from the date of the original payment up until the refund date.

There is also much discussion about the possibility of tribunal claims now being commenced in respect of claims that are out of time, from claimants who were deterred from pursuing a claim by the fees regimes. We have not seen any claims of this nature to date but expect to see some test cases on this point.

Longer term it is not clear whether the government will consider replacing the fees with a fairer, more proportionate system; for example one that sees claimants and respondents jointly contribute towards the costs of running the employment tribunal system.

What are the longer term consequences of the decision?

We consider it is very likely that there will be an increase in the number of employment tribunal claims brought. Our clients have already experienced unrepresented applicants submitting last minute claims, reminiscent of the old tribunal system.

However we do not anticipate the number of claims will revert back to the levels experienced prior to the introduction of fees. The ACAS pre-claims conciliation process remains a useful tool to try and resolve claims before proceedings are issued. This process will remain in place and might be incentivised now that employers recognise claimants are free to pursue their complaints to a tribunal without the financial barrier of fees.

Parties may find that existing claims are slower to proceed through the tribunal system as the number of claims increase and the tribunals grapple with the ongoing administrative burdens of unpicking this situation.

Last but by no means least, we think this decision reinforces the importance of employers taking time to properly deal with employment issues when they arise, ensuring procedures are followed and that the focus is on the resolution of workplace issues given the increased likelihood of tribunal claims.

Sexual harassment claims

There appears to have been an increase in sexual harassment claims according to recent tribunal statistics for 2016/2017. Whilst the vast numbers of employment tribunal claims have seen a decline in numbers, this is one type of claim which seems to be increasing and this is reflected in the increased number of claims which the employment team at Rollits are currently dealing with.

There have also been a number of high profile reports of sexual harassment in the workplace. A survey by the trade union TUC states more than half of the women they surveyed said they had been sexually harassed at work, there are reports of sexual harassment at 'epidemic levels' in UK Universities.

It is unclear what lies behind the increase but it could well be that following the media coverage over recent times that more women are prepared to step forward and report such behaviour.

The Equality Act 2010 prohibits three types of discrimination:

- Harassment related to sex
- Sexual Harassment
- Less favourable treatment because the employee rejects or submits to harassment.

Sexual harassment occurs where:

- A engages in unwanted conduct related to sex; and
- The conduct has the **purpose or effect** of either violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or environment for B.

When considering the effect the person's perception of the treatment, the circumstances of the particular case and whether it is reasonable for the conduct to have that effect are all taken in to account.

There is no need for the person to make it clear the conduct is unwanted for the behaviour to constitute harassment and a single incident is enough to amount to sexual harassment.

Conduct related to sex is wide ranging, it could include male work colleagues putting tools on a high shelf which makes it difficult for a female colleague to reach, telling sexist jokes, displaying material such a calendars which depict scantily clad models or office banter that has sexual connotations.

Less favourable treatment could include a female manager asking a male colleague on a date, when he declines, he is not invited to important meetings which affects his ability to undertake his role.

For the purposes of the Equality Act, anything done by an employee in the course of their employment is treated as having been done by the employer, regardless of whether the employee's acts were done with the employer's knowledge or approval. An employer is therefore 'vicariously liable' for an act of discrimination or harassment during the course of employment. This has been held to include social gatherings such as Christmas parties.

However an employer can take steps to ensure they are not liable for the actions of their employees if the employer can show it took "all reasonable steps" to prevent the employee from behaving in a discriminatory way. This is commonly known as the "reasonable steps" defence which is set out in the Equality Act.

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Sexual harassment claims (continued)

What is particularly important to note is that to succeed with such a defence, the employer must have taken such steps before the harassment occurred. Employment tribunals have also stressed the mere existence of a policy is not enough!

So what can employers do to eradicate this behaviour from the workplace?

- Have in place and implement an equal opportunities, anti-harassment and bullying policy and regularly review these policies.
- Make all employees aware of the policies, ideally provide them with a copy and ensure they sign to confirm they have received it or confirm where they are located.
- Ensure employees are aware of the implications of the policies.
- Train managers and supervisors in equal opportunities and harassment issues.
- Take steps to effectively deal with complaints, including disciplinary action when appropriate.

Example of a reasonable steps defence

An employer ensures that all of their workers are aware of the policy on harassment, that any such behaviour is wholly unacceptable and will lead to disciplinary action. They also ensure that managers receive training in recognising such behaviour and how to apply the policy. A male employee makes sexual comments to a female colleague who is humiliated and offended by the comments. This is reported to the manager who recognises the unacceptable nature of the comments and disciplinary action is taken against the employee. In the circumstances, the employer may avoid liability because their actions are likely to show that they took all reasonable steps to prevent the behaviour and to address it when it did occur.

Mental health in the workplace

The 10th of October marked World Mental Health day and this year's theme is mental health in the workplace.

Mental health issues at work continue to be an important issue, the Department for Health estimates that one in four of us will suffer a mental health problem at some point in our lives. The Centre for Mental Health estimates the total annual cost of dealing with mental health problems at work is over 30 billion.

Recognising this, Acas have now published a new guidance booklet on Promoting Positive Mental Health in the Workplace.

There are many sources of support for both employees and employers to assist them either coping with mental health at work or supporting their employees. These include:-

- **Access to Work Scheme** direct.gov.uk/en/Dissabled/People/Employmentsupport/WorkSchemesAndProgrammes
- **The Fit to Work Service** – Free occupational health assessments fitforwork.org
- **Mindful Employer** – NHS initiative mindfulemployer.net
- **Mind** mind.org.uk
- **ACAS** acas.org.uk/managingmentalhealth
- **Rollits LLP** – If required we are able to assist by providing both training for employers and employees and specialist legal advice in this area.

Gig economy

As the world of employment law continues to develop apace, so does the terminology. One such term is "gig economy".

The Oxford English Dictionary defines a "gig" as "a job", especially one that is temporary or that has an "uncertain future". It also defines the "gig economy" as "a market characterised by the prevalence of short-term contracts or freelance work as opposed to permanent jobs".

Research by Citizens Advice only last year suggested that as many as 460,000 people could be falsely classified as self-employed costing up to £314 million a year in lost tax and employer national insurance contributions.

Many businesses with fluctuating demands have historically maintained a core workforce and intermittently relied upon "casual workers". This term encapsulates a range of working arrangements but commonly included bank staff, seasonal workers and individuals working zero hour contracts, guaranteed minimum or short-hours contracts.

Whilst a casual worker has fewer rights than an employee, they are still entitled to certain rights including national minimum wage and paid holidays.

In contrast, these emerging economies have tended to engage individuals, not as employees or workers, but as self-employed contractors, who have freedom to accept the work (the "gig") or reject it. However, some individuals are challenging their employment status as independent contractors and are arguing, with some success, that they are in fact workers, giving them increased protection in the form of holidays, payment of a wage in line with the national minimum and the protection of certain employment law provisions such as the Equality Act.

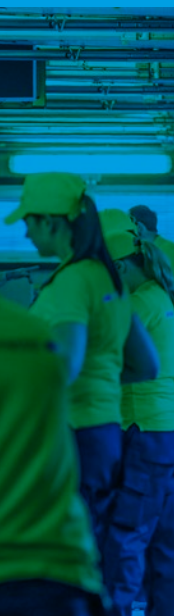
Before the gig economy became established, self-employed people tended to hold the more recognised traditional self-employed roles working as skilled tradespeople or consultants engaged to provide specific expertise to a client on a specific project.

With employees and self-employed contractors, they are at such opposite ends of the spectrum you can usually quickly identify which category they fall into. The line is more blurred between a worker and a self-employed contractor. Furthermore the "worker" test has developed with case law over time and each case depends on its own facts. This has produced inconsistent results with employment tribunals making different decisions on similar facts.

This uncertainty has provided a line of attack for those who wish to challenge their status within the gig economy. Add to this the fact that tax law only distinguishes between an employee and self-employed person, you can be left with a situation whereby an individual can be self-employed for tax purposes but a worker for employment status purposes!

Legal arguments centred on employment status are nothing new; however the dimension of the gig economy has widened the scope for debate and many gig economy cases have been brought with the support of the unions. There was the highly publicised case brought by Uber drivers who were held to be not self-employed, rather workers entitled to the national living wage and holiday pay. Uber have appealed the decision although that appeal has been unsuccessful.

More recently the Equality and Human Rights Commission stepped in to fund the Court of Appeal case of Gary Smith, a plumber engaged as an 'independent contractor' employed in a gig economy set up by Pimlico Plumbers. Mr Smith successfully argued he was a worker which then gave him the protection of the Equality Act and the ability to proceed with a discrimination claim.



It is clear there is national interest in ensuring workers' rights are protected.

Statistics tend to suggest that there remains significant elements of inconsistency in such cases but the recent trend has been for employment tribunals and the courts to find that individuals who had been engaged as self employed contractors are in fact workers.

There remain no concrete plans to change the law but the spotlight shines on this area given the changing nature of the economic landscape. There have been a number of reviews, one such review includes the Taylor Review, launched by BEIS in November 2016, and its scope was to review Employment Practices in the Modern Economy. It is led by Matthew Taylor, Chief Executive of the Royal Society of Arts and its task is to consider the implications of new models of working on the rights and responsibilities of workers.

The final report recommended a number of proposals including:-

- Making the definition of "worker" more clear and consistent;
- A higher rate of national minimum wage for hours not guaranteed by the contract;
- A pay reference period of 52 weeks instead of 12 weeks; and
- That agency workers should have a right to request direct employment with the hirer after they have been engaged for 12 months.

Whilst the report may be used to inform the government's strategy there is a long way to go before there is likely to be any consistency in the law.

It is therefore important for the parties to address their mind to the employment status of working relationship at the very outset, that it is agreed, reflected in writing and that the actual work is performed in accordance with what has been agreed.

CHAMBERS AND PARTNERS

We were delighted when Chambers and Partners legal directory published its latest law firm rankings earlier this month.

The work which Rollits' Employment team has carried out over the past year has been recognised and rated by the independent editors, with their resulting commentary that 'Rollits offer full-service employment offering, with experience advising on employment matters across multiple industry sectors including food services, education and healthcare. They continue to advise family-owned and owner-managed businesses. Experienced in TUPE, collective redundancy and Equality Act claims.

Clients say…
"They've understood the issues from our perspective and guided us in a way that gets things sorted."

Partner and head of the Employment team Ed Jenneson is recognised in the directory as a "Leader in the Field" and clients commend Ed for his…
"ability to give sound, pragmatic advice from an employer's point of view."

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.

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