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Employment Law Cases Update and Newsletter

July 2012

At a time when companies are making increasing use of outsourcing, short-term fixed contracts and dubious self-employment arrangements, it is crucially important to determine whether or not a client with employment problems has an enforceable contract of employment.

Employment tribunals and courts have recently given guidance on the meaning of "employee" in a number of cases. In circumstances where it is unclear whether a worker is, for legal purposes, an employee or has self-employed status. The clarification of this issue has very important implications. If a worker has employee status, he/she may then be entitled to all the benefits of employment protection under English law. If, on the other hand, the worker is classified as self-employed, these protections and remedies are not available. The self-employed worker who seeks redress for grievances must rely on common law remedies, for example breach of contract and/or negligence.

R. H. Spicer

Head of Chambers

Newsletter Contents

Welcome..................... p.1
Coping with................. p.1
Case 1......................... p.2
Case 2..........................p.2
Case 3............................p.3
Case 4.......................... p.3
Opinion......................... p.4
News............................ p.5
Dates for your Diary...... p.5

Coping with... .... Social networking at work...

A number of reported cases recently have involved workers and employees suffering varying degrees of detriments, from warnings through to dismissal, for using and accessing social networking sites at work. So common is the problem now, a number of employment law contracts stipulate when and whether such sites can be accessed. Thus, an employer may prevent employees from using office equipment in certain ways, in the contract of employment. These "permitted use" clauses extend to prevention of accessing certain websites and whether the employee is permitted to use the office equipment for personal use. If these are not included in the contract of employment, and the employers dismiss for inappropriate use, they may well find themselves facing an unfair dismissal claim. Interestingly, if employees choose to use social networking as a way to vent grievances about their employer, they also may be dismissed for breach of mutual trust and confidence- a term implied into contracts of employment which are usually relied upon by the employee. Thus, a word of caution for use of social media at work; check your contract carefully and if in doubt always seek clarification from a manager or alternative. Otherwise you may find yourself explaining to a tribunal judge the intricacies of sites such as Twitter and Facebook...

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Statement of particulars
Jurisdiction of employment tribunal

Southern Cross Healthcare Co Ltd v Perkins and others [2011] IRLR 247, CA

Facts P and others were employed by S. A dispute arose in relation to the contents of the written statement of particulars of their employment. The issue before the Court of Appeal was whether the employment tribunal had jurisdiction to interpret the terms and conditions contained or referred to in the written statement of particulars.

Decision
1. The tribunal did not have jurisdiction to interpret the statutory statement.
2. The tribunal could amend the statement to correspond with the contract of employment.
3. The only forum with jurisdiction in relation to the construction of the statutory written statement is the ordinary civil court.

Agency worker
Meaning of "Worker"

Evans v RSA Consulting Ltd [2011] ICR 37, CA

Facts E agreed with P Ltd that P, described as E's employer, would assign her to carry out services for end users. P had an agreement with RSA and E was introduced to PN Ltd by RSA. PN Ltd later brought the arrangement to an end. E then brought proceedings against P Ltd, RSA and PN Ltd, complaining of unlawful deduction from wages. She later withdrew her claim against PN Ltd. The claims against the other two companies were struck out by the employment tribunal. On appeal to the EAT, the claims were reinstated on the basis that they were arguable. RSA appealed to the Court of Appeal.

Decision
1. The appeal was dismissed.
2. In order to establish a claim against any respondent under section 23 of the 1996 Act, a claimant had to establish that she was a worker and that the respondent was her employer.
3. In the absence of an express contract between the parties, a contract could be implied, on the basis of necessity, if that was necessary to give effect to the parties' actual relationship.
4. In such a case, consideration had to be given to evidence of the actual relationship. It was not clear that the employment judge had regard to such evidence.

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Employee
Lap Dancer

Quashie v Stringfellows EAT/0289/11/RN

Facts Q worked as a lap dancer at Stringfellows nightclub in London for 18 months. She attended regularly on several nights each week. Her claim for unfair dismissal was rejected by the employment tribunal on the basis that she was self-employed and not an employee. The unusual arrangements for payment meant that there was no mutuality of obligation between Q and Stringfellows. Q appealed to the EAT.

Decision

1. The appeal was allowed.
2. Q was an employee on each night that she attended the club and she had an "umbrella" contract of employment which covered the entire period.
3. On each occasion when Q attended the club, she was paid in "Heavenly money" which would be converted to cash at the end of each session.
4. There was a mutuality of obligation.
5. Mutual obligations to do with work existed on the night. The claimant had to turn up pursuant to her contractual commitment to the rota. The duty corresponding to her right to attend personally and supply services was that she would be given the opportunity to earn money.
6. Q and other dancers were required to attend an unpaid meeting once a week whether they worked that night or not.

Employee
Minister of religion

Moore v President of the Methodist Conference [2011] ICR 819, EAT

Facts M was a Methodist minister. She was appointed to a group of congregations for a five-year term. She had no contract of employment. Her post was covered by standing orders which dealt with accommodation, pay, holidays, pension benefits and discipline. She was treated as an employee for tax purposes. M resigned and complained of constructive unfair dismissal. Her claim was rejected by the employment tribunal which ruled that she was not an employee for the purposes of s.230 of the 1996 Act. M appealed to the EAT.

Decision

1. The appeal was allowed.
2. The spiritual role of a minister did not in itself justify denying contractual effect to an arrangement which had the requirements of a contract.
3. The arrangement between M and the Methodist Church was contractual. It involved offer and acceptance and, on its face, was legally binding.
4. The arrangement was a contract of service. Although M did not have to work set hours, there was a clear concept of working time. As a professional, she had discretion as to how she did her work. This was not inconsistent with a contract of employment.

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Opinion

Migrant workers

Since the enlargement of the European Union, with the general principle that citizens of EU states have the right of free movement to work, increasing numbers of migrant workers have found employment in the United Kingdom. Migrant workers are generally regarded as being highly motivated, reliable and committed. Many of these workers do not have a fluent grasp of English and may be particularly vulnerable to failings in health and safety practices. The large number of migrant workers from Central and Eastern Europe currently employed in the United Kingdom has started to make an impact on health and safety and employment law.

These workers may be prepared to accept lower wages than their British counterparts, because wages in their home countries are far lower than those in the United Kingdom for comparable work. Those migrant workers who are highly educated find themselves in a position where they are not familiar with their employment rights. They may feel that they are in a vulnerable position in a foreign country with whose laws and customs they are unfamiliar. English employment tribunals and courts are increasingly demonstrating an awareness of this position.

Migrant workers are frequently victims of contractual unfairness, due, perhaps, to either a lack of understanding of their contract of employment due to language or this acceptance of lower rights. However, this does not mean that such a situation ought to be accepted. One of the starkest areas of this is in the area of health and safety, where ignoring rights can have real and devastating consequences.

The Health and Safety Executive has shown itself to be well aware of these problems. It has issued detailed advice and guidance on the proper management of migrant workers' health and safety. The HSE recognises that factors such as poor language skills and unfamiliarity with the workplace can magnify the effects of existing health and safety problems. It advises that migrant workers with better English should be asked to interpret for their less fluent colleagues. Internationally recognised signs, videos or audio materials can be used to communicate health and safety messages.

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In general, tribunals and courts have expressly recognised the problems arising in relation to large numbers of workers with a limited grasp of English language, law and culture. Spokespersons for the HSE have repeatedly commented on the vulnerability of such employees in relation to health and safety.

In July 2009 Thomas Thomson, the director of Thomas Thomson (Blairgowrie) Ltd, a fruit farming company, was fined following the death of a migrant worker by electrocution.

In July 2006 Gerard Faltynowski, a Polish migrant worker, was helping to build a polytunnel in a field near Blairgowrie in Scotland. The polytunnel was placed below three overhead power lines carrying 11,000 volts.

Faltynowski had slotted thirteen poles, each one half a metre in length, and was carrying them vertically. The pole touched the cables. He was killed instantly.

Thomson was fined £1800 under Regulation 3 of the Management of Health and Safety at Work Regulations 1999 for failing to make a suitable risk assessment of working below power lines.

In August 2006 a gangmaster in charge of Chinese migrant cockle pickers was sentenced to 14 years' imprisonment on 21 counts of manslaughter. The facts, in summary, were that 23 Chinese migrant workers died after a group of 35 cockle pickers were cut off by the tide after dark in February 2004. Twenty-one bodies were later recovered.

The gangmaster – Lin Liang Ren – was also convicted of perverting the course of justice and facilitating illegal immigrants to work in the United Kingdom. His girlfriend, Zhao Xiao Qing, was sentenced to two years and nine months imprisonment for perverting the course of justice and facilitating. His cousin, Lin Mu Yong, received a sentence of four years and nine months imprisonment for helping cocklers to break immigration laws.

With the Olympics well underway and acting as a showcase of international talent against a fair, objective and consistent background, it is now perhaps time for migrant workers to be fully integrated into our employment rights system. Then we can truly reap the economic, social and cultural rewards of a multi-ethnicity society.

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Chambers & Legal News

Chambers Update

The big news this month is that the long awaited publication of Robert's book – Law – is nearly here. The book has been digitally published and will soon be available in Mobi for Kindle download.

We are still extending our services, advising on recording contracts, clinical negligence and neighbour disputes. With Polly likely to be with us for at least the next year, do keep checking Chambers' websites for updates to services and areas of law in which we can provide. We also have a team of student researchers who are happy to assist on a pro bono basis if necessary.

GB Update

In keeping with the spirit of the Olympics, this months' update of the local area turns to all things sport, with the below athletes competing at London 2012 all from Bristol;

- Emily Diamond – Athletics (400 m)
- Larry Godfrey – Archery
- Imogen Cairns – Gymnastics (Artistic)
- Jack Butland – Football
- Sally Conaway – Judo
- Stacie Powell – Diving
- Katie Dawkins – Synchronised Swimming
- Ciaren James – Water Polo
- Craig Figes – Water Polo

We wish all athletes competing for Team GB at London 2012 the very best of luck!

Dates for your Diary

August 29th 2012 Seminar at 10am. Subject Welfare Rights.
All welcome. Please confirm by calling or emailing Chambers.

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