2021/8

High Court rules that 'workers' should be protected from health and safety detriment (UK)

CONTRIBUTOR Shalina Crossley*

Summary

The UK failed properly to implement EU health and safety law by restricting protection from detriment on health and safety grounds to 'employees', the High Court (HC) ruled in a recent case. Such protection should be extended to the broader category of 'workers'. Importantly, this ruling potentially increases employers' exposure to Covid-19-related health and safety claims.

Background

The main issue in this case was whether UK national law was inconsistent with two EU directives dating back to 1989:

- Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work (the so-called 'Framework Directive').
- Council Directive 89/656/EEC on the minimum health and safety requirements for the use by workers of personal protective equipment (PPE) at the workplace.

The UK legislation at issue was specifically the following:

- Section 44 of the Employment Rights Act 1996 (ERA) which provides, among other things, that all employees have a right not to be subjected to any detriment for leaving or refusing to come to work in circumstances where they have a reasonable belief they are in "serious and imminent danger".
- Regulation 4 of the Personal Protective Equipment at Work Regulations 1992, which requires an employer to ensure that suitable PPE is provided to its employees who may be exposed to a risk to their health or safety while at work, except where such risk is adequately controlled by other effective means.

Facts

The Independent Workers' Union of Great Britain (IWGB) is a trade union with around 5,000 members who are mainly lower-paid workers, including many working in the 'gig economy'. Between March and May 2020, the union's legal department received a large number of queries regarding Covid-19 issues, such as a lack of PPE and failure to implement social distancing, which indicated that members were scared by having to work without the health and safety protection they considered they needed.

The IWGB brought an application for judicial review in the HC, seeking a declaration that the UK had failed properly to implement the Framework Directive and the PPE Directive. Its central complaint was that both these directives require EU Member States to confer protection on 'workers', whereas the implementing UK legislation covers only 'employees'. While this alleged gap in protection had existed since the directives were transposed into UK law in the 1990s, the IWGB claimed that the Covid-19 pandemic had given it special significance.

Judgment

The HC upheld the IWGB's contention that both directives, by referring to protection of 'workers', impose obligations in relation to a wider category than just 'employees'. The Framework Directive defined 'worker' as "any person employed by an employer, including trainees and apprentices (but not domestic servants)", and 'employer' as "any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment".

The HC also noted that EU case law had established a specific meaning of 'worker' for areas including equal pay and free movement, which covers any person who performs services for and under the direction of another

* Shalina Crossley is Partner at Lewis Silkin LLP.

doi: 10.5553/EELC/187791072021006001009

person in return for remuneration. While this was not the same as the definition in the Framework Directive, the HC decided there was no indication that any significant difference in meaning was intended. Accordingly, 'worker' should be taken as falling within the general EU law definition.

Based on this approach, the HC concluded that Section 44 of the ERA and Regulation 4 of the PPE Regulations failed to implement the respective directives correctly by not providing the same level of protection for workers as for employees. It granted the IWGB a declaration to that effect.

Commentary

This is a significant decision because it opens the door to workers as well as employees having protection from detriment on health and safety grounds, including where they leave work or refuse to come into work due to a reasonable belief in serious and imminent danger.

This type of claim under Section 44 of the ERA is one of the most likely to arise during the Covid-19 pandemic. Although the right to claim unfair dismissal does not extend to workers, they can make a 'detriment' claim if they are subjected to a sanction for leaving work in these circumstances, which would include terminating their contract. This arguably brings many additional workers within the scope of these provisions, including those in public or customer-facing roles working in the gig economy.

The UK's Health and Safety at Work etc. Act 1974 sets out the general health and safety duties that an employer owes to its employees which, for the most part, do not extend to workers. Clearly there is a tension between that approach and this decision, although many employers will choose to treat individuals who work alongside each other in the same way, irrespective of their contractual status. There may be situations, however, where an employer chooses to treat workers differently in order to avoid an argument that they are really an employee – for example, by requiring workers to provide their own PPE, or by not providing homeworking risk assessments.

This decision could be seen as part of a recent trend of courts finding that existing legislation should be extended to workers in order to comply with EU law – see also the Employment Tribunal (ET) decision in November 2019 that workers as well as employees transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) (*Dewhurst and others – v – (1) Revisecatch Ltd t/a Ecourier; (2) City Sprint (UK) Ltd* – reported at EELC 2020/9).

If the UK government does not to appeal this decision, the HC's declaration means that ETs and courts may be asked to interpret Section 44 of the ERA as covering workers, although this may be difficult to do as the wording of the legislation is clearly limited to employees.

The UK's final exit from the EU at the end of the Brexit transition period on 31 December 2020 may affect what happens as a result of this decision. The European Union (Withdrawal) Act 2018 (as amended) provides that any UK law passed or made before the end of the transition period must still be interpreted, as far as possible, in accordance with EU law. This means that the courts and ETs must continue to interpret UK legislation in accordance with the wording and purpose of the health and safety directives referred to above, and so could still interpret Section 44 of the ERA as covering workers. The government could potentially take steps to change the law post-Brexit expressly to exclude workers, but that is unlikely to happen anytime soon.

Subject: Health and Safety, Employment Status

Parties: R (on the application of the IWGB) – v – Secretary of State for Work and Pensions and others

Court: High Court

Date: 13 November 2020

Case number: [2020] EWHC 3050 (Admin)

Internet publication: https://www.bailii.org/ew/cases/EWHC/Admin/2020/3050.html.

doi: 10.5553/EELC/187791072021006001009