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Commercial Law Update

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Ministry of Justice

Dispute Resolution in England and Wales Call for evidence

3rd August 2021

- 25 years after the Woolf Report, litigation is still far from the last resort and too many cases still go through the court process unnecessarily.

- The provision of dispute resolution schemes remains patchy, even though there have been some welcome initiatives.

- Still more needs to be done to increase the uptake of less adversarial options.

- What has up until now been seen as “alternative” methods of dispute resolution, need to be mainstreamed within online processes.

- There needs to be a recognition on the part of the legal system, that such methods are not “alternative”.

- Along with those consumers and businesses that it serves.

- Progress has been made, but it needs to be built on by utilising more innovative technologies integrated with online dispute resolution processes.

- As we emerge from the pandemic, the justice system (with its chronic backlog and historic underfunding) must be better able to resolve disputes in smarter ways.

- At the forefront should be integrated mediated resolution interventions.

- “We want to support people to get the most effective resolution without devoting more resources than necessary – financial, intellectual and emotional- to resolve their dispute.

- Creating more proportionate and constructive routes to resolution avoids the need for these resources to be expended.

- Saving the consumer’s time as well as reducing their levels of stress at an already difficult time.”

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- “Our ambition is to mainstream non-adversarial dispute resolution mechanisms, so that resolving disagreements, proactively and constructively, becomes the norm.

- We want to build a more proportionate system by giving people a fuller, more integrated, range of routes to get the best outcomes for their issue.

- Helping people to access the support they need at the right time to achieve a resolution, without the need for court-based litigation”

Existing models of (alternative) dispute resolution;

- ACAS Early Conciliation
- Small Claims Mediation Service
- ADR Pilot schemes at Employment Tribunals
- Agreed formal mediation with an accredited mediator (CEDR)

Factors in play

- Cost
- Accessibility
- Timings
- A willingness to compromise
- The importance of privilege
- The legal view; merits and litigation risk
- The wider view; financial emotional intellectual & emotional commercial considerations.

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Estimating the costs of workplace conflict

A report for ACAS

11 May 2021

- “In the midst of a pandemic, and an economic recession, people are naturally reluctant to heed any advice that doesn’t help them to save money.

- Putting the pound sign in front of the cost of conflict at work undoubtedly grabs the headlines.

- That’s why this piece of research is a landmark event and hopefully one that will ignite the debate about taking workplace conflict more seriously”

- “The headline statistics are startling; in total in 2018-19 the cost of conflict to UK organisations was £28.5 billion; the equivalent of more than £1,000 for each employee.

- Close to 10 million people experienced conflict at work. Of these, over half suffer stress, anxiety or depression as a result.

- Just under 900,000 took time off work; nearly 500,000 resigned and more than 300,000 employees were dismissed”

Key Takeaways

- ‘Conflict competence’ is an essential ingredient/key skill in good people management.
- There is a critical time to intervene; and that’s before the conflict reaches formal workplace procedures.
- Whilst conflict can be damaging, to individuals and the business, it can also be creative, acting as the catalyst for fairer and more inclusive workplaces.

Key Takeaways

- Investment in effective and early steps to conflict resolution, designed to build positive employment relationships, will yield a very significant return.

- Organisations need to place much greater emphasis on repairing employment relationships at a far earlier stage, particularly when addressing issues of capability and poor performance, which focus on learning and blame avoidance.

- Aim to rebalance the approach with a greater focus on the resolution of conflicts (when they arise) within organisations and less of a focus on legal compliance and the ET system.

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Abbeyfield (Maidenhead) society V Hart UKEAT0061/21

The ‘iniquity’ exception to privilege

- Litigation privilege applies to confidential communications between a client or lawyer and a third party, where adversarial litigation is contemplated or commenced.

- And the communication in question is made for the dominant purpose of obtaining advice and/or the giving of information in connection with that litigation.

- The “iniquity principle” however means that a communication that would otherwise be privileged must nevertheless be disclosed, if it contains legal advice/information sought or given, with the purpose of effecting a fraud.

- H was employed by AMS, a charity operating care homes.
- He was suspended on 9 December 2016, following an altercation at work involving a gardener.
- At a disciplinary hearing held on the 2 March 2017 he was dismissed for gross misconduct.

- His appeal was rejected by C a senior manager.
- H brought a number of ET claims against AMS.
- Including unfair dismissal wrongful dismissal and discrimination.

- AMS were required, during the course of the ET proceedings, to disclose all documents relating to the alleged misconduct.

- AMS submitted that its various communications with its HR advisers (Avensure) on how to deal with H's case were inadmissible, on the grounds of litigation privilege.

- Although the ET agreed, it concluded that one document had lost the protection of litigation privilege and was admissible under the "iniquity principle."

- This document was an email from C (the senior manager who heard H's appeal) to Avensure.

- In it he said that "H's rudeness and gross insubordination had caused major problems".

- And that he would therefore not be returning to work "under any circumstances".

- The ET said that it would be iniquitous to allow AMS to claim litigation privilege over a communication which tended to show that the appeal was not fair, when they were asserting the complete opposite during the case.

- The appeal officer had clearly expressed a view before the appeal that H would not be returning to work.

- AMS appealed to the EAT.

- The EAT observed that the usual policy in favour of non-disclosure was a forceful one.

- Privilege (LAP/LP) enabled parties to communicate frankly with their legal and other advisers knowing that it would remain private.

- In order for that policy to be displaced by the “inequity principle” there must be a strong prima facie case of fraud, illegality, or some other iniquity.

- The EAT considered that C's email to Avensure did not engage the iniquity principle.
- It did not seek advice on how to act unlawfully, and the HR consultant did not give such advice.
- Instead, the HR consultant gave advice on the disciplinary process and the risk of that process leading to litigation.

- The indication by C that he did not wish for H to return to work was just the sort of frank instruction that a party may feel able to give in a privileged communication without losing the protection of privilege.

- The EAT recognised that there may be cases where a client's instructions leave the adviser professionally embarrassed such that they have to decide whether they can continue to act.

- But this was not that case.

- “I agree that the Employment Judge erred at this point by not focussing on the nature of the communication in question.

- Despite C’s intentions, and the fact that he went on to hear and reject H’s appeal.

- I do not consider that the email in question was part of any iniquitous conduct involving him and the HR consultant”.

Key Takeaways

- A useful reminder of the importance of privilege; LAP and LP.
- The principle of privilege does however have its public policy limitations provided they can be made out.
- Privilege cannot operate to mask either fraud, illegality or some other form of iniquity.

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Manchester Building Society V Grant Thornton UK LLP [2021] UKSC 20

A New Road Map For Negligence

- Supreme Court considered the extent and nature of a professional adviser's duty of care to their client and whether losses, arising from a breach of that duty, are recoverable.

- And whether they could escape liability (for professional negligence) by labelling the activity (upon which their client relied) "information" as opposed to "advice".

- The former resulting in no liability; as distinct from the latter, which would.

- Supreme Court held that labels of “advice” and “information” were unhelpful distractions and were unrealistic.

- They said that there was a spectrum of activity that a professional adviser may move along, but it is the underlying purpose behind that activity which will determine whether any loss, sustained as a result of the client relying on what they were told, falls within the scope of the duty.

They said it would be “desirable” to dispense with the descriptions of “information” and “advice” and to focus instead on the need to identify, with precision in any given case, the matters on which the professional person has undertaken responsibility to advise on and, the risks associated with that advice which the adviser may fairly be taken to owe a duty of care to protect the client against.

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- The case concerned an audit negligence claim, and whether GT was liable for all of the losses that MBS sustained resulting from its negligent advice.

- In particular, that MBS could adopt hedge accounting when preparing its statutory accounts and assessing its capital adequacy requirements.

- Those losses extended to the cost of breaking interest rate swaps that MBS had entered into as a hedge against the cost of borrowing money to fund its lifetime mortgage business; swaps that they would not have entered into if competently advised.

- Supreme Court reaffirmed that the basic objective of compensating a claimant in tort, is to place them in the position that they would have been absent the defendant's negligence.

- Their Lordships set out a road map, which starts at the end of the process with an initial assessment of the loss sustained.

- And then goes on to set out the steps in order to identify the loss for which the defendant is legally liable.

Step 1; Damage

- What has the claimant lost?

- An assessment of the consequences of the defendant's actions/omissions, without considering why or how these arose.

Step 2; Scope of duty

- Focus on the purpose of the duty, judged objectively, by reference to the reason why the advice/information is being given.

- Once the purpose of the duty is clear, the question then, is whether the whole of the loss (identified at step 1) falls within its scope.

Step 3; Breach of duty

- Did the defendant's act or omission breach the duty identified at step 2

Step 4; Causation, factually not legal

- Usually described as the ‘but for’ test.
- But for the defendant’s act/omission, would the claimant’s loss have occurred?
- Not always a straightforward question.

Step 5; Duty Nexus

- Is there a sufficient nexus (link/connection) between the harm/loss suffered by the claimant, and the defendant's duty of care?

Step 6; Legal Responsibility

- Do any legal filters (exclusions or other limiting factors) apply?

- What about remoteness, breaks in the chain of causation, contributory negligence and mitigation of loss?

Key Takeaways

- Information and advice, and the associated fights to shoehorn a professional adviser's activity into one or other binary category will no longer be appropriate.
- There will be a shift in focus to a purposive approach.
- This will shine an even greater light on terms of engagement and retainer letters

Key Takeaways

- There will be a greater debate around client transparency and the risks that the professional adviser has accepted or is willing to accept.

- In determining whether a loss sustained is recoverable, then under the new road map, these arguments will be decided by reference to the ambit of the purpose of the duty to advise and

- The nexus between that purpose and the harm suffered.

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Settlement Agreements for Board & Senior Exits

Reason(s) for termination

- Important to reach agreement on this at an early stage; it could well impact on potential liabilities and internal/external announcements.
- Employee may want resignation/redundancy.
- Employer may want mutual consent. the Betfred site some years earlier.

The severance package; a balancing act.

- Always a strong desire to reach an amicable separation quickly and confidentially.
- Invariably it will involve contractual and statutory entitlements, along with an additional incentive.
- Battle lines will invariably be drawn around the ex gratia payment; the package needs to be sufficiently attractive to ensure a smooth and seamless transition, but it also needs to be justified and not seen as a reward for failure.

Notice

- It is relatively unusual for Executives and Senior Managers to work out the entirety of their notice period.
- A ‘mixed’ approach facilitates transitional arrangements whilst providing for some protection via garden leave.
- PILON is also typically limited to basic salary only, and it can be paid in monthly tranches, provided there is provision for that in the service agreement.

Hidden payments and entitlements

- Be aware of any departures arising from ‘change of control’ events where enhanced entitlements often have to be paid.
- Golden parachute clauses will also contain specific provisions as to entitlements.
- And be mindful of departing shareholders; there is no recognisable mechanism for the acquisition of their shares outside the Company’s Memo and Arts; check the good leaver and bad leaver provisions.

Bonuses

- Check the service agreement to make sure that the Executive's (discretionary) bonus is not payable when they are under notice of termination.
- It can nevertheless be a significant point of contention, particularly when it has already been earned.
- Provided it doesn't set an uncomfortable precedent, this is an area ripe for compromise.

Statutory Directors

- Shareholder approval will be required for severance payments.
- However, there are exemptions, which include a payment made by the Company in good faith in settlement or compromise of any claim arising from the termination of the Director's employment.
- Any payment however over and above their legal entitlement would require shareholder approval.

Managing the fall out

- Always sensible and desirable to agree the wording of internal and external announcements, which both parties agree to abide by and not depart from.
- Don't overlook the need to manage the rest of the team following their departure; not to mention CRM.
- Confidentiality is key, although always difficult to enforce with illusory remedies.

It's not always just about the money

- The departing Executive will be concerned with reputation and (future) relationships; a reference can often be crucial.
- Consider modifying post termination restrictions, but if they are to be strengthened, then it will require adequate consideration for them to be enforceable.
- Payment of any severance package by way of instalments is an option.

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ITTC
The importance of trust

- A powerful tool in the employment relationship.
- Best summarised thus, in the *Malik* case;
- "The employer must not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."

- The ITTC principle has its roots in a 1981 case.
- *Woods v W M Car Services (Peterborough) Limited [1981] ICR 666.*
- The facts of the case shed some useful light on the (wide) applicability and relevance of the principle.

- W had been employed at a garage since 1952.
- The business was sold to WM in 1980.
- W was told that he T's and C's would not change or at least be no less favourable.

- She was then asked to take a pay cut, and she refused.
- Then she was asked to increase her hours and again, she declined.
- There was then an incident about who should henceforth do the cashing up.

- She complained and was then issued with a verbal and then written warning as to her conduct.
- New accountancy procedures were then introduced.
- And she was issued with a new job description which she thought included more work than one person could handle.

- She promptly resigned claiming constructive unfair dismissal.
- The IT concluded that none of these experiences singly amounted to a repudiation of the contract on the part of WM.
- They also found that neither did they cumulatively amount to such a breach and so dismissed her claim.

- On appeal the EAT disagreed and said

- “In our view it is clearly established that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee…”

- They found WM had acted in that way and remitted the case back to the IT.

- The most recent iteration of the ITTC principle is to be found in

- *Nair v Lagardere Sports and Entertainment UK limited [2020] EWHC 2608*

- The question for the Court; did it apply to circumstances where the employer failed to secure bonus payments due to an employee under contracts with other companies that were broadly in the same group, and where it is alleged that he was 'strung along' about the payment of such bonuses.

- The alleged breach consisted of a failure to secure payment of those bonuses.

- And where the conduct consisted of the employer stringing the employee along thereby avoiding payment.

- Such that this, it was alleged, had led to a breakdown in trust and confidence between the employee and the employer.

- The employer made an application to strike out the claim.
- Arguing that the ITTC principle did not extend to taking steps to protect the financial welfare of an employee.
- The sums involved were huge; at least £25m!

- The Court held that the claim should not be summarily thrown out.

- It could not be said that the claim stood no real prospect of success.

- The ITTC principle could well be breached where an employer prevaricates, strings along or wriggles and fails to respect the payment of very large bonuses due to an employee from other companies falling within their control; it was a matter for evidence at trial.

Key Takeaways

- "Conduct can take the form of failure to do something or the form of positively doing something and often the difference may be merely semantic. That is fact specific."

- Mr Nair lives to fight another day.

- Yet a further example of the ITTC principle being used to regulate employer behaviour.

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Stress; what stress?

The importance of establishing employer knowledge, in stress-induced claims brought by employees

Mackenzie v AA PLC and Another [2021] EWHC 1065

- A timely reminder of the high hurdle that employees face when seeking to prove that their employer is liable to stress induced psychiatric injury.

- Particularly as we emerge from the pandemic where the ingredients are there for a spike in workplace stress claims.

- M was formerly the CEO of the AA and was 64 years old at the relevant time.
- On the 24 July 2017 he attended a strategy away day at a hotel in Surrey for one of the companies in the AA Group.
- M drank heavily during dinner and afterwards and at around midnight he was involved in an altercation with a senior colleague and assaulted him.

- He was swiftly placed on paid leave and an investigation into his conduct was commenced.
- On the 1 August 2017 he tendered his resignation.
- And shortly afterwards, before his resignation had been accepted, he was dismissed for gross misconduct.

- It was acknowledged that the workload and challenges that M had taken on during his tenure had been exceptionally challenging.

- At the time of his dismissal, he was suffering from a number of physical health conditions.

- M maintained that the AA was aware that he had become overstressed as a result of his workload and that his health, including his mental health, had deteriorated.

- M further maintained that the assault incident occurred because he was overworked, exhausted and physically and mentally ill, and therefore temporarily unable to exercise full control.

- M argued that his medical condition was caused by the AA's breach of an implied term and/or common law duty of care.

- Namely a failure to take reasonable care for his health and safety.

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- M argued that his medical condition was caused by the AA's breach of an implied term and/or common law duty of care.

- Namely a failure to take reasonable care for his health and safety.

- M therefore commenced proceedings and not only claimed that his summary dismissal was wrongful (i.e., in breach of contract)
- He also claimed damages for breach of contract (loss of remuneration)
- And brought a personal injury claim against the AA in respect of the psychiatric injury for which he claims that the AA were responsible.

- The AA applied for summary judgment on the basis that M's personal injury claim had no realistic prospect of success.
- The Court agreed.
- It found that M was unable to provide any evidence to show that the AA knew, or ought to have known, that as a result of stress at work, there was a risk that he would develop a psychiatric injury.

- In reaching this conclusion the Court summarised the key principles applicable to workplace stress claims.

- Above all else the psychiatric injury must have been foreseeable by the AA, which in this case it was not.

- When considering foreseeability, the Court also set out some useful guiding principles in claims of this nature.

Key Takeaways

- It is not enough to show that an employer knew the employee had too much work to do, or even that they were vulnerable to stress as a result of over work.

- Mere stress is not enough.

- The employee must be able to show that the employer knew, or ought to have known, that as a result of stress at work there was a real risk of injury.

- An employer is entitled to assume that an employee can withstand the normal pressures of the job, in the absence of clear evidence to the contrary.

- An employer only has a duty to act, when the indicators of imminent harm are plain enough for any reasonable employer to realise that they should do so.

- An employer is not under an obligation to make searching or intrusive enquiries and may take, at face value, what an employee tells them.

- The mental health and well being of employees has been the focus of much attention both during and in the aftermath of the pandemic.

- Working from home, and the stresses that can arise, have been under the spotlight like never before as have the stresses that have arisen from the profound changes that have been initiated to the working environment because of the pandemic and its associated illness.

- It is therefore likely that claims for stress-related psychiatric injury are likely to predominate in the years to come.

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Defining the boundaries of vicarious liability

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Blackpool Football Club Limited V DSM [2021] EWCA Civ352

In 2020 the Supreme Court, in the Morrison case, restated a restrictive approach to the principle of vicarious liability.

Responding to concerns about the potential for the unprincipled expansion of the doctrine of vicarious liability, they reinstated the 2 stage approach.

Stage 1-

What was the relationship, and if not employer/employee, then was it ‘akin to employment’.

Stage 2-

The conduct must have been committed in circumstances closely connected with the function and duties arising from that relationship.

This is a latest in a series of (high profile) cases concerning “non-traditional” allegations of historic sexual abuse brought by members of clubs and associations.

In a first instance decision (heard before the Morrison’s case) the High Court held that Blackpool FC was vicariously liable for the acts of an unpaid scout who had sexually abused the Claimant whilst on a football tour that he had organised.

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Background

- The Claimant alleged that he was sexually abused whilst on a football tour when he was 13. The perpetrator Mr Roper, oversaw the trip and was the only adult leading it. He had funded a significant element of the trip himself. He acted as an unpaid scout for the Club in that he would try and find talented players and send them to the Club; one such player was the Claimant.

- He issued proceedings more than 30 years after the acts took place. Mr Roper died in 2005; the Claimant's account of what took place was accepted.

The trial Judge found that the Club was vicariously liable for Mr Roper's acts when he abused the Claimant and awarded the Claimant compensation.

The Club appealed the trial Judge's findings.

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The Appeal

On the issue of vicarious liability, the Club argued

The Judge was wrong at stage 1 (on the facts in law) to hold that Mr Roper was, at any material time, in a relationship with the Club that was capable of imposing upon it vicarious liability for his actions.

The Judge was wrong at stage 2 (on the facts and in law) to hold that there was a sufficient connection between the assault on the Claimant, and any relationship between the Club and Mr Roper.

In respect of stage 1, the Club submitted that the Judge had failed to address the actual relationship between the Club and Mr Roper. The Club had no relevant control over him; he was effectively a free agent. The Club was happy to receive his recommendations but he was under no obligation to make them or make them exclusively for the Club; he had dealings with other clubs.

In respect of stage 2, the Club submitted there was no close connection between the actions of Mr Roper on tour and his relationship with the Club. The tour was an independent venture and not something that he was authorised or required to do as the Club's (official) scout or representative. The Judge's finding that the tour was "as close to an official trip as makes no difference" was wholly incorrect.

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Outcome

The Court of Appeal upheld the Club's appeal.

Although Mr Roper's scouting activities were important to the Club, given his previous successful referrals, "none of the normal incidents of a relationship of employment are otherwise present".

The "free rein and full access to the Club premises" that the Club had given Mr Roper, as well as "deference and welcome" was not enough to justify the imposition of vicarious liability.

There was no evidence of any control or direction by the Club over what Mr Roper should do when scouting for them/on their behalf.

His activities were not exclusively for the Club's benefit.

He was actively involved in assisting other boys who were trying to get into other football clubs.

There "was a complete absence even of a vestigial degree of control" over him and his activities.

The trip was Mr Roper's venture, organised and paid for by him.

There was no evidence that the tour was the Club's idea, and most of the boys who went on tour had no existing connection to the Club.

The fact that the parents of the boys considered or regarded Mr Roper as a Club representative when leading the trip was not an acceptable test for the imposition of vicarious liability.

Key Takeaways

Cases outside of the traditional employer/employee scope require a close examination of the nature and extent of the relationship; a tick box exercise is neither desirable nor appropriate.

More is required (at both stages of the test) than that the “employer” has engaged the individual to carry out work which then gave them the opportunity to commit the acts in question.

An element of control will often be required; especially relevant when the acts concern either independent sub-contractors, freelancers, or third parties.

The decision marks a clear declaration of the retrenchment in the doctrine of vicarious liability.

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The importance of workplace training

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Allay (UK) Limited v Mr S Gehlen [2021] UKEAT 0031

A recent EAT decision which considers an employer's "reasonable steps" defence to a claim of racial harassment brought by a former employee

In particular, what are the steps that an employer needs to take (as regards diversity training) in order to be able to successfully rely on the statutory defence?

The Law

Section 109 (1) Equality Act 2021

"Anything done by a person (A) in the course of A's employment must be treated as also done by the employer".

Section 109 (4)

In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment, it is a defence for B to show that B took all reasonable steps to prevent A –

(a) From doing that thing, or

(b) From doing anything of that description.

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Background

The Claimant alleged that he was subjected to harassment related to his race (he was of Indian origin) by a fellow employee a Mr Pearson during the course of 2017.

An investigation was carried out; Mr Pearson was found to have made racist comments and was ordered to undertake further equality and diversity training.

The Claimant brought a claim for harassment related to his race.

At the ET the Company sought to rely on the “reasonable steps” defence, and argued that equality and diversity training had been given to its employees including Mr Pearson.

This was rejected. Although the ET accepted that employees had received training that covered harassment related to race, they found that this was “stale” and “ineffective”; it had been given in 2015 and a reasonable employer would have provided refresher training.

The Claimant was awarded £5,030.63.

The Company appealed against the ET's rejection of the Section 109 (4) employer's defence.

It argued that the ET's decision was unlawful/perverse, and it sought to rely on the equality and diversity training that it had provided to all of its employees in 2015.

The EAT dismissed the Company's appeal.

It held that the starting point when considering an employer's "reasonable steps" defence, is to consider whether the employer took any steps to prevent the harassment or discrimination from occurring.

Once that had been established, it was then important to go on and consider the nature and extent to which those steps were likely to be effective to prevent harassment.

It was also necessary to consider whether there were any other reasonable steps that an employer should have taken.

The EAT concluded that the ET was right to find that the training that had been given was no longer effective to prevent harassment.

As evidence of that; Mr Pearson regarded his racist remarks as "banter"; a colleague who heard his comments did not report them, and two managers who were informed about his remarks did not take any action.

Whatever training had been given was stale and no longer effective.

The training that had been given had evidently faded from memories.

There were further steps that the Company could and should have taken including refresher training.

As a result, the ET was right to find that the Company was unable to rely on the “reasonable steps” defence.

Key Takeaways

Decision highlights the importance of employers providing up to date meaningful training to its employees regarding appropriate workplace behaviours.

It reinforces the need for employers to provide regular refresher training to avoid it becoming stale.

Brief and superficial training is unlikely to have a substantial effect in preventing harassment in the workplace. Such training is also unlikely to have any long-lasting consequences.

Key Takeaways

Thorough and forcefully presented training is more likely to be effective and last longer.

It is not sufficient merely to ask whether there has been training; consideration has to be given to the nature of the training, and the extent to which it was likely to be effective.

It would be prudent for employers to take some time out to review their current policies in relation to the provision of workplace training, equal opportunities and anti-bullying and harassment, so as to ensure that employees are fully aware of the consequences of inappropriate workplace behaviour, and so that employers are given a fighting chance of being able to rely on the statutory defence, in the event of a claim being made.

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Uber BV and others v Aslam, Farrar and others [2021] UKSC 5

Employment status, particularly in the ‘gig economy’

- Employment law distinguished between 3 different types of individuals in work;

- Employees under a contract of employment

- Self-employed who are in business on their own account

- Workers, who are entitled to certain statutory rights.

- The battle ground in recent years/cases has concerned the distinction between employee and worker.
- The ERA 1996 provides a statutory definition of who a worker is.
- They are an individual who enters into or works under.

- A contract of employment or any other contract, express or implied, oral or in writing, whereby

- The individual undertakes to do or perform, personally,

- Any work or services for another party to the contract whose status is not, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

- The Claimants brought claims against Uber for a failure to pay NMW and to provide paid leave, on the basis they were workers and entitled to such worker rights.

- Uber defended the claims; they classified these drivers, who operate through their platform, to be self-employed, on the basis that Uber provided technology for them to use and acted as an agent for the drivers when accepting private hire bookings.

- It did not therefore consider them to be workers.

- After loosing in the ET, the EAT and the Court of Appeal (LJ Underhill dissenting) the Supreme Court was required to consider the following two key points.

- Whether the Uber drivers are working under contracts with Uber, undertaking to perform services for Uber, or whether they are instead regarded as performing services solely for and under contracts with passengers through Uber as their agent and

- If the Uber drivers are workers, then what period constituted their working time.

In respect of the first point:

- The SC rejected the argument that Uber contracts as a booking agent for the drivers.
- It held that Uber entered into contracts directly with its drivers under which they agreed to provide services personally for Uber.

- Significantly the SC said that the starting point on deciding employment status should not be the terms of the written contract for three reasons.

- The balance of power, the employer's ability to dictate terms and the worker's inability to influence such terms.

- It should be the reality of the relationship, taking into account all of the circumstances, of which the written agreement is only part.

- The SC also emphasised the need to view the facts realistically and to have regard to the purpose of the legislation.
- That is to give protection to vulnerable individuals who have little or no say over their working pay and conditions.
- The greater the extent of such control on the part of the 'employer' the stronger the case for classifying the individual as a worker.

- In reaching its unanimous decision, the SC found that there were five factors that indicated a relationship beyond that of an independent contractor.
- Uber fixes the remuneration
- Uber presents its written terms to its drivers which they are obliged to accept.

- Uber constrains a driver's choice about whether to accept ride requests (controlling information, and monitoring acceptance and cancellation rates)

- Uber exercises control over the way its drivers deliver the services (specifying the make and model of the car and operating a driver rating system)

- Uber takes active steps to prevent drivers from establishing relationships with passengers beyond an individual journey.

In respect of the second point:

- The SC found that the drivers came within the definition of a worker when they logged onto the app in their territory.

- The time they were on call i.e., when logged onto their app and available to accept a trip, constituted working time for the purposes of the Regulations.

Key Takeaways

- This (final) decision has wide implications for individuals in the gig economy and beyond.
- The global coronavirus pandemic has accelerated the growth and popularity of atypical working arrangements as more traditional forms of employment has declined.
- The issue of employment status is a fine balancing act between the need to give appropriate rights to workers, versus and employer's need for increasing levels of flexibility and independence among its workforce.

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Independent Workers Union of Great Britain v Central Arbitration Committee and Deliveroo [2021] EWCA Civ 952

Riders not workers

- A decision that appears to run counter to the apparent trend of extending employment protections.
- Underlying litigation however was not an ET case.
- Rather, it concerned an application made to the CAC by the IWGB, for trade union recognition for collective bargaining purposes in a particular Deliveroo delivery zone.

- To succeed a trade union has to seek recognition on behalf of workers
- In order to be able to act on their behalf.
- The definition of worker for such an application is substantially similar, though not identical, to that of worker in the 1996 Act.

- The CAC decided that the individuals for whom the IWBG sought recognition were not workers.

- In particular, the relevant contract under which the riders were engaged, provided them with a relatively unrestricted right to engage a substitute to perform work in their absence.

- The CAC heard evidence that although rare, it did happen on occasion, and that it was a genuine right, rather than merely an artificial device to defeat a claim of worker status.

- The CAC therefore concluded that this was fatal to the application.

- A worker is required to engage in personal service/performance, and the existence of a genuine right to engage a substitute was therefore fatal to the contention that the riders were workers.

- The IWGB obtained permission to appeal by way of judicial review on one limited ground under Article 11 ECHR (the right to freedom of association including the right to join a union).

- The appeal failed before the High Court and the matter then came before the Court of Appeal; LJ Underhill presiding.

- It held that there was no requirement to interpret the definition of worker more widely for the purposes of Article 11.

- Moreover, the finding reached by the CAC was one that was open to it on the facts.

Key Takeaway

- Although this was an unusual appeal it does restate, in terms that go beyond the facts of this case, the principle that a genuine and broad right to appoint a substitute can defeat the requirement for personal service essential to worker status.

- In short, it can be a contra indicator of worker status.

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Checklist; Employee v Independent Contractor

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Mutual Obligation

- The company is under an obligation to provide the individual with regular work and they are under an obligation to make themselves available to do the work.

- There is no obligation on the company to offer work on a regular or frequent basis and the individual is under no obligation to accept the work.

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Control

- The individual is under the control of the company. It controls what they do, how they do it, and when they do it.

- The individual has the ability to determine when and how they work and is not under the direct supervision of the company.

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Personal Service

- The individual is required to provide their services personally. There is no right to appoint a substitute.

- The individual is not required to carry out the work personally and has an unqualified (and unfettered) right to appoint a substitute. The right is only limited by the requirement to show that the substitute is just as qualified.

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Exclusivity

- The individual is not normally free to work for other companies without their employer's express permission. There may also be restrictive covenants in their contract.

- The individual is free to provide their services to whomever they choose without operating exclusively for one client.

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Nature and Length of Engagement

- Its length is not determined at the outset of the relationship (except in the case of fixed-term employment contracts); neither does it relate to the performance of a specific task.

- The individual us usually engaged for a finite period of time to carry out a specific task.

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Pay and Benefits

- The individual is paid a fixed amount on a regular payment date. They may also receive other benefits and are entitled to a pension and holiday and sick pay.

- The individual is paid on completion of a specific task or project or on a commission-only basis (but be aware of Commercial Agents). They are not entitled to participate in a benefit schemes and will not normally be paid overtime.

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Expenses

- The individual may reclaim from the company all personal expenses they incur in the proper performance of their duties.

- The individual would normally include their expenses in their fee negotiated at the outset of the work, or they will be responsible for bearing any expenses personally.

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Integration

- The individual is integrated into the company and is recognisable as part of the organisation. They perform work that is very often substantially similar to others in the company; their name appears on the internal telephone directory/intranet; they have a company email address; they may wear a uniform; they have to adhere to the company's employee handbook; they have a name badge, carry a business card and maybe drive a company car.

- The individual is not sufficiently integrated within the company to have a defined role; they have no line management responsibilities; sit outside the company's DG and A procedure; are not invited to staff and office functions and don't receive long service awards/gifts/rewards/perks.

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Facilities and Equipment

- The company provides the individual with the facilities and equipment required by them to carry out their job.

- The individual provides their own equipment and materials in order to carry out the work.

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Financial Risk

- The individual is paid even if there is insufficient work to keep them fully occupied. They assume no financial risk in working for the company.

- The individual risks their own capital in the business. Will be personally responsible for any losses arising from their work. They are responsible for arranging their own insurance. And may be required to correct any unsatisfactory work at their own expense.

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Taxation

- The individual is not responsible for the payment of income tax and NICs on their earnings; the company operates PAYE in respect of their employment.

- The individual is responsible for payment of income tax and NICs on their earnings; and is responsible for registering for VAT if the level of their supplies exceeds the relevant threshold.

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Asda Stores Limited v Brierley and others [2021] UKSC 10

Check out equal pay

- The legal framework around equal pay is notoriously complex, although it sits behind a simple concept.

- That men and women should receive equal pay for carrying out equal work.

- This landmark case is a reminder to employers that internal organisational constructs, such as departments, divisions, and even different locations, are unlikely to prevent comparisons from taking place across the business.

- This case has been running now since 2014.
- It concerns some 44,000 predominately female ASDA shop floor employees, who are seeking pay parity with predominately male ASDA distribution centre workers.
- The principles established in the case will have a significant bearing not only on all of the other supermarket equal pay cases, but across the entirety of the British workforce.

- Under the Equality Act 2021 men and women should receive equal pay for carrying out work which is the same or similar
- Which has been rated as equivalent under a job evaluation scheme or
- Which is of equal value.

- The Claimants in the ASDA case (and in all other supermarket cases) allege that they carry out work in the supermarket of "equal value" to those employees who work in the distribution centre.

- The law however will only allow a comparison to take place with someone else who is employed on "common terms" and this was the issue at stake before the SC.

- Were the mainly men in the distribution centre on common terms with the mainly women in the supermarket?

- SC held that the Claimants were on “common terms” with the distribution centre employees for equal pay purposes.
- They advocated a broad-brush approach when answering this threshold question at the outset of equal pay litigation.
- It was not necessary (nor desirable) for the ET to carry out a line by line comparison of the terms and conditions between the Claimants and their chosen comparators.

- “The aim of the equal pay legislation is to remove pay disparities that are endemic in some pay awards and which do not properly reflect the value of the work for which they are paid. If in the absence of firm case management, the threshold test is elevated into a major hurdle mirroring other elements of an equal pay claim, then the purpose of equal pay legislation will be thwarted, and the pay disparities will not be investigated.”

Mark D Owen

Key Takeaways

- The common terms analysis is now a shrinking hurdle for a prospective Claimant on the road to equal pay success.
- The decision chips away at a technical defence that hitherto was open to an employer when defending an equal pay claim.
- It will act as the catalyst for countless other Claimants coming forward, not just in supermarkets.

- It is also clear that such claims are now no longer confined to public sector workforces; this was a private sector employer where the Claimants' and the comparators' terms and conditions were not fixed on both sides by collective bargaining agreements.

- Employers should be encouraged to carry out a JES or a simple equal pay audit helping them to identify pay discrepancies, and then either address them or document the rationale for the difference.

- The Claimants in the ASDA litigation still have a long way to go before they can check out.

- Next, they must show that they carry out work of “equal value” to their comparators, which will be a detailed time-consuming expensive and laborious process for both sides, with appeals undoubtedly looming for the unsuccessful party.

- And if the roles are to be found of “equal value” it will still be open for ASDA to argue that the pay difference is because of a material factor other than sex.

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Asda Stores Limited v Brierley and others [2021] UKSC 10

Check out equal pay

- “While sexual harassment in the workplace has been unlawful for decades, in recent years, we have more people, predominately women, feeling empowered to share their experiences, showing that there is still a real, worrying problem with sexual harassment at work, as well as in other settings.”

Mark D Owen

- “Everyone should be able to live and work without the fear of encountering violence or harassment. That is why this Government is committed to tackling sexual harassment in all its forms.”

Mark D Owen

- “The pandemic has drastically changed how and where we work, with many people, where possible, working from home. As we begin to map out the future of the workplace, we have the chance to think more broadly about the fair treatment and environment every employee should expect. As people start to return to offices, we must be clear that ‘building back better’ extends to every corner of our lives.”

Mark D Owen

- “The steps we plan to take will help shift the dial, prompting employers to take steps which will make a tangible and positive difference. We want to provide the right legal framework, which supports employees and employers alike. We now have a real opportunity to transform the workplace and guarantee everyone an environment in which they can thrive and feel safe”.

Mark D Owen

Response 1

- "The Government intends to introduce a duty requiring employers to prevent sexual harassment, as we believe this will encourage employers into taking positive proactive steps to make the workplace safer for everyone."

- Such a duty would prioritise prevention.

- An important and symbolic first step.

- Employers would be required to take all reasonable steps to prevent harassment.
- An incident will need to have taken place before an individual would be allowed to bring a claim.
- The Government will support the EHRC in developing a statutory code of practice.

- The Government also plans to introduce what they term “accessible” guidance for employers.

- Designed to outline the practical steps an employer can take to meet this new duty.

- Raising awareness of this issue will also help improve staff understanding of what they should expect from their employer.

Response 2

- “In the interests of providing clarity, we will introduce explicit protections from third-party harassment”.
- To be introduced when Parliamentary time allows.
- It may only apply in situations where an incident of harassment has already taken place, and will be subject to the “all reasonable steps” defence.

Response 3

- "We recognise the impact that extending time limits could have for those bringing sexual harassment cases and that 3 months can be a short timeframe. Therefore, we will look closely at extending the time limit for bringing Equality Act 2010 based cases from 3 months to 6 months".

- Likely to be introduced for all Equality Act 2010 cases and not just sexual harassment/discrimination cases.

- Affords potential Claimants space to pursue the course of action they thought best, given that it mirrors the 6 month time limit for equal pay cases.

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Thank you