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THIS MONTH'S CONTRIBUTOR

Daniel Tivadar

Click here for Daniel's website profile.

Seminars & workshops

3 Hare Court members regularly provide seminars and workshops to individual firms or groups of practitioners. If you have a request for a seminar or lecture, or would like further information then please do not hesitate to contact our marketing manager, Mika Thom.

Employment Law Update - January 2013

Welcome to the next edition of 3 Hare Court's Employment Law Update. 3 Hare Court's employment practice group provides commercial and sensitive advice to employers, employees and employment agencies. In these monthly email updates we highlight recent developments in employment law and provide analysis on recent noteworthy cases. We hope you enjoy this January edition!

Stringfellow Restaurants Ltd v Nadine Quashie [2012] EWCA Civ 1735

The Court of Appeal in this recent decision considered once again the vexed question of employment status.

Ms Quashie worked intermittently for over a year as a lap dancer in two clubs run by Stringfellow. In December 2008, however, she was told that she would no longer be permitted to work at the clubs as she was believed to have become involved with drugs. Ms Quashie brought an unfair dismissal claim. The crucial preliminary issue was whether Ms Quashie was an employee under s. 230 of the Employment Rights Act 1996.

The ET's findings set out in some detail how the lap dancing clubs operated. The dancers had to pay the Club a fee each night before commencing their shift. The dancers were then paid in "Heavenly Money" by the customers – a form of voucher that customers bought from the Club. The dancers would then give the Heavenly Money they collected to the Club. The Club would take a percentage cut and pay the dancers the remainder. The dancers had to do certain free dances and would receive fines if they were late or failed to perform these. Importantly, the contractual document (that although Ms Quashie was not given a copy of but the terms of which were observed by the parties) referred to the dancers as independent contractors.

The Employment Tribunal held that Ms Quashie was not an employee. The EAT disagreed and upheld Ms Quashie's

Conferences

We are often invited to speak at conferences in the UK and abroad. If you have a query concerning a conference then please get in touch with our marketing manager, Mika Thom.

Clerks

We have an experienced and approachable clerking team who will be happy to assist with recommendations, fees, our service protocol or general enquiries. Please contact the clerks on 0207 415 7800. Alternatively please contact the Senior Clerk, James Donovan.

Feedback

As always at 3 Hare Court we welcome your feedback. In particular, any feedback or suggestions on this and forthcoming updates will be gratefully received.

Please contact our marketing manager, Mika Thom with any queries. Alternatively, do contact the barrister responsible for this update, Daniel Tivadar.

Employment Law at 3 Hare Court

We regularly appear in the employment tribunals and EAT. Silks in chambers have experience of employment and discrimination issues in the High Court and

appeal. HHJ McMullen QC observed that the club was under an obligation to pay dancers and it mattered not that dancers were paid by a third party in Heavenly Money. In any event, the learned Judge observed that *"these days, it is not uncommon to find a person agreeing to work for no pay to gain work".* Further, the reality was that Ms Quashie was obliged to work on the nights she attended the club. The EAT concluded that the only proper conclusion was that when Ms Quashie was on duty on any particular night, she was subject to a contract of employment.

The Court of Appeal – Elias LJ giving the lead judgment – reinstated the ET's findings and dismissed Ms Quashie's claim. Elias LJ emphasised that the ET's factual findings were not perverse and, accordingly, the EAT should not have interfered with them. The ET found that the club was under no obligation to pay the dancer anything – the dancer negotiated her own fees with clients and took the risk of being out of pocket. The ET was also entitled to conclude that the arrangement for payment was no more than the mechanism whereby the club discharged its obligation to pay the dancer. The arrangement did not amount to an obligation to pay the dancer wages.

Further, the dancer taking an economic risk was a further *"very powerful pointer against the contract being a contract of employment".* It would be an unusual case where the worker takes the economic risk and is paid exclusively by third parties. It was also relevant – albeit not decisive – that dancers accepted that they were self-employed and conducted their affairs on that basis (e.g. paid their own taxes, received no sick pay, holiday pay etc). Accordingly, Stringfellow's appeal was allowed.

The Court of Appeal provided Respondents with a useful judgement on status. The case clarifies that in a situation where the Claimant - rather than the Respondent - takes the economic risk; there will be a strong presumption against an employment relationship. This is to be contrasted with the view HHJ McMullen QC appears to have expressed in the EAT that the wage-work bargain is not such an important factor in deciding status. The case will also assist Respondents in arguing that the contractual provisions as to status – while of course not decisive - are to be carefully considered when deciding who is an employee and who is not.

Claimants' representatives should argue that this decision is fact-specific and seek to distinguish it on that basis. In the simplest terms, what the Court of Appeal decided is that the ET's factual findings should not have been interfered with as they were not perverse. On the facts as established by the

Court of Appeal.

Members deal with a range of work from straightforward issues of unfair dismissal and redundancy to issues of equal opportunities, discrimination and human rights. This includes the seminal case of Bull & Bull v Hall & Preddy & Hall [2012] EWCA Civ 83 where the Court of Appeal determined whether it was discrimination not to provide goods and services on the grounds of sexual orientation.

Additionally, members regularly deal with the full range of discrimination claims under the Equality Act 2010 including direct and indirect discrimination, whistleblowing, victimisation and harassment in multi-day hearings for both Claimants and Respondents.

For more information and examples of cases, please visit our Employment Law page.

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ET, the question of status was relatively straight forward. The EAT went wrong simply by not considering the case in the context of the facts as found by the ET. Further, it should be noted that the Court of Appeal left open the argument about the relative bargaining power of the parties that the Supreme Court blew open in **Autoclenz v Belcher [2011] UKSC 41** (see paragraph 35 of Lord Clarke's speech).

The decision by no means represents a final word on the issue of employment status, but it is well worth being familiar with the authoritative analysis provided by Elias LJ.

Eweida and others v The United Kingdom

The Chamber of the European Court of Human Rights (the "**ECHR**") has delivered its long-awaited decision in this case involving four individuals of Christian faith who complained about their Article 9 and 14 rights being inadequately protected. It should be noted that the Chamber's judgment is not necessarily final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber. Some commentators believe that it is very likely that the case will proceed to the Grand Chamber – so watch this space!

To remind ourselves, Article 9(1) of the European Convention on Human Rights provides a right to freedom of thought, conscience, religion and a right to manifest one's religion or beliefs. Article 9(2) provides that the right to manifest religion or belief (but not the other rights) may be limited, but the limitations as are to be prescribed by law and must be necessary in a democratic society in the interests of public safety, for the protection of public order, health, or morals, or for the protection of the rights and freedoms of others. ECHR case law further establishes that any interference with the rights must also be proportionate.

In the present decision the ECHR clarified that for an act to amount to a "manifestation" of religion it did not necessarily have to be *"mandated"* by the religion (see paragraph 82). It was sufficient for the act to be *"intimately linked to the religion or belief"* – as opposed to *"only remotely connected to a precept of faith".* In the case the two applicants who wished to wear a crucifix, there was no discussion about whether the Christian faith demands its followers to wear such an item. What mattered was that wearing a crucifix was linked to the applicants' religious belief.

The ECHR further revisited past authorities that suggested

that "if a person is able to take steps to circumvent a limitation placed on his or her freedom to manifest religion or belief, there is no interference with the right under Article 9 § 1 and the limitation does not therefore require to be justified under Article 9 § 2". This line of authorities has been endorsed by Lord Bingham in **R (Begum) v Headteacher and Governors of Denbigh High School [2006] UKHL 15** (at paragraphs 23 and 24). These authorities allowed the employer to argue that there was no interference with the employee's rights as he/she could resign and look for another job. The ECHR stated that this approach was incorrect in the Article 9 context. National courts should instead hold that there is an interference with Article 9(1) rights and move on to considering whether the interference can be justified under Article 9(2). The fact that an employee can resign is a relevant factor the courts should take into account when deciding whether the restriction on the employee's right was proportionate. This development can lead to an important shifting of the burden to the employer/state.

Turning to the individual applicants; the only successful applicant, Ms Eweida – represented by **James Dingemans QC** – worked for British Airways. She insisted on wearing a visible crucifix but BA - initially - did not allow this as it conflicted with its uniform policy. BA offered Ms Eweida an administrative post, where she did not need to wear a uniform. Ms Eweida refused this offer and remained at home without pay. A few months later BA amended its uniform policy and allowed Ms Eweida to display her crucifix.

Ms Eweida lodged a claim of indirect discrimination pursuant to regulation 3 of the Employment Equality (Religion and Belief) Regulations 2003. Her claim was rejected by the ET, the EAT and, finally, by the Court of Appeal.

The ECHR accepted that by enforcing its uniform policy BA's legitimate aim was to communicate a certain corporate image and promote recognition of its brand. However, this had to be balanced against Ms Eweida's right to manifest her religion. In accepting BA's justification as sufficient, the national courts failed to strike a fair balance. The ECHR emphasised that Ms Eweida's cross was discreet and cannot have detracted from her professional appearance. Further, there was no evidence that religious items worn by other members of staff (such as turbans and hijabs) had a negative impact on BA's brand. Further, there was no real encroachment on the interests of others by Ms Eweida wearing a crucifix.

Ms Eweida's case can be contrasted with the case of Ms Chaplin, the second applicant. Ms Chapman was a nurse

who was not allowed to wear her crucifix because of health and safety concerns. The ECHR was far more impressed with such concerns as a reason for interference than the one given by BA in the case of Ms Eweida.

Similarly, Ms Ladele and Mr McFarlane (the third and fourth applicants) were both unsuccessful for broadly the same reason. Ms Ladele, a registrar, believed that same-sex unions are contrary to God's will and did not wish to perform them. Mr McFarlane refused to provide psycho-sexual counselling to same-sex couples. Disciplinary proceedings were brought against both of them culminating in their dismissal. The ECHR emphasised in both cases that the employer's policy was aimed to provide a service without discrimination and to secure the rights of others which are also protected under the Convention. Member states benefit from a wide margin of appreciation in deciding how they balance the competing rights of individuals.

The ECHR's decision is going to be heavily relied on in cases of discrimination at the workplace. The domestic courts and tribunals are of course obliged to interpret primary and subordinate legislation in a way which is compatible with the Convention rights and to act in a way which is incompatible with a Convention right – pursuant to sections 3(1) and 6(1) of the Human Rights Act 1998. They will, therefore, have to interpret and decide discrimination claims under the Equality Act 2000 in a way compatible with the claimants' Convention rights.

Claimants benefit from the decision to the extent that it has become somewhat easier to establish interference with the manifestation of their belief. Further, claimants could forcefully argue that the ECHR's analysis should not only apply in the context of religion and belief but should be extended to other forms of discrimination. After all Article 14 of the Convention guarantees the enjoyment of the rights and freedoms *"without discrimination on any ground".*

Respondents will take some comfort from the fact that they can interfere with an employee's human rights as long as they can demonstrate that they pursued a legitimate aim in a proportionate manner. As always in employment litigation, the process followed will be of key importance: issues should be discussed with the employee, alternative solutions should be contemplated and the rationale of the offending policy may need to be revisited.

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