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Employment

EMPLOYMENT NEWSLETTER - NOVEMBER 2017

Welcome to the latest edition in which we hope you will find something to interest both you and your business. If there is anything in particular you would like to know more about in a future issue, do let the employment team know.

Bus firm is first employer guilty of failing to auto-enrol

A bus operator has become the first employer in the UK to be found guilty of failing to auto-enrol its staff on to a workplace pension scheme – as experts warned that even businesses making minimum contributions could be leaving themselves open to future legal action.

Oldham-based Stotts Tours and its managing director, Alan Stott, admitted deliberately avoiding setting up workplace pension schemes for 36 staff, despite employees meeting auto-enrolment criteria, the Pensions Regulator reported.

Under current auto-enrolment legislation, anyone earning more than £10,000 a year and aged between 22 and the state pension age is entitled to be automatically enrolled on to a workplace pension scheme.

Employers like Stotts Tours with fewer than 50 staff on their largest PAYE schemes have been legally obliged to place staff into suitable workplace pension schemes and begin making pension contributions since between June 2015 and April 2017.

Stotts Tours pleaded guilty to a total of 16 offences of 'wilfully failing' to comply with auto-enrolment legislation. Sentencing is due on 14 December, with a maximum sentence of an unlimited fine.

Minimum auto-enrolment contribution rates are set to rise in April 2018 to 2 per cent, and again in April 2019 to 3 per cent. The Pensions Regulator works on the basis of trying to assist and support employers in meeting their auto-enrolment duties, but there clearly comes a point when education and information isn't sufficient and court action will be taken.

Worker Status: Employment Appeal Tribunal find that Uber Drivers are 'Workers'

The EAT agreed with the employment tribunal that when the Uber app was switched on, Uber drivers were workers for the purposes of their claims under the *Employment Rights Act 1996, Working Time Regulations 1998* and *National Minimum Wage Act 1998.*

When drivers had the app switched on, they were obliged to be "able and willing to accept assignments", were subject to a requirement that they "should accept at least 80% of trip requests", and would suffer a penalty if they cancelled a trip once accepted. Those matters were indicative of a worker relationship and inconsistent with the contractual documentation or a suggestion that drivers were in business on their own account.

The tribunal was entitled to find that Uber London Limited was not acting as agent between the drivers and passengers. While there may be "gaps" when the drivers did not have the app switched on and were not workers for Uber London Limited, that was not "fatal to their status as 'workers' when they did".

It is likely that Uber will appeal, and they may indeed seek a leapfrog appeal to the Supreme so this case can be heard at the same time as the Pimlico Plumbers case.

We plan to use length of service as a criterion when selecting employees for possible redundancies. Is this age discrimination?

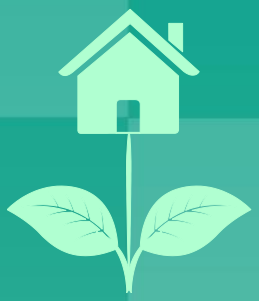
Be very careful - and take legal advice. Older employees are likely to have been with you longer, so using length of service as a criterion is potentially age discrimination against younger employees. Men may also have longer continuous service than women, so it is potentially sex discrimination too.

However, the High Court has held that using length of service as one of the criteria when selecting employees for redundancy can, in some circumstances, be objectively justified - it is not necessarily age discrimination (although using 'last in, first out' is also likely to be discriminatory).

The Court decided that the policy of giving credit for long service on a redundancy amounted to a benefit for the employee concerned - the benefit was the retention of employment which would otherwise be lost.

The tribunal also found that the criterion fulfilled a business need, because length of service equated to loyalty and experience, and meant that older workers were better protected from losing their jobs than younger workers in a difficult economic climate. The employer had therefore justified the impact of the age-related benefit.

However, in another case concerning a pay scheme that rewarded longer service (but, significantly, a claim based on indirect sex discrimination on the grounds that women generally have shorter periods of continuous service than men, rather than an age discrimination claim) the European Court of Justice accepted that, in general, length of service went hand in hand with experience, and experience would enable a worker to perform better. So normally, employers do not need to provide a justification for using length of service as a criterion in pay schemes in order to avoid indirect sex discrimination claims.



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But the Court also accepted the 'serious doubts' the claimant had raised as to whether, once a worker had reached a certain level of experience, further service made a real difference to their performance. So where a worker can raise serious doubts about the benefit provided by extra experience, using length of service may be a form of indirect discrimination. It is unclear whether this 'serious doubts' test could also be applied in an age discrimination case to defeat a justification that, by rewarding length of service, the employer is rewarding experience.

We hope this newsletter has been helpful and gives you peace of mind with practical advice. Please contact Michelle Morgan on m.morgan@gardner-leader.co.uk with any questions or feedback. Click here for information on the employment team.

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