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UK Employment Law Round-up

OCTOBER 2019

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine: referrals made to European courts shortly before the UK is due to leave the European Union, what investigators should focus on when writing their investigation report, if vegetarianism is a protected philosophical belief and a recent tribunal ruling on IR35.

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IN THIS ISSUE

Could Brexit change the landscape of worker status claims?

Workers

In the UK, the definition of "worker" includes both employees and anyone else working under a contract under which they undertake to do or perform work or services for the other party personally. This definition is generally applied, including for the purposes of the Working Time Regulations 1998 (WTR) (which are relevant for the purposes of this case). The EU Working Time Directive (WTD), from which the WTR derives, does not give a definition of "worker".

It is established under UK law that, for the purposes of determining worker status, the following considerations will be relevant:

- there must be a contract between the worker and the putative employer;
- the contract must require personal service by the worker;
- the other party to the contract is not the customer or client of any business undertaking or profession carried on by the individual; and
- there must be sufficient mutuality of obligation between the worker and the putative employer.

The body of case law that has developed on worker status makes clear that it is not only the written terms of the contract but the reality of the relationship between the putative employer and the individual that is relevant. In other words, it is not possible for an organisation to avoid conferring worker status on an individual simply by engaging them on contractual terms which bear little or no resemblance to the reality.

But what happens if the terms of the contract do not reflect the reality, but could do if the individual wanted them to? Should an individual obtain worker status where the contract genuinely allows them to have the flexibility a worker would not have, but they elect not to make use of that flexibility?

Facts

The reference to the CJEU here concerns the employment status of a Yodel parcel courier. The courier is engaged under a courier services agreement. The agreement expressly provides that the courier may:

- appoint a substitute or sub-contractor to carry out all or some of the services (this right is unfettered provided that the substitute is at least as qualified as the courier); and
- perform services for other delivery companies at the same time as performing services for Yodel.

Other couriers engaged on the same terms do, in practice, make use of sub-contractors or carry out work for other delivery companies alongside making their Yodel deliveries. However, the claimant in this particular case has not exercised either of these rights.

CJEU reference

Case law on worker status has dealt extensively with the right of substitution. The Supreme Court, in the case of *Autoclenz Ltd v. Belcher* [2011] ICR1157 accepted that it was uncontroversial that "if a contractual right, as for example a right to substitute, exists it does not matter that it is not used". In its consideration of the issue last year, the Central Arbitration Committee (which deals with union recognition and collective disputes) found that the existence of a substitution clause which could be used in practice was fatal to a worker status claim brought by Deliveroo riders. It is quite clear under UK law that a substitution clause which may genuinely be used by an individual is inconsistent with worker status.

The question that has now been referred to the CJEU is, essentially, whether this approach is inconsistent with EU law. Whilst the WTD itself is silent on the definition of "worker", the CJEU has tended towards a wider interpretation of "worker" than has been applied in the UK. For example, in *Fenoll v. Centre d'aide par le travail "La Jouvene" and another* (Case C-316/13) [2016] IRLR 67 the CJEU held that "any person who pursues real, genuine activities, to the exclusion of activities on such a small scale to be regarded as purely marginal and ancillary, must be regarded as a 'worker'". The employment judge in the Yodel case considers that the definition of "worker" that has developed under UK law may be inconsistent with the intention of EU law. He has therefore asked the CJEU to consider (among other points):

- whether the right to appoint a substitute precludes the individual from being a worker:
  - at all; or
  - when they are exercising the right of substitution;
- whether it is material to a determination of worker status for the purposes of the WTD that the claimant is not appointing a substitute where others on the same terms have; and
- whether it is material to a determination of worker status for the purposes of the WTD that the claimant is not working for others at the same time as Yodel where others on the same terms have elected to do so.

If the answer is that the claimant is not precluded from being a worker where he is not exercising the right of substitution, and that what others on the same terms elect to do is irrelevant, the implications could be huge. But, if we leave the EU on 31 October 2019, do we really need to think about this at all?

EDITOR'S TOP PICK OF THE NEWS THIS MONTH

- Could taking action on climate change result in disciplinary action?
- Employment Tribunal entitled to re-label decision to dismiss
- Be more Japanese? Stepping up to manage automation (like Dentons!)
- Agenda for Change – contractual and statutory recovery

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Brexit

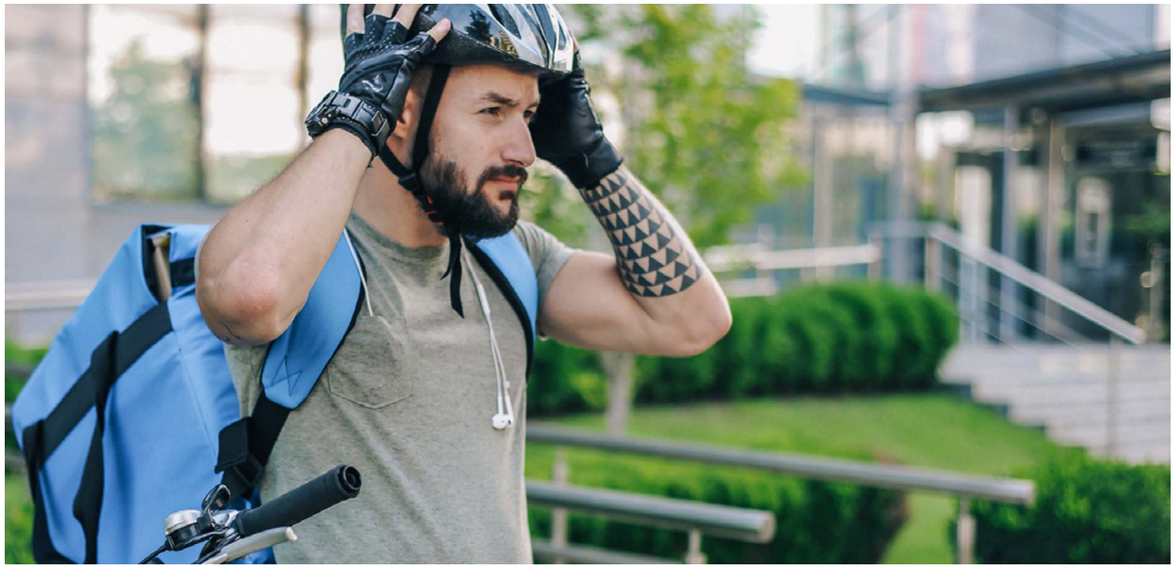
Of course, until the UK leaves the EU any decisions made by the CJEU will be binding on the UK courts. If the UK remains in the EU after 31 October 2019, the decision on any references made after that date (at least while we remain a member) will be binding and UK courts and tribunals will have to make any relevant judgments in light of them.

The European Union (Withdrawal) Act 2018 (which is already law) makes express provision for this sort of thing. It states that a court or tribunal will not be bound by any principles laid down or any decisions made by the CJEU, on or after exit day. This law will stand alone if the UK leaves the EU on 31 October (or any later date) with no deal. Unless the CJEU acts very quickly on the Yodel reference then, if we leave on 31 October with no deal, it is unlikely we will ever get an answer to the questions posed in this case.

However, if we leave on 31 October (or a later date) with a deal, then it is likely that we will still get an answer, and it will still be binding. The terms of the EU Withdrawal Agreement negotiated by Theresa May state that, in cases where references are pending, the CJEU will continue to have jurisdiction to give preliminary rulings on requests from UK courts and tribunals, provided that they are made before the end of the transition period. Whilst this deal itself seems unlikely to progress, it would be surprising if this term is one that has been renegotiated by Boris Johnson as part of his revised deal (the contents of which, at the time of writing, are not known). If we leave the EU on or after 31 October with a deal, then we will still get an answer to the questions posed in the Yodel case and that answer will be binding. In any event, it is likely that after Brexit CJEU decisions would be persuasive. Of course, with things on the Brexit front changing so rapidly, by the time this article is published all of this may be known. However, the extent to which the UK would continue to follow EU law after the end of any transition period remains to be seen.

Potential implications

The law on worker status, as it stands, allows organisations to design a contract and a relationship with contractors to ensure that those they engage do not attain worker status. However, if the CJEU takes the view that, in each case, it is the reality of what the individual chooses to do under the contract rather than the reality of what they are able to do that is relevant to the question of worker status, this would represent a significant change. Ultimately, in that case, the individual would be able to determine their status as a worker by the extent to which they chose to use the rights granted to them under their contracts. If Brexit does not get in the way, more interesting times could lie ahead for the worker status question and the gig economy.



Investigation reports: get your facts straight!

In this article, we focus on investigation reports in disciplinary matters, and the lessons investigators can learn from the latest decision of the Employment Appeal Tribunal (EAT) in the case of Dr J Dronsfield v. The University of Reading. In particular, on what should investigators focus when writing their investigation report? The answer, it appears, is facts and only facts.

Dr Dronsfield was an academic employed by the University of Reading as a fine art lecturer until he was dismissed following a disciplinary process. He was dismissed under the university's disciplinary guidelines for behaviour of an "immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment". The disciplinary charges, which eventually led to his dismissal, involved allegations of unsavoury behaviour at an exhibition after-party, of evening meetings with students involving alcohol, and allegations that the claimant had a sexual relationship with one of his students, whose dissertation he later marked. He was also involved in that student's academic supervision and had failed to report his actions to the university.

Due to its scandalous nature, the facts surrounding the case were reported in a number of national newspapers. As a short aside, this case serves as a reminder that tribunal cases are public knowledge and, as a result, reputational damage can arise for both employer and the employee bringing a claim.

Following his dismissal, Dr Dronsfield brought a claim on the basis that amendments to the investigation report rendered his dismissal procedurally unfair. His main complaint was that the investigators took advice from the university's in-house lawyer and, as a result, had removed parts of the draft investigation report that expressed opinion and reached the conclusion that Dr Dronsfield had not acted in an immoral, scandalous or disgraceful nature. However, the Employment Tribunal (ET) found that the dismissal had been fair. Although the investigation report had been amended, the ET held that it fairly set out the investigators' position and the amendments did not mean that it represented a false or incomplete position. Dr Dronsfield appealed, the EAT

found that the first ET had erred in two respects and remitted the case for a complete rehearing to a fresh tribunal. The fresh tribunal also found that the dismissal had been fair, since the report accurately represented the facts and it was reasonable for the investigators to rely on the advice of their solicitors and to omit any "evaluative opinion" in the report.

The latest judgment, reported last week, was Dr Dronsfield's appeal to the EAT against the decision of the fresh tribunal. This appeal was dismissed. The removal of evaluative conclusions from the investigation report did not mean the dismissal was unfair and there was no suggestion of impropriety in the way the investigation was handled.

Although the tribunal on this occasion found that the amendment to the investigation report did not lead to Dr Dronsfield's dismissal being unfair, investigators must be careful, when seeking advice, that such advice does not mean that the report is no longer a product of their investigations. The key point, however, is that an investigator's focus should only be on the facts.

Key tips for investigators drafting investigation reports

- All findings should be recorded in writing and all evidence collected by the investigator should be adequately summarised in the report. Excluding information may leave it open for the employee to make claims of bias. It may also appear as if the investigator is filtering evidence to fit their findings.
- Investigators should establish the facts of the matter and must never give an opinion on what the outcome decision should be. Many of the issues raised in the Dronsfield case came from the fact that the investigators had included opinion in the original investigation report.
- Where the evidence of the facts that are being investigated is contradictory or contested, an investigator should decide which version of the facts they prefer on the balance of probabilities and explain in their report why they reached that conclusion.
- The investigation report should be a product of the investigator. The report should reflect the investigator's own conclusions on the facts and not the conclusions of anyone else from whom they have sought advice during their investigation.
- If an investigator is asked to make a recommendation at the end of their report, they should only say whether they consider that further action is necessary or beneficial. They should not suggest a possible sanction for the employee.

Finally, employers should remember that not all disciplinary investigations will or should lead to a disciplinary hearing. The outcome of a report, when more information is available, is a good time for a reassessment of the position and the employer may wish to consider if a different and informal approach with the employee might be preferable.

What is a protected philosophical belief?

Not vegetarianism according to a recent decision of the Employment Tribunal in Newcastle (*Conisbee v. Crossley Farms Limited*) and yet, in the case of *Mr Casamitjana v. League Against Cruel Sports*, there is a widely held view that the claimant's "ethical veganism" will be found to be a protected philosophical belief under the Equality Act 2010. That case is currently awaiting hearing. Why might vegetarianism and veganism differ for the purposes of discrimination law?

In the leading case of *Grainger plc v. Nicholson*, the Employment Appeal Tribunal set down a number of criteria that a claimant needs to satisfy for a philosophical belief to receive protection under the Equality Act 2010:the belief must be genuinely held;

i. it must be a belief (and not an opinion or viewpoint based on the present state of information available);
ii. it must be a belief as to a weighty and substantial aspect of human life and behaviour;
iii. it must attain a certain level of cogency, seriousness, cohesion and importance; and
iv. it must be worthy of respect in a democratic society, be compatible with human dignity and not conflict with the fundamental rights of others.

In the *Conisbee* case, his employer successfully argued that vegetarianism was no more than an opinion or viewpoint. Mr Conisbee believed the world would be a better place if animals were not killed for food. In support of the employer's position, it was argued that there were too many different reasons why an individual might choose to be vegetarian, ranging from moral objection to personal taste. The judge agreed, finding that the reasons for being a vegetarian differ greatly, whereas the reasons for being a vegan appear to be largely the same. He went on to say that vegans "simply do not accept the practice under any circumstances of eating meat, fish or dairy products, and have distinct concerns about the way animals are reared, the clear belief that killing and eating animals is contrary to a civilised society and also against climate control". It will be interesting to see whether the Employment Tribunal in the *Casamitjana* case agrees. The Conisbee case is not binding on other tribunals.

This is not the first time that philosophical beliefs have been subject to scrutiny by employment tribunals. Such beliefs have been diverse. For example, beliefs in climate change, mediums and in the higher purpose of public service broadcasting, as well as an opposition to fox hunting, have all been found to fall within the scope of protection under the Equality Act, whereas beliefs in copyright and anti-transgenderism have not. In each case, tribunals have applied the Nicholson test set out above. In the copyright case, the claimant's belief was found not to form any cogent philosophical belief system and therefore failed to satisfy part (iv) of the *Nicholson* test. The tribunal in that case concluded that the claimant's objections were purely commercial and designed to protect her own private interests. In the anti-transgenderism case, Dr Mackereth was dismissed after he said he would not address a six-foot, bearded man with a female form of address or pronoun. His position derived from his Christian belief. He alleged after his dismissal that his employer had discriminated against his religious beliefs. The tribunal in that case unanimously concluded that the "lack of belief in transgenderism, and conscientious objection to transgenderism, in our judgment are incompatible with human dignity and conflict with the fundamental rights of others, specifically here, transgender individuals". Part (v) of the *Nicholson* test was not satisfied.

On the face of it, the decisions of the employment tribunals in this area appear arbitrary, but in fact the tribunals continue to apply the now established criteria set out in the *Nicholson* case to determine eligibility for protection. We look forward with interest to the Employment Tribunal decision in the *Casamitjana* case on whether veganism will qualify for protection under

the Equality Act.

IR35: Case Update

IR35 was introduced to crack down on perceived tax avoidance whereby individuals would seek to avoid paying employee income tax and National Insurance contributions by contracting through personal service companies (PSCs). The First-Tier Tribunal (FTT) decision in Paya Limited and others v. HMRC [2019] UKFTT held that the successive contracts under which three news presenters worked for the BBC demonstrated that each should be treated as in employment, and that, therefore, IR35 applied.

IR35 background

The aim of this legislation was to increase the collection of tax and National Insurance from individuals who supplied their services through an intermediary (normally a PSC) and paid themselves dividends instead of a salary. If IR35 applies to an individual, they will be obliged to pay National Insurance contributions and income tax as an employee, despite considering themselves a self-employed contractor.

IR35 will apply in cases where:

- an individual personally provides services for a client;
- those services are provided under arrangements involving an "intermediary" (this intermediary will usually be a PSC directly owned by the individual providing the services); and
- the circumstances are such that if the arrangements had been made directly between the individual and the client, the individual would have been regarded as "employed" by the client for the purposes of income tax and National Insurance contributions.
- To ascertain whether an individual would have been an employee of the client if they had been working directly for them, HMRC sets out certain guidelines including:
- *Personal service*: an employee is obliged to provide their services personally.
- *Mutuality of obligation*: for an employment relationship there must be the obligation on the part of the worker to provide his or her work or skill, and the obligation on the part of the engager to pay the worker for that service.
- *Right of control*: an employee is subject to a certain degree of control by the engager.
- *Right of substitution*: a self-employed worker would have a right to send a replacement or engage a helper.

Case background

The three appellants in *Paya Limited and others v. HMRC* were PSCs, formed by three news presenters to provide their services to the BBC. They operated on this basis for a number of years under a series of contracts between each PSC and the BBC. The issue in dispute was whether the relationship between the BBC and the presenters would have been a relationship of employment in the absence of the PSC. If it would have been an employment relationship, IR35 would apply and the presenters' income would be taxed as employment income.

The FTT held by casting vote that the arrangements between the PSCs and the BBC created an employment relationship and that IR35 applied.

Decision reasoning

The main principles behind the FTT's decision were based on its conclusions on mutuality of obligation, the degree of control exercised by the BBC and the requirement for personal service.

When considering mutuality of obligation, the FTT applied the long-established test set out in Ready Mixed Concrete, which considered the difference between a contract of service (where an individual is an employee) and a contract for services (where the individual is not). In this case, the FTT held that an employment relationship would have been created between the presenters and the BBC. This was because the presenters had been engaged by the BBC to provide their services continuously over a period of between five and seven years under a series of contracts with very similar terms. Under each contract, the BBC was obliged to call on the presenters' services on a minimum number of days and, if called upon, the presenters were obliged to be available on sufficient days for the minimum number of days to be met.

In relation to control, the FTT found that the BBC had an ultimate right of control over the presenters and that there was a framework of control with regards to what had to be done, when and where the presenters performed their services and, to some extent, the manner in which those services were performed. When assessing the degree of control held by the BBC over the presenters, the FTT took into account the fact that the presenters were required to attend meetings, training and appraisals and that the presenters were contractually obliged to adhere to the BBC's editorial guidelines. The FTT attached great importance to the fact that the BBC was able to prevent the presenters from working for another broadcaster and the presenters were, in effect, tied to the BBC when it came to carrying out their main business skill – presenting the news. In this vein, the FTT also found it highly relevant that two of the three presenters were economically dependent on the BBC for their livelihoods during the terms of the contracts.

In relation to personal service, the FTT found that the presenters had no meaningful right of substitution.

Tax perspective

The FTT also considered whether HMRC's determinations were "stale" and, therefore, invalid. However, it rejected the notion of "staleness" under Regulation 80(5) of the Income Tax Regulations, because the presenters would have been in no doubt from the point the discoveries were made that HMRC intended to issue the determinations. That meant the individuals could not object to the determinations as being too old.

Take-away points

Following this decision and a number of other cases since the introduction of IR35, it is ever clearer that the tax savings which many contractors have benefited from by using PSCs are under challenge. Even before the April 2020 changes come into effect, such savings will no longer be possible if, when looking behind the veil of the PSC, the relationship would satisfy the mutuality of obligations or control tests and, therefore, the contractors would be considered employees for tax purposes.

Currently, it is essential for contractors working in the private sector to get their tax status correct. Failing to do so could lead to significant financial consequences, in the form of fines and interest. From April 2020, this will be important to all medium and large companies in the private sector which use contractors – not just the contractors themselves. The new rules will require the end user/client to assess the status of contractors which provide services through a PSC and determine whether they should be treated as if they are employees (or inside IR35) for tax purposes. Payments to the PSCs may need to be processed through payroll. With this, income tax and employer National Insurance contributions become payable on the whole fee paid to the PSC. This could add an extra 13.8% cost to each invoice, as well as additional costs for administering the new rules introduced by the extension of IR35.

Reach out to Dentons' People, Reward and Mobility team to receive a detailed walkthrough of the IR35 changes, and the associated steps that employers should take to ensure that they are compliant.

IN THE PRESS

In addition to this month's news, please do look at publications we have contributed to:

- Scottish Grocer – Claire McKee outlines the rules around working flexibly and some of the benefits of flexible working arrangements.

If you have ideas for topics you'd like us to cover in a future round-up or seminar, please tell us here.

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