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earwiggin : employment law update

EMPLOYMENT STATUS

Clarkson v Penser Security Doors Ltd

This case provides some useful guidance on the factors that courts will take into account when assessing whether someone qualifies as a "worker" (and therefore entitled to certain rights such as paid annual holiday).

The legislation defines a worker as someone who performs work personally for another party unless the other party is a client or customer of profession or business undertaking carried on by that individual. Therefore, the question that often arises is when someone will be treated as carrying on a business undertaking.

In this case, Mr Clarkson carried out nearly all the electrical work for Penser Security Doors for around two years. After the company dispensed with his services, Mr Clarkson issued a claim which required the tribunal to determine whether he was an employee and/or worker. The tribunal found (just) that he was neither on the grounds that Penser was a client of his business undertaking. Mr Clarkson appealed to the EAT. He argued that there had been no evidence that he operated as a business - he had not actively marketed his services nor did he draw up business accounts.

The EAT rejected his appeal. It found that the following factors pointed to Mr Clarkson not being a worker:-

- he did not have use of a dedicated desk;
- he did not take part in company meetings;
- he came and went as he chose and was not involved in appraisals;
- he decided how and when he worked;
- he was not paid when he did not work; and
- he was free to, and did, work for third parties.

The case is an interesting example of how the courts examine an employment relationship when determining worker status. It is worth noting that, although it upheld the conclusion that Mr Clarkson was not a worker, it found that he was very close to the dividing line. The EAT reiterated that the plainest case of someone operating as a business undertaking (and therefore not qualifying as a worker) would be where they commercially market their services.

DISMISSAL AT THE BEHEST OF A THIRD PARTY

Henderson v Connect (South Tyneside)

What is the position if an important customer or client demands that you dismiss one of your employees? Will that provide a fair reason for dismissal?

In this case, Mr Henderson was employed by Connect as a bus driver to drive disabled children to school. The service was provided under a contract between Connect and the local Council which gave the Council an absolute right to veto the employment of any individual providing the service. In January 2008, the Council became aware of some historical allegations that Mr Henderson had sexually abused his two young nieces. It emerged that the matter had been investigated by the police who had decided not to

prosecute him. The Council decided to exercise its contractual right to veto Mr Henderson's employment. Since Connect was unable to offer him alternative employment, it dismissed him with immediate effect.

The tribunal dismissed Mr Henderson's claim for unfair dismissal. It was satisfied that the third party pressure amounted to a potentially fair reason for dismissal and that the decision to dismiss was within the range of reasonable responses. The EAT upheld the tribunal's decision. It confirmed that, in a case involving third-party pressure to dismiss, the question of whether the employer had acted reasonably will involve considering the extent of injustice to the employee. Provided that the employer has done everything that it can to avoid or mitigate the injustice to the employee (e.g. by trying to persuade the customer to change its mind or by trying to find alternative employment for the employee) then the dismissal is likely to be fair. The legislation requires an examination of the reasonableness of the employer's conduct, not that of the third party's.

DISMISSAL TO PREVENT ACCESS TO ENHANCED PENSION

Woodcock v Cumbria Primary Care Trust

An employment tribunal has held that dismissing an employee, without completing a redundancy consultation process, with the aim of ensuring that he did not qualify for enhanced pension benefits was justified and therefore did not amount to unlawful age discrimination.

Mr Woodcock's role as Chief Executive of Cumbria PCT became redundant following a merger of PCTs in the area and when he was unsuccessful in applying for the newly created role. The PCT was required to give him 12 months notice. Mr Woodcock would have been entitled to an enhanced pension (at a cost of somewhere between £500,000 to £1,000,000) if his employment ended at any time after his 50th birthday. In order to protect the PCT's and taxpayers' position and in light of the year's notice clause in Mr Woodcock's contract, the new Chief Executive decided to dispense with a consultation process so that notice could be issued before Mr Woodcock's 49th birthday.

The tribunal found that the failure to consult with Mr Woodcock did constitute less favourable treatment on the grounds of his age. However, somewhat surprisingly, it also found that this course of action had been justified and was therefore not unlawful. The tribunal held that the PCT's legitimate aim was to avoid the additional costs of the enhanced pension and that dismissing without proper consultation was a proportionate way of achieving that aim.

Although many may agree with the pragmatic approach adopted by the tribunal here, it is a surprising result given the body of case law that has developed in recent years on the issue of justification. In particular, the decision appears to be at odds with EAT case law which has confirmed that employers cannot justify discrimination solely on considerations of cost. We will obviously keep you updated with developments should this decision be appealed. In the meantime, employers should continue to be wary of relying solely on cost to justify discrimination.

EMPLOYMENT STATUS

Autoclenz Ltd v Belcher

This is yet another decision on the thorny issue of employment status which confirms when a court may look behind the express terms of a contract in order to determine an individual's employment status.

The case concerned a group of 20 valets who were engaged under self-employed sub-contractor agreements. Several years later the valets were given new documents which included a substitution clause and stated that there was no obligation upon the company to provide work or upon the valets to accept it. When the valets lodged claims seeking unpaid wages and holiday pay, the tribunal reached the decision that the contractual documentation (and, in particular, the most recent contract) did not reflect the reality of the relationship. The valets were fully integrated into the business and subject to its control meaning they were all employees.

The Court of Appeal has recently confirmed that the tribunal had set out the correct approach when dealing with this issue. The law on "sham" contracts in the employment field required the court to consider whether the express terms of a contract reflect the reality of the relationship between the individual and the company, not only at the inception of the contract but also at any later stage of where the relationship still subsists. There is no requirement for a common intention to mislead in order for the contract to be a "sham". The Court of Appeal noted that this was especially true in employment contracts where the employer often dictated the written terms.

This case confirms a growing band of case law which reiterates that, when it comes to assessing an individual's employment status, the substance of the relationship is more important than the label applied by the parties. Having a contract which ticks all the right boxes is one thing but it will not necessarily avoid a finding of employment or worker status if it does not reflect the reality of the situation.

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