What are the topics of most interest in 2018? Inevitably, there is some cross-over with legislative developments – most notably regarding the gig economy and new ways of working – but here, we present some broad themes likely to be developed further by the courts in the coming year.

Employment status

Pimlico Plumbers v Smith (Supreme Court)
Uber BV and others v Aslam and others (Court of Appeal)
Various employment tribunal cases

In February 2017, the Court of Appeal upheld a decision that Gary Smith, a nominally self-employed plumber providing services to Pimlico Plumbers, was in fact a worker for the company. Next month, Pimlico Plumbers’ appeal will be heard by the Supreme Court.

Last autumn, the EAT upheld an employment tribunal decision that two Uber drivers were workers, not self-employed. Uber’s appeal to the Court of Appeal is expected to be heard later this year.

There are other gig economy employment status cases expected this year. Eight couriers working for the parcel delivery company Hermes have brought claims for worker status. 45 (so far) Deliveroo riders are claiming to be employees (not just workers) and there will be a hearing to determine their status in July 2018. These riders work under different terms and conditions to those in Camden and Kentish Town who were recently held not to be workers by the CAC, which held in November 2017 that as workers, the riders were not entitled to be represented in collective bargaining by the Independent Workers of Great Britain union.

For a further development in this area, see also Boxer v CitySprint (see Transfer of Undertakings below).

A foster carer is claiming to be an employee of Hampshire County Council, following the decision of the Glasgow employment tribunal that two foster carers were employees under Scottish law. Meanwhile, the former elite cyclist Jess Varnish is claiming employment status against British Cycling and UK Sport as part of a discrimination complaint.
Maternity rights and shared parental leave

Porras Guisado v Bankia SA (ECJ)
Capita Customer Management Limited v Ali (EAT)
Hextall v Chief Constable of Leicestershire Police (EAT)

At the ECJ, an Advocate General gave her view in September 2017 that workers should be protected from dismissal from the moment they become pregnant, not just once they have notified their employer. The case considered how far workers are protected during pregnancy and maternity leave period in the context of collective redundancies. It is generally the case in the UK that a pregnant woman is only protected from discrimination or dismissal because of her pregnancy once her employer knows she is pregnant. If the ECJ agrees with the Advocate General, employers may find that they have acted unlawfully although they were unaware of the pregnancy at the time. The Advocate General suggests that this can be remedied if the worker promptly discloses her pregnancy and the employer has the opportunity to undo the damage caused.

Thankfully, the EAT is expected to resolve the inconsistency between two conflicting employment tribunal decisions on enhanced shared parental pay for fathers this year. Capita Customer Management Limited v Ali (in which a tribunal held it was sex discrimination not to pay a male employee full pay during any period of shared parental leave, while a woman on maternity leave would have received 14 weeks' pay) was heard in December 2017. Hextall v Chief Constable of Leicestershire Police (which took the opposite view and held that paying a period of full pay to mothers on maternity leave, but only statutory pay to partners on shared parental leave was not discriminatory) will be heard on 16 January 2018.

Disability discrimination

Gallop v Newport City Council (Court of Appeal)
Donelien v Liberata UK Limited (Court of Appeal)

Two key questions to be (we hope) answered by the Court of Appeal in judgments to be handed down this year are:

► Can there be direct disability discrimination where the decision-maker does not know of the employee’s disability? In Gallop v Newport City Council, the EAT held that imputed knowledge of disability could not be established where the decision-maker did not know all the facts.

► How far must an employer go to ascertain whether or not the employee is disabled? The EAT said in Donelien v Liberata UK Ltd that an employer that took reasonable steps, but not every step possible, had made enough effort to find out whether the employee was disabled as to avoid having constructive knowledge of the employee’s condition.

Is knowledge of the consequences of a person’s disability required for claims of discrimination arising from disability? In Grosset v City of York Council, a teacher with cystic fibrosis was dismissed for showing an 18-rated film to a group of 15 and 16 year olds. The school concluded his conduct was not connected to his disability. The EAT agreed with the Employment Tribunal’s finding that on the medical evidence, there was a link. The Court of Appeal will hear the Council’s appeal in April 2018.

Transfer of Undertakings

Boxer v CitySprint (employment tribunal)

Although only at employment tribunal level, a finding in favour of the Claimant in Boxer v CitySprint will have huge implications for sales of businesses and for outsourcing arrangements.

Andrew Boxer is a cycle courier who last year won his claim for worker status against his old employer, Excel. Excel’s business was bought by another courier company, CitySprint (itself no stranger to employment status litigation). The claimant now provides services to CitySprint, who say he is self-employed. He argues that, as a worker for Excel, he should have transferred to CitySprint on his previous terms and conditions, since the definition of ‘employee’ in the Transfer of Undertakings (Protection of Employment) Regulations 2006 is sufficiently wide to include workers. The hearing will take place in February 2018.

Holiday and working time

The Sash Window Workshop Ltd v King (Court of Appeal)
Shannon v Rampersand (Court of Appeal)
Ville de Nivelles v Matzak (ECJ)

The Sash Window Workshop Ltd v King will return to the Court of Appeal this year after the
ECJ’s decision. The Court of Appeal will decide whether the Working Time Regulations 1998 can be interpreted so that a worker is entitled to be paid on termination of employment for any periods of annual leave that have accrued but where the worker would have been unpaid. The case will have significant implications for those in the gig economy and elsewhere who may have been treated as self-employed but may in fact be workers.

Shannon v Rampersand will be heard by the Court of Appeal in March 2018. It was decided by the EAT on the same basis as the EAT’s decision in Sash Window Workshop: following the ECJ decision in that case, Shannon may now be overturned.

Finally, for those who have workers who may need to provide occasional cover out of hours, the ECJ’s decision is awaited on whether working time should automatically include time spent on stand-by duty, when workers need not be present at their workplace but must be ready to start work if needed within a set period of time. The Advocate General said not in July 2017.

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