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Albion Chambers EMPLOYMENT AND PROFESSIONAL DISCIPLINARY TEAM NEWSLETTER

Beware the Jabberwock, my son!

Previous inconsistent statements in professional disciplinary proceedings

A defendant in a criminal trial can be cross-examined about previous statements which are inconsistent with the account given to the jury, and such cross-examination can have great effect. Previous inconsistent statements have, like the Jabberwocky, *'jaws that bite, and claws that catch'.*

A little context

In cases where healthcare professionals are charged with a criminal offence, it is not infrequent for years to have elapsed between the events and the trial; years in which the regulators ask questions, the police investigate, the Crown Prosecution Service takes a decision to prosecute.Years in which an inquest takes place, and years in which disciplinary proceedings take place. At each stage in that process, the healthcare professional may be asked for his or her account of the events in question.

During disciplinary proceedings, the possibility of a criminal prosecution may not be foremost in the mind of the medic or those carrying out the disciplinary investigation, and it is unlikely that anyone would be thinking about the potential use of accounts given in disciplinary meetings in any subsequent criminal trial.

As a stark example of how previous inconsistent statements bite, a medic may have given an account to a senior manager in disciplinary proceedings along these lines:

"I checked the patient's oxygen saturation levels, which were 94%, and I told Dr Strange".

At the medic's subsequent trial for gross negligence manslaughter the medic gives evidence and says:

"I checked the patient's oxygen saturation levels, which were 100%".

The prosecution want to cross-examine the medic, to ask why has he been inconsistent about the saturation level – the inference being, it's because he was lying and he hadn't checked at all.

What about hearsay?

This type of evidence is not generally governed by hearsay rules. The prosecution, in cross-examining, would not suggest that either account was factually correct: the Crown's case would be 'you've been inconsistent because you're lying, you didn't check any vital signs'. Unless a party is seeking to rely on an out-of-court statement as true, that statement is not hearsay under the Criminal Justice Act 2003.

The hearsay provisions therefore do not apply, and there is no need for the prosecution to make any application. Instead, the test which applies is the common law: is the previous statement relevant and probative? Generally, a previous inconsistent statement is both: it tends to undermine the witness's credibility.

A wide net

Previous inconsistent statements are not confined to a final, formal disciplinary meeting. There is no rule of criminal evidence which excludes any source of inconsistent material: in a recent medical manslaughter trial in which members of Albion chambers defended a nurse, the prosecution sought to rely on apparently inconsistent statements from all stages of the disciplinary process, including notes of an informal chat and a formal interview.

A previous inconsistent statement can be something which was said by the professional (whether recorded or not). It can be something which was written by the professional, such as a reflective note. All have the same evidential status in criminal law, and the same caution therefore needs to be applied to *all* of these stages.

Tricky issues and top tips

Two legal issues commonly arise in relation to previous inconsistent statements in criminal trials which are worth bearing in mind during disciplinary proceedings: first, how can the prosecution prove the accuracy of the document and secondly, is it unfair to allow cross-examination on the document?

In relation to accuracy:

- where a disciplinary meeting is not tape-recorded, the healthcare professional or representative should keep their own note, and/or
- require that the investigator's note is sent to them for approval after the meeting.
- Parts of the note which are not agreed should be highlighted and re-written.
- Any agreement about a note is often best qualified in these terms: 'it is agreed that this note reflects the gist of the conversation but not the exact words used by any party'.

If this process is not followed, the professional may be faced at trial by a statement from their ex-employer attaching a note of a meeting which they have never seen, and which is difficult to challenge many years later.

In relation to fairness:

- It is a good idea to keep a record of what documents were or were not

made available at the time of the disciplinary meeting.
- Record whether the professional had access to the patient's hospital records to remind themselves of the sequence of events?
- Were they able to remind themselves of times from their own contemporaneous notes?
- It may also assist to have a clear note of any procedural protections which were not put in place: for example, was the professional informed that they had time to consider the allegations before responding, or informed that they had the right to be represented?

These sorts of details may enable the criminal defence team to argue at trial that the notes should be excluded (under section 78 Police and Criminal Evidence Act 1984) on the grounds of unfairness.

Taking a cautious approach to any statements during disciplinary processes may remove the teeth and talons from the prosecution's case on inconsistency, and protect the professional from an unjust attack on their credibility.

Kate Brunner QC

Employment Law in the English Channel

A personal perspective

Having never been to the Channel Islands before, I was rather excited to be instructed in a direct access case on behalf of a Jersey employer. The fact that they owned a glitzy restaurant overlooking the sea where they would wine and dine me for the duration of the case was a bonus. The downside: a claim of race discrimination under the newly enacted Discrimination (Jersey) Law 2013 which, as of the beginning of May 2016, had not seen any published judgments. Not only was Jersey in unchartered water but so was I. And not just for the discrimination claim, I had to familiarise myself with the subtle differences between employment law on the mainland and in the Bailiwick.

Background

With a population of around 90,000 Jersey is the largest of the Channel Islands. Although part of the British Isles and a Crown dependency it is not part of the United Kingdom and - without wishing to stoke the embers of Brexit - not part of the EU either. Notwithstanding that it has its own administrative, fiscal and legal system, there are many similarities between employment law in the UK and Jersey.

Sources of Employment Law

The duties of Jersey employers and employees derive from a number of sources which include:

- Statute
- Customary/common law (i.e. judicial precedent)
- Contracts and other documentation.

The Jersey Employment Tribunal (commonly referred to as 'JET') hears employment related claims whilst contractual claims over £10,000 are dealt with by the Royal Court of Jersey.

Although Jersey law of contract has distinct differences to English law, when it comes to employment contracts the Jersey courts and tribunals generally (although not exclusively) have regard to English law and principles, particularly when it comes to implied contractual duties. And, in general employment law, Jersey is heavily influenced by English case law and so it is often the case that English cases will be cited before the Tribunal or Courts in Jersey.

Some Noticeable Differences

Notwithstanding that English law heavily influences the development of employment law in Jersey, advisors should be careful to ensure that specific consideration is given in relation to employees working wholly or mainly in Jersey because there are some important differences between the two jurisdictions. Notable examples include:

- **Outside the EU**: Since Jersey is not part of the EU, it does not fall under the jurisdiction of EU Directives such as the Working Time Regulations. This means there is no statutory limit on daily or weekly hours of work. Likewise, there is no legislation preventing staff from working on Sunday or special entitlements for those who do. There are, however, specific rules around holiday and holiday pay; insolvency; grievance and disciplinary procedures; and transfers of undertaking.
- **Parental rights**: There is no statutory right to maternity or paternity leave in Jersey. Women are able to take up to 18 weeks' leave unpaid and may be entitled to a state allowance. Paternity leave, leave for compassionate reasons and other types of leave are also at the discretion of the employer.
- **Residency** [a topic that for non-islanders is a labyrinth and difficult to fathom]: When it comes to recruitment, people who have lived on Jersey more than 10 years are said to have "entitled" residential status, which means they may live and work in Jersey without restrictions. Other statuses include "entitled to work", "licensed" and "registered", all of which give the holder different rights to work and live on Jersey.
- **Information and consultation**: The rules regarding employee consultation and trade unions are broadly similar to those in the UK, with one key exception. Where UK-based employers are obliged under the Information and Consultation of Employees Regulations to consult with trade unions or other staff groups on key issues that affect them, Jersey employers are under no obligation to consult with employees on any business or employment matter other than collective redundancy.

Discrimination Timeline

The concept of statutory discrimination is relatively new to Jersey. Not all discrimination is unlawful and legislation has been gradually phased in (hence practitioners should check the dates of discriminatory acts carefully as they may fall outside of the window of unlawfulness, as indeed some did in my case).

- As of 1 September 2014 it was unlawful to discriminate on the grounds of race.
- As of 1 September 2015 it was unlawful to discriminate on the grounds of:
  - Sex
  - Sexual orientation
  - Gender reassignment
  - Pregnancy and maternity
- As of 1 September 2016 it was unlawful to discriminate on the grounds of age.

In 2017/2018 it is anticipated that it will be unlawful to discriminate on the grounds of disability.

The introduction of each new protected characteristic has ramifications peculiar to Jersey. For example:

- Race discrimination will hugely impact the island's immigration, work and housing laws given the high number of immigrant workers.
- Sex discrimination, aside from matters relating directly to pregnancy and maternity, raises issues in relation to part-time working because significantly more women work part-time in Jersey than men.

Where a protected characteristic applies an employer cannot directly or indirectly discriminate, harass or victimise any person based on that characteristic. That applies to the recruitment and selection processes, treatment of employees whilst in employment (i.e. promotion) and the grounds and circumstances in which employees are dismissed (in particular during a redundancy exercise).

Because statutory discrimination is relatively new to Jersey, how the law is being interpreted and applied is in its infancy, with only a small number of claims to date. As the types of protected characteristics expand the number of claims are expected to increase and given that similar provisions have been in existence in the UK for many decades, at least during these early stages, the Jersey Employment and Discrimination Tribunal ('JEDT') is likely to draw on practice from the UK. As I found, practitioners from the mainland are ideally placed because their experience could prove to be distinct advantage in understanding the issues and, combined with a sensitive and respectful approach, will find themselves welcomed by the Tribunal.

A Meagre Incentive

What is unclear, however, is whether the discrimination law will work in practice as a deterrent. Unlike the UK where there is no cap, the maximum compensation claim of £10,000 is relatively low. Moreover, it will be interesting to observe whether employees feel confident or brave enough to bring a claim, given that the employment market is relatively small and word of mouth on [small] islands tends to travel fast. The limited rewards on offer may not, therefore, outweigh the downsides of submitting a claim.

In contrast, what is clear is that Jersey employers will need to keep a weather eye on what may previously have been considered as workplace "banter"; there is an undoubted risk that ill-advised comments/acts may stray into the territory of what will now be potentially unlawful behaviour. And because individual perception can be so vastly different - the 'Men are from Mars, Women are from Venus' school of thought - that line of unlawfulness can easily be crossed, deliberately or inadvertently.

To help avoid breaching discrimination law, Island employers should therefore:

- Amend (if required) employment handbooks, including policies on equal opportunities and harassment, setting out what constitutes acceptable behaviour and what does not.
- Review employment contracts and any relevant policies to ensure they comply with the Law.
- Provide training on equal opportunities and harassment. This may help managers to avoid inappropriate questions at interviews, or to recognise and deal with harassment at an early stage.
- Set up clear procedures for staff to raise concerns and complaints, and for dealing with complaints. Ensure discriminatory behaviour by staff is not tolerated and is dealt with through proper disciplinary measures.

Conclusion

As for me, I was not disappointed by my foray into the jurisdiction of the Channel Islands. It turned out that the only downside was returning slightly fatter… in every other respect it was a thoroughly enjoyable and rewarding experience and one that any practitioner should jump at if given the opportunity.

Jason Taylor

Frivolous, vexatious, unreasonable and totally without merit

The Employment Tribunal has a number of levers, usually backed by a costs order, to dissuade the frivolous, vexatious and unreasonable litigant from pursuing a claim, or continuing to pursue a claim. The difficulty arises because these levers, however effective, apply to individual cases, rather than a litigant generally.

Large employers, whether in private industry, local government or those providing public services are frequently having to deal with numerous claims, from the same individual or small group of individuals who seem hell bent on making an organisation's life as difficult as possible. After all, the organisation still has to respond to each of these claims, even if they are totally without merit. Members of Albion's Employment and Professional Disciplinary team have noticed a sharp rise in repeat offenders, the same names popping up, time and time again and therefore it is important to explore the available options at this time.

So what can an employer do in such circumstances?

Well, to quote a line from *Crocodile Dundee*, "That's not a knife... That's a knife."

If the usual levers of the Employment Tribunal, used on a case by case basis, aren't enough then one has to look a little harder for a bigger lever. And that's where Civil Restraint Orders come in.

Civil Restraint Orders

CPR 2.3 means a court order can be granted, restraining a party from;

- making further applications in current proceedings (Limited LCRO);
- issuing specified types of claim in specified courts or tribunals (Extended ECRO); or
- issuing any claim or application in specified courts (General GCRO).

The final category is of course the most draconian and therefore the greatest burden in terms of applying for one to be granted, but each category has its own legislative burden in terms of procedure and proof.

Generally speaking the CROs operate so as to require a judge to act as some sort of filter prior to that individual being able to pursue the matter in their chosen tribunal.

Do CROs apply to Employment Tribunals?

Well, yes and no.

Technically speaking, CROs are a creature defined by the Civil Procedure Rules which, as we know, do not apply to Employment Tribunals.

However, the mystical 'inherent jurisdiction' of the High Court is a powerful

thing and the authority of *Nursing & Midwifery Council v Harrold* [2015] EWHC 2254 (QB) establishes that the High Court can make a CRO to restrain a litigant from issuing unfettered Employment Tribunal claims.

To complete the picture, in the latest stage of reported *Harrold* litigation, this time in 2016, the organisation issued a claim for a General Civil Restraint Order (GCRO) because by that point Harrold had issued well over a dozen separate claims, in various courts, which included appeals, cross appeals, costs orders and other challenges to various decisions, almost all were totally without merit.

Spade work and foresight

The granting of any sort of CRO is unusual. There are onerous hoops to jump through before a court will grant such an application. Therefore it is incumbent on an organisation's legal advisers to ensure that where unmeritorious cases are pursued and dismissed, the tribunal or court marks the order or judgment "Totally Without Merit", or TWM for short. This is a necessary step because a later court, entertaining an application for a CRO will not necessarily be in a position to be able to evaluate the old claim, to be able to decide whether it is TWM or not.

The sense of this approach is obvious. CROs are generally applied for when there have been multiple failed claims. If the first two or three are not marked TWM, and it is after the fifth claim that a CRO is applied for, the decision making court will only have two TWM declarations to base its decision on. As legal advisers we have to be alive to the potential need for a CRO in the future, even where a claimant is bringing their very first claim.

Defining "Totally Without Merit"

There are a number of authorities that may assist a court (or tribunal) in deciding what sort of case is totally without merit, these include;

- *R (on the application of Grace) v SoS for the Home Department* (2014) and
- *R (on the application of W) v SoS for the Home Department* (2016).

But the 2016 version of *Harrold*, without seeking to bind other courts, decided to adopt the test most favourable to the claimant, that of "bound to fail", rather than a "reasonable prospects" test. It may be that the courts define TWM further in the near future but when deliberating as to whether to apply for a CRO, it would be prudent to use the "bound to fail" test in the meantime.

Clean Hands

It is worth noting that the usual rules of equity regarding injunctions do not apply to CROs. The argument pursued in *Harrold* (2016) was that the NMWC could not apply for such an order as they had not come to the action with "clean hands", an injunction is an equitable remedy and therefore the application should fail.

The court did not agree, noting that the ability to grant a CRO was not just on an application but also could be made of the court's own motion, as such, the conduct of the applicant was of 'secondary importance'.

How do I know if a Claimant is Subject to an Order?

The government publishes a list of those who are subject to either a GCRO or a ECRO on the gov.uk website, at https://www.gov.uk/guidance/civil-restraint-orders--2#lists-of-people-with-cros, note, these lists do not include those subject to a LCRO.

Richard Shepherd

The big five

Five of the most significant employment cases of 2016... so far

#1 Employment Tribunal Fees

While not a case, surely one of the biggest news stories was the publication of the Justice Committee's Report on Courts and Tribunals Fees on 20 June 2016. This inquiry into the impact of the introduction of fees and changes in the employment tribunal system (amongst others) is strongly critical on a number of topics. It states that the clear majority of the decline in cases brought to the tribunal is attributable to the introduction of fees, not other reasons as the MOJ attempted to argue.

There is an air of concealed anger when the report discusses the non-appearance of the government's own post-implementation review of the fees system. As the Committee points out, this review was due by the end of 2015 and has yet to be released. The suspicion has to be that the government is stalling. The Committee concluded that changes have to be made if there is to be an acceptable level of access to justice to the employment tribunal service, either by reduction of fees or by an increase in the fee remission threshold. Good news for all of us who were watching the fall in claims with alarm.

However, to ensure that the title of this article is not misleading, on the topic of Employment Tribunal fees, Unison's challenge to the fee system continues on its progress to the Supreme Court, is a case to watch.

2 Holiday Pay

Lock v British Gas (No 2) **[2016] IRLR 316 EAT- Holiday pay**

This judgment follows where *Bear Scotland v Fulton* left off. As an aide memoire, in Bear, it was decided that an employer should include overtime in their holiday pay calculations. In Lock, British Gas tried to argue that it would be wrong to add to the wording of the Working Time Regulations in order to conform with current ECJ jurisprudence. The EAT did not accept that and ruled that the Working Time Regulations can be interpreted to require the employer to include commission in the calculation of holiday pay.

However, no practical guidance as to how to go about this was given. Another hearing is needed to determine what the compensation award should be for the missing commission payments. British Gas is seeking leave to appeal to the Court of Appeal.

3 Religious Dress

Bougnaoui and ADDH v Micropole SA **Case C-188/15 Opinion of AG Sharpston**

A design engineer wore her hijab at work and while she visited clients. Following a report from a client requesting that there should be "no veil next time",

she was asked not to wear her hijab while visiting clients. She refused to comply with this instruction and was subsequently dismissed. The French labour tribunal dismissed her claim based on religious discrimination, stating that her dismissal was founded on "genuine and serious reasons". After her appeal to the Court de Cassation, a referral to the CJEU was requested for a preliminary ruling on whether the policy of requiring employees to remove their hijab when in contact with clients was a "genuine and determining occupational requirement" within Article 4 of the Equal Treatment Directive.

The AG Opinion advises that her dismissal was unlawful and constituted direct discrimination on the grounds of religion or belief. The treatment would only have been lawful if it was based on an occupational requirement that was genuine and limited to matter absolutely necessary to undertake the activity. It is pointed out that there was nothing to suggest the employee was unable to perform her duties because she wore a hijab. A memorable quote is;

"when an employer concludes a contract of employment with an employee, he does not buy that person's soul".

This opinion contrasts sharply with that provided in *Achbita v G4S* [2016] Case C-157/15 where the employer's prohibition on the wearing of a hijab was justified by the their general policy of neutrality and where the ban applies consistently to all visible sign of religious or philosophical belief.

The difference between the opinions may seem to lie in the singular nature of the decision affecting Ms. Bougnaoui and the blanket policy imposed by G4S. However, AG Sharpston made it clear in her opinion that an entirely neutral dress code policy may constitute indirect discrimination which will only be justified if it is proportionate to the pursuance of a legitimate aim, including the interests of the business. She remarks that it is difficult to see how it can be proportionate in the current case.

Judgment in the case will be given at a later date.

4 Employment Status

***Aslam v Uber BV* (2016)**

A case that began on 20 July and a judgment to look out for. This judgment may have major implications for sharing economy businesses. This is a test case to determine the employment status of Uber drivers: whether they are self-employed or workers. If it is found that they are workers, Uber would need to provide drivers with basic workers' rights such as the minimum wage and holiday pay. Uber are claiming that the workers are all self-employed, and that Uber itself is simply a technology company.

This issue has an impact for many other on-demand companies, including Deliveroo: another well-known business that classifies its cyclists as self-employed. Deliveroo is trying to go one step further and includes a clause in its contracts to prevent their cyclists from presenting any claim to the tribunal that they are an employee or worker. Furthermore, if they do present such a claim, they apparently have to pay Deliveroo's costs. Of course, such clauses are highly unlikely to be enforceable but who will be the first to take them on?

5 Covert Recordings and Costs

***Zia v Brighton University Hospital NHS Trust* ET/2301120/2014**

A warning to all those who are tempted by more exotic tactics in tribunal hearings. A group of employees brought claims for racial discrimination. They had a without prejudice meeting with the respondent and their legal team, and then left a recording device in the room to record the legally privileged and confidential discussions between the trust and their legal team only. They then sent these recordings to the respondent in an attempt to pressure them into a settlement.

The tribunal (rather unsurprisingly) took a very dim view of the employees' actions. While the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Rule 41 states that the formal rules of evidence are not binding in the employment tribunal, all are well aware that that rule does not mean the rules of evidence are to be wholly disregarded. *HSBC Asia Holdings BV v Gillespie* [2011] IRLR 209 confirmed that the principles in the civil courts and the employment tribunal are the same.

In this case, the covert recordings were of legal advice. The Tribunal found that the claimants' behaviour was "at the very least unreasonable" and that it was proportionate to strike out the cases, especially as a fair hearing was no longer possible in the light of the recordings. Added to that, the tribunal made a costs order against each employee to the sum of £17,371.

6 One more for Luck

***Metroline West Ltd v Ajaj* Appeal No. UKEAT/0185/15/RN**

Lastly, a case to remind us of the correct questions when considering unfair and wrongful dismissal in a gross misconduct case.

Mr Ajaj was employed by MWL as a bus driver. In February 2014, he reported that he had slipped and sustained an injury at MWL's depot. The Occupational Health adviser assessed Mr Ajaj and concluded that he was not fit for driving. MWL became suspicious about the genuineness of the nature and extent of his injuries. Between March and April 2014, MWL arranged for covert surveillance of Mr Ajaj. MWL concluded that his abilities shown in the footage were not consistent with what he had reported. MWL informed him that they did not believe his injuries to be to the extent that he had claimed and suspended him. After a disciplinary hearing, MWL decided that the allegations constituted gross misconduct and Mr Ajaj should be dismissed with immediate effect. He appealed but the appeal panel dismissed this appeal.

The ET accepted that MWL had genuine reasons for dismissing Mr Ajaj. However, the ET held that there was medical evidence demonstrating that he had difficulties sitting, not walking that prevented him from returning to work. There was no evidence to show that he was capable of carrying out his duties as a bus driver. The ET concluded that the evidence relied on by MWL to dismiss Mr Ajaj was "equivocal and speculative". The ET, therefore, found that he had been unfairly dismissed and also made a finding for wrongful dismissal (but Mr Ajaj contributed to his dismissal by 35%). MWL appealed.

The EAT clarified the correct test to be applied when assessing gross misconduct and unfair dismissal. The question was not whether Mr Ajaj was capable of walking or sitting for long periods, but whether MWL had reasonable grounds to believe, based on a reasonable investigation, that Mr Ajaj had misrepresented his injury and its effects. With regard to the second allegation, the ET had asked an irrelevant question based on capability. The relevant question was whether there were grounds on which a reasonable employer could hold the belief that Mr Ajaj had misrepresented his ability. Finally with regard to the third allegation, the EAT held that in deciding whether MWL had reasonable grounds for dismissing, an objective test was to be applied. The EAT therefore allowed the appeal.

Erinna Foley Fisher

Since this article was written, two cases have been decided. Updates are below:

1. *Lock v British Gas* Court of Appeal Judgment on Holiday Pay Calculation

This judgment follows where *Bear Scotland v Fulton* left off. In Bear, it was decided that an employer should include overtime in their holiday pay calculations. In Lock, British Gas tried to argue that it would be wrong to add to the wording of the Working Time Regulations in order to conform with current ECJ jurisprudence of the EU Working Time Directive (No.2003/88). The EAT did not accept that and ruled that the Working Time Regulations can be interpreted to require the employer to include results-based commission in the calculation of holiday pay. In practice, a "week's pay" was to be calculated not under the ERA s221(2) but by taking an average of the worker's remuneration over a 12-week period, including any commission (s221(3)).

British Gas appealed to the Court of Appeal, arguing that it had not been open to the tribunal to amend the WTR under the guise of interpretation, and that its interpretation was precluded by domestic authorities.

The judgment of the Court of Appeal was released on Friday and upheld the decision of the EAT. The judgment notes that the domestic authorities relied on pre-date the decision of the ECJ that member states could determine the level of holiday pay. The Directive was now clear that, under Article 7, holiday pay was to include commission. The question was whether the WTR could be interpreted to give effect to that. The CA considered the fact that the WTR was specifically enacted to implement the Directive and the purpose of the WTR was to fulfil the UK's obligations under the Directive, even those obligations not apparent at the time of enactment. Since the ECJ had subsequently interpreted Article 7 as requiring the worker's 'normal remuneration' to be taken into account, the court could and should interpret the WTR accordingly. The grain or thrust of the WTR could be identified as directed at this. This did not offend against the principles of legal certainty and non-retroactivity but was an example of the national court performing its duty to provide a conforming interpretation of legislation implementing a Directive.

British Gas has now applied for permission to appeal to the Supreme Court.

Erinna Foley-Fisher

2. Taxi for – erm... everyone?

What does the decision in *Aslam and Farrar v Uber* (2016) mean in practice?

The short answer, to save you reading the rest of this article. Yes, Uber drivers are workers... for now.

A slightly longer answer.

The Collins online dictionary as of 28 October 2016 defines the gig economy as;

"the freelance economy", and helpfully gives the following explanation;

"For the unknowing, the online platform connects people who have space to spare with those looking for a short stay at a competitive price. Services such as these, along with Uber, are driving the "gig economy". Their platform enables people to become freelance service providers without the inspections and legal oversight that traditional lodging and cab industries are subject to".

Those portions that are underlined, based on this first instance decision, are now out-of-date.

The issue

Many will be familiar with the meandering and sometimes opaque tension between a person working under a contract of service or contract for service. The line became even more blurred when the term 'worker' was imported from Europe. In fact, in late 2015 Erinna Foley-Fisher wrote a very long piece analysing these same principles in relation to the adult entertainment industries. These aren't new issues; they're simply being applied to a new-style industry.

Very crudely, for the purposes of this piece, a worker falls somewhere in between contractor and employee and in terms of the UK legislation; it gives a worker more rights than a contractor but fewer rights than an employee.

The issue in the Uber case was whether the drivers were contractors, in the traditional sense of the word, or workers. The question of whether they were employees was never posed. Nevertheless, for a relatively low-margin business such as Uber (and a host of other similarly structured organisations), the extra rights and responsibilities provided to workers over those who are contractors, primarily the entitlement to the National Minimum Wage, may mean the difference between profit and loss.

The decision

I must stress, this is a first instance decision. *It is not binding*, though no doubt it will be cited extensively, by enthusiastic employment lawyers, over the coming months in Employment Tribunals up and down the country, seeking to apply the Uber decision a host of different scenarios.

The decision will be appealed. The gig economy, as currently structured, will not like this decision. Uber will not like this decision - so when advising our clients, we should tell them to expect many more months of uncertainty. There may even be a number of similar, non-Uber cases, where the decision at first instance finds similar scenarios not to fall within the definition of 'worker' and in due course, the EAT, the CoA and potentially the Supreme Court are likely to be called upon to decide this, and other similar cases.

On that note, I may take the night bus instead, at least I know where I stand...

Richard Shepherd

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