In the news...

Workplace Law

In this month's edition of Workplace Law, we look at the Pimlico Plumbers case, the increases to tribunal awards, the online tribunal database, whether gross negligence can constitute gross misconduct and ill-health retirement!

Tribunal awards and statutory payments increase

It's that time of year again when the compensation elements for certain claims are reviewed.

The main changes detailed below that will come into force from 6 April 2017.

Compensation	Current limit	From 6 April 2017
Maximum compensatory award for unfair dismissal	£78,962	£80,541
Maximum limit on a week's pay	£479	£489
Minimum basic award for certain unfair dismissals	£5,853	£5,970

We recommend that you update your senior managers as the increase in the maximum limit on a week's pay will affect situations involving statutory redundancy calculations.

Court of Appeal finds plumber's self-employed status to be a pipedream

Yet another verdict has been handed down finding that, despite a written contract describing the claimant as self-employed, there was in fact a worker-employer relationship in place.

Gary Smith asserted that his contractual relationship with Pimlico Plumbers matched the legal definition of a worker.

A worker is defined as an individual who undertakes to do or personally perform 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.

Mr Smith's contract with Pimlico Plumbers was terminated in 2011 following a heart attack. He sought the protective rights that accompany the status of being a worker.

There has been a recent surge of Employment Appeal Tribunal judgements looking at falsely labelled worker-employer agreements. (***Uber*** and ***CitySprint*** are cases we have previously reported on in Workplace Law).

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The Pimlico Plumbers case has been decided by the Court of Appeal, a higher court, meaning it sets a binding precedent for courts and tribunals below. The ruling will almost certainly be much cited in future cases, unless it is appealed to the Supreme Court, which is a possibility.

The Court of Appeal's decision follows the ***Uber*** and ***Citysprint*** cases. The key in this case was the actual relationship between Mr Smith and Pimlico Plumbing and not they labelled the relationship in the contract.

The factors that proved that the Court of Appeal found made Mr Smith a worker were:

- he was not, in the written contract, entitled to send a substitute to do work on his behalf. He did in practice have a limited entitlement to use a substitute, but this was only really a right to send another Pimlico Plumber;
- the written contract stipulated that he had to work 40 hours per week, over 5 days. This effectively meant he could not work for anyone else;
- there were restrictions in the contract which prevented him from competing with Pimlico;
- he was required to wear a uniform and drive a company van and use a company mobile phone;

The Court of Appeal found that Pimlico intended that their plumbers appeared to the public to be employees, whilst seeking to maintain legally that each plumber was self-employed.

Pimlico's CEO Charlie Mullins OBE asserted that this case differs from previous cases because Mr Smith was not a hard-done-by gig economy worker, but a plumber who was earning in excess of £100,000 per annum and who benefited from being taxed as a self-employed person until it suited him to have the rights of a worker. Mr Mullins has since the decision was handed down claimed that Pimlico have updated their arrangements and that "*like our plumbing, now our contracts are watertight*"!

It is important to note that in response to the recent influx of employment status disputes, the government has commissioned a review of modern working practices and this is certainly an area of employment law to keep an eye on as changes are likely to be introduced which may impact your business.

Can gross negligence constitute gross misconduct?

According to the Court of Appeal, yes it can.

Mr Adesokan was a 26 year working veteran for Sainsburys and held one of their senior roles as Regional Manager and was responsible for looking after twenty stores.

Sainsburys have a system to allow engagement with their employees called the "Talkback Procedure" (**TP**). TP had been in operation for many years and had become part of Sainsbury's culture. It helps facilitate Sainsburys in offering a desirable workplace environment and is also very important as it can influence:

- performance progression;
- target setting;
- decisions of pay; and
- bonus and staff development.

A HR Business Manager/Partner, Mr Briner, sent an email out as the TP system commenced in June 2013. The email was received by five relevant store managers who were involved with the TP system and were under Mr Adesokan governance. The email apparently attempted to interfere with the TP system by suggesting that the TP survey could be manipulated to target employees which could compromise the results of the TP survey.

Mr Adesokan discovered the email and requested Mr Briner clarify what he meant to the store managers. Mr Briner failed to do so and indeed the email was recirculated twice more as part of a chain of emails. Despite Mr Briner's omission to carry out the request, Mr Adesokan did nothing to remedy the situation either by contacting the relevant store managers or by alerting senior management.

The email was discovered and disciplinary action was taken against Mr Adesokan. He was summarily dismissed, despite it being found that, at the time the email was sent, Mr Adesokan knew nothing about the email and he was found not to be complicit with Mr Briner in the sending of the email.

Whilst there was no definition of gross misconduct in Mr Adesokan's contract of employment Sainsburys relied on their disciplinary procedure in that his omissions to act were so serious that it had led to a loss of trust and confidence which justified a dismissal for gross misconduct.

The Court of Appeal upheld the decision that his 'dereliction of duties' i.e. failure to remedy the situation which could have potentially led to an undermining of the TP system, had damaged the relationship between the parties sufficiently enough to be considered gross negligence which was "tantamount to gross misconduct".

It may seem an odd outcome because:

- Mr Adesokan's failure to remedy the situation did not actually cause any harm to Sainsburys. The results from the affected stores were "sufficiently robust"; and

- Mr Adesokan was not actually responsible for carrying out the TP exercise.

Whilst this cases raises an interesting stance that an employer might take, we would urge caution as gross misconduct cases are always very fact specific and so blanket dismissals for gross negligence should not be considered acceptable. Clearly with Mr Adesokan's length of service, coupled with his senior position, he should have acted in a manner to underpin the values contained in the TP system.

Online tribunal database

Want to check online whether an employee or employer has had a previous judgment against them? Well now you can!

On June 2016 Her Majesty's Courts and Tribunal Services announced it would be launching an online database of employment tribunal decisions. This service is now live and covers new or recent judgments from England, Scotland and Wales.

https://www.gov.uk/employment-tribunal-decisions

At present, it is not clear whether previous and existing judgments will be added to the database.

Ill-health early retirement

Ill-health retirement is an issue that crops up for us quite regularly and the below scenario shows just how easy it is to get into difficulties when considering this.

Mrs B was an "After Work" (**AW**) member of Barclays Bank UK Retirement Fund. This scheme allowed members to take ill-health early retirement "*at any age at the discretion of the Bank*" where the retirement was owing to incapacity. This was defined as "*where the Bank considers him or her permanently and totally unable to carry out any employment*". Alternatively the member could be considered when they were unable to fulfil their role. Naturally, this required evidence from a registered medical practitioner

Mrs B had her employment terminated in October 2011 on the grounds of ill-health. At the time she was in her early forties and was informed she did not meet the requisite criteria to be considered for the AW scheme. Barclays sought to rely on an AXA Occupational Health Adviser report from July 2011. However, the report referenced comments from a previous independent examining doctor and Mrs B's French GP, both of whom stated that she was unlikely to return to work. Despite this, the AXA health report concluded that she was not medically unfit for work and that her condition was likely to improve.

On appeal another AXA Occupational Physician came to the same conclusion as his colleague.

In early 2014 Mrs B provided additional letters from her doctor in France but again the AXA occupational physician disagreed with the poor prognosis and believed she remained reasonably likely to return to work before the age of 60.

Seeking external assistance, Mrs B approached the Pension Advisory Service who, in turn, requested that Barclays reconsider their position and a further medical certificate was sent. This certificate set out the treatment that Mrs B was undergoing and confirmed that she should be considered “handicapped” and an “invalid”. A further AXA occupational health report was in line with their previous colleagues which led to the claim being rejected by Barclays in December 2014.

Mrs B finally turned to the Ombudsman on the basis that the decision being made by Barclays was based on incorrect and incomplete information. We can only assume to Mrs B’s delight that, after at least three years of fighting the matter, the Ombudsman upheld her complaint.

Barclays asserted that under the scheme it was not required to request evidence based reasoning. Despite this, the Ombudsman found that whilst Barclays was not responsible for the acts of their medical advisers it must understand the reasons for their opinions and that their failings in this matter amounted to maladministration.

The decision of whether Mrs B was entitled to her benefits under the AW scheme was given back to Barclays who must obtain a new medical report from an AXA medical adviser not previously involved. If the previous reports are anything to go by, it would appear likely that the same conclusion will be drawn. That being said, if the report finds against Mrs B, Barclays must still pay her £500 for the distress and inconvenience caused.

At first glance, we’re sure many employers could sympathise with Barclays as it would appear that they did the right thing by seeking registered medical practitioners’ advice which came back with consistent conclusions. However this case demonstrates that an employer cannot simply rely on and rubber stamp medical opinions, they must go further and understand the evidence on which the opinion has been reached so that they can come to their own informed decision.

Given the crevasse of differing medical opinions, it may have been worth requesting AXA contact the doctors treating Mrs B to further understand the treatment she was undergoing and prognosis. Alternatively, it may have been advisable to seek further information and eliminate the inconsistencies or conflicts of information, where possible.

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Finally we would like to thank our employment trainee Mark Primrose for all of his work with the employment team. Mark will be leaving us on the 3 March 2017 to move to his next six month seat in his training contract with the firm.

Mark has written the majority of the articles for Workplace Law over the past six months and we would like to take this opportunity to thank him for his hard work and wish him well in our Commercial Property where he moves to next.

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