Welcome

Another month, another case about employment status.

This time it's about a delivery cyclist at the courier company, CitySprint (Dewhurst v CitySprint UK Ltd). A tribunal has decided that Ms Dewhurst was not a self-employed contractor but a worker, and therefore entitled to certain minimum rights.

It's a legal point that seems to be echoing around the country as the so-called gig economy grows and alternative working arrangements become the norm. The message for employers is clear: whether someone is a worker or self-employed comes down to the reality of what they do for you, day in, day out, and how they do it. It's not just about the wording of a contract, or the labels that are attached.

Pinpointing employment status is often easier said than done. So if you're unsure about any of this, talk to us.

Paul Housego
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Diabetes as A Disability

Taylor v Ladbrokes Betting and Gaming Ltd

Disability is defined quite strictly in employment law. You are disabled if you have a physical or mental impairment that has a substantial, adverse, long-term effect on your ability to carry out normal day-to-day activities. It's a neat checklist – in theory, anyway.

Add into the mix the idea of a 'progressive condition'. That is a condition that doesn't currently have, or hasn't had, the requisite adverse effect, but which is likely to. It's an interesting angle. And this case suggests that type 2 diabetes could qualify as a disability on that basis.

Mr Taylor wasn't disabled, the tribunal had said. Even without medication, his condition wouldn't adversely affect his ability to carry out normal daily activities. And there was only a small chance of his type 2 diabetes progressing – especially if he followed advice on diet, lifestyle and exercise.

The Employment Appeal Tribunal allowed Mr Taylor's appeal. More medical evidence was needed as to whether or not Mr Taylor's diabetes could be considered to be a progressive condition. The big question for the experts to answer is around the likelihood of his condition worsening. That will be key to the decision the tribunal makes when it hears the case again.

About Us

Beers LLP has a national reputation and is recognised and named in the Chambers and Partners and Legal 500 directories for expertise in employment law. From our offices in the South West of England our specialist solicitors provide advice, representation and training on all aspects of employment law.

We advise strategically and tactically on how to resolve problems and disputes arising from HR issues. We look to you for your intended outcome, agree a way forward and implement it. We work with you to solve problems in a constructive and cost effective manner.

We are experienced at dealing with unfair dismissal, capability, misconduct, discrimination, union related issues, redundancy exercises and ex-employee problems.

We will represent you cost effectively in the Employment tribunals and the County Court.

We will provide you with up to date employment contracts for your staff; update your policies and procedures handbook and provide training for your managers to help you maintain best practice throughout your organisation.

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The important point for employers is that even though a person doesn't appear to satisfy the definition of disability now, their prognosis is relevant. Type 2 diabetes – and other conditions that may not currently have a substantial effect on daily life – could be a disability. It's a reason to ask medical experts to advise very carefully on the future, not just on the current and the past.

Mobility Clauses and Redundancy

Kellogg Brown & Root (UK) Ltd v Fitton and Ewer

If an employee has a mobility clause in their contract and, in a redundancy situation, it is reasonable for the employee to relocate, dismissal (and a redundancy payment) can sometimes be avoided.

In this case, two employees whose office in Greenford was closing refused to relocate to their employer's premises in Leatherhead. They were dismissed and each claimed unfair dismissal and a statutory redundancy payment.

Mr Fitton had objected to what would be a two-hour commute each way. He didn't have a car, so that was an extra complication. Mr Ewer was approaching retirement and said that he shouldn't have to have the additional stress of a 47-mile (as opposed to his usual 18-mile) commute each way. It would mean getting up at 4am in order to miss the traffic, he told his employer during his disciplinary.

At separate hearings the same tribunal reached the same conclusion. The instruction to work at Leatherhead was unreasonable and the company hadn't put in place any measures that were relevant to these two men. They had been dismissed for redundancy. A proper redundancy process hadn't been followed and the dismissals were unfair.

The Employment Appeal Tribunal didn't agree entirely. The employer had dismissed the men because it believed they had failed to comply with the reasonable instruction to relocate to Leatherhead. That was misconduct, not redundancy. But the dismissals were still unfair. The instruction to relocate was unreasonable. And it was reasonable for the men to have refused.

There's a big message here. If you want to rely on a contractual term to require employees to relocate, look very carefully at that proposed relocation in the context of each person and their particular circumstances. Reasonableness is key.

When Switching Off Is a Good Thing

Has France got it right?

Under a new law, French companies with more than 50 workers have to enter into negotiations with employees about their use of digital devices. It's to do with employees being able to assert their right to ignore their smartphones.

Cue gasps from those whose mobiles are now permanent body parts.

But it's serious stuff. Aside from the commonly-known (but often overlooked) problems of sleeplessness and burnout caused by using mobile devices too much, there is now this duty on French companies to guarantee the 'right to disconnect'. It's a positive obligation not to require staff to look at emails, and all the rest of it, at certain times while not at work.

The details are subject to agreement between employers and employees, so this should allow for the flexibility that is needed. If agreement can't be reached, the employer will have to draw up a charter that sets out the times when employees should be truly switched off.

Everyone needs and deserves a private life, and this development in French workplaces recognises that. We'll have to wait and see if the UK follows suit.

Expired Warnings Taken into Account

Stratford v Auto Trail VR Ltd

There is a reason why the warnings given to employees expire after a set period of time. It's to wipe the slate clean. But, as this case shows, expired warnings aren't always irrelevant to future disciplinary decisions.

Mr Stratford had a chequered history with his employer. His disciplinary record listed 17 items, but there were no live warnings at the time he was eventually dismissed for carrying his mobile phone while on the shop floor – something strictly prohibited by company rules. The company took the view that although the phone incident didn't amount to gross misconduct, it was the 18th time that some formal steps (this time a final written warning) had had to be taken. The employer believed that this pattern would simply continue, and it terminated Mr Stratford's employment.

Fair dismissal, the tribunal said. The company was entitled to take account of Mr Stratford's disciplinary record and of his general attitude to discipline. A line had to be drawn.

The Employment Appeal Tribunal agreed. It can be okay to take account of an employee's record. But whether that's reasonable or not will depend on the circumstances of the case. In Mr Stratford's, the history of misconduct, together with a prediction of future problems, was a legitimate consideration.

Although this case isn't the green light to factor expired warnings into future disciplinary decisions, it may well help you deal with employees who find themselves in trouble time and time again. Have a clear policy on how you will deal with repeat offenders; that's important. And, above all, be sure that your decisions are those that a reasonable employer would make.

Get on Board with Reasonable Adjustments

FirstGroup Plc v Paulley

The wheelchair versus the buggy. It made for a catchy headline.

Mr Paulley's claim against FirstGroup is likely to have consequences that extend far beyond the facts of his case, which was about discrimination in the context of public services. The outcome could require employers to be more proactive in their handling of reasonable adjustments.

Wheelchair-user Mr Paulley was unable to board a bus because another passenger refused to move her pushchair, which had in it a sleeping child, from the designated wheelchair space. He won his disability discrimination claim against the bus company.

After the company's successful appeal, Mr Paulley took his case to the Supreme Court, arguing that the bus driver hadn't gone far enough in making the space available to him. The driver had, in line with company policy, asked the passenger to move but when she didn't, he did no more about it. Mr Paulley argued that the driver ought to have insisted that the non-disabled passenger made way for him, and that insistence should have been enforced if necessary.

The Supreme Court didn't agree entirely. But it did say that drivers shouldn't simply make the request and leave it at that. The duty to make reasonable adjustments requires more. It would be good practice for drivers to be encouraged to go as far as they think appropriate in the circumstances - which is for them to judge, taking account of the non-wheelchair user's reasonableness.

So, what does this mean for employers? Well, we think it requires you go a bit further than you otherwise might when it comes to reasonable adjustments. If a non-disabled employee parks in a disabled parking space, for example, you will probably be expected to (appropriately) 'require and pressurise' the offending employee into moving their car. You should probably look to enforce rules, such as proper parking, in this context as a reasonable adjustment.

Dismissal For Gross Negligence

Adesokan v Sainsbury's Supermarkets Ltd

Mr Adesokan had worked for Sainsbury's for 26 years before he was dismissed for gross misconduct.

He was Regional Operations Manager. The Human Resources Partner who worked alongside him sent an inappropriate email to five store managers. It was to do with a procedure that Sainsbury's was running to assess the level of its staff engagement. The results would be relevant to performance progression, target setting, pay, bonuses and staff deployment.

The email suggested that stores should focus predominantly on getting the most enthusiastic colleagues to complete the survey. When Mr Adesokan found out about this he asked the HR Partner to clarify the position with the store managers. But that wasn't done, and Mr Adesokan didn't take action to put that right. He didn't contact the stores directly. Nor did he tell more senior management what had happened.

He was dismissed because of his gross negligence. But was that, as the employer believed, tantamount to gross misconduct? And was summary dismissal justified? Yes and yes, the High Court held – and the Court of Appeal agreed. Although Mr Adesokan hadn't been dishonest and he hadn't made a conscious decision to not eliminate the effects of the email, he was guilty of gross misconduct because he hadn't taken active steps to put things right. His inaction had seriously damaged the employer's trust and confidence in him.

Negligence won't always amount to gross misconduct, but Mr Adesokan's senior position in the business was relevant. Here, there was a serious breach of the standards expected of this manager by his omissions, rather than his actions.

And Finally...

Dashing to the bakery to pick up cakes for colleagues because it's your birthday. It's an odd workplace custom, isn't it?

But if dentists have their way, the ready availability of sweet treats at work will be a thing of the past. It's fuelling obesity and poor oral health, the Faculty of Dental Surgery has apparently said. Workplaces are being called on to encourage healthy eating and to help workers avoid being tempted by cakes, biscuits and sweets. Tips include:

- Reducing portion sizes
- Keeping sugar as a lunchtime treat
- Thinking about where you put the sweet treats; people will eat more if they're nearby and visible.

This is all well and good and, yes, there are excellent reasons for promoting healthy life choices, but the real challenge for employers will be in changing long-standing habits and practices.

Being cruel to be kind never was a piece of cake.

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