**High court legal victory strengthens health and safety rights for locum pharmacists**

PDA Senior Employment lawyer, Deborah Franks explains the legal position relating to an employer’s responsibility for locum health and safety:

The difficulties locums faced were in relation to the lack of employment rights afforded to workers and where PDA lawyers supporting members had to rely on the Health and Safety at Work Act to be able to bring the responsibility to employers’ attention. However, the decision handed down on Friday, 13 November has filled the gap where that protection was not previously provided and members can directly refer to this case in support of any further such health and safety issues that arise from the pandemic or other health and safety issues.

**The facts**

The Independent Worker Union of Great Britain (IWGB) represents low-paid workers, including migrants and those within the ‘gig economy’. In the early part of the pandemic, the union’s legal department received around 144 queries regarding COVID-19 issues, including lack of PPE, failure to implement social distancing and failure to package COVID-19 samples correctly in order to protect medical couriers and they felt vulnerable without this PPE.

It became apparent that employment and health and safety law did not adequately protect workers who did not receive the protection of employees (under section 230 of the Employment Rights Act 1996).

**The Law**

Under the EC Directive, the UK should have transposed Measures into domestic law to encourage improvements in the health and safety of workers at work and minimum health and safety requirements for the use by workers of PPE in the workplace (‘the PPE Directive’). The union’s argument was that workers should have such protection but the UK domestic legislation, mainly within the Health and Safety at Work etc Act 1974 (HSWA) and the Employment Rights Act 1996 (ERA), only gave this protection to employees.

In its judgment, the High Court held that the UK had failed properly to implement Article 8(4) and (5) of the EU Health and Safety Framework Directive (No.89/391) by confining protection from detriment on health and safety grounds under S.44 of the Employment Rights Act 1996 to employees.

The Directive requires such protection to extend to all those who fall within the autonomous meaning of ‘worker’ specific to EU law, which covers any person who performs services for and under the direction of another person in return for remuneration and so extends to ‘workers’ as defined in section 230(3)(b) ERA; employee fall under section 230(3)(a), (commonly referred to as limb (a) and limb (b)).

The court accepted that the Directives, which refer to the protection of workers, imposes an obligation to a wider class of individual than just employees.

Article 3 of the Framework Directive defines worker as ‘any person employed by an employer, including trainees and apprentices but excluding 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’.

EU law refers to a person who performs services for and under the direction of another person in return for remuneration as a worker. In the absence of any indication that any other significant difference in meaning was intended, the Court concluded that ‘worker’ includes anyone who would fall within the above definition.

Whilst domestic law purported to implement the Directive protections, this was not the case. The main protection for employees who wish to take action under the employment rights legislation can do so under section 44 of ERA, which provides that it is unlawful to subject an employee to detriment for leaving or refusing to return to the workplace in circumstances of serious and imminent danger, or for taking appropriate steps to protect him or himself or other persons from the danger. The Court held that this section failed to implement the Directive protections, as workers who took the appropriate steps in response to serious and imminent danger were disadvantaged by not receiving the section 44 protection.

The Court also held that various provisions of the HSWA and related secondary legislation do not properly implement Article 3 of the PPE Directive, which requires PPE to be used in certain circumstances when risks cannot be avoided by other means. However, the Court held that the general obligations in Article 5(1) and 6(1) of the Framework Directive were properly implemented as regards limb (b) workers by S.3 HSWA, taken together with other more specific domestic legislation.

In the light of this ruling, it is anticipated that the UK Government will now take urgent legislative measures to ensure that limb (b) workers are covered by the EU-derived health and safety protections. The decision is likely to affect a significant number of workers, particularly those that risk being exposed to COVID-19 at work. It will also call into question whether other EU-derived rights and protections should also be extended to cover limb (b) workers.