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EMPLOYMENT LAW BULLETIN

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Welcome to Wrigleys' Employment Law Bulletin, June 2023.

We start this month by taking a look at new proposals to regulate umbrella companies. Broadly speaking, these are companies which provide the services of individuals to end users. The proposals set out proposed minimum standards for umbrella companies along with enforcement options.

We also highlight new Q&As from the Information Commissioner for employers handling data subject access requests. These provide useful further guidance on deciding what should be shared in a DSAR.

In our case law report this month, we look at the recent Supreme Court case of ***BXB v Barry Congregation of Jehovah's Witnesses*** which has provided helpful clarification of the circumstances in which an organisation will be found vicariously liable for the wrongful acts of an individual carrying out a voluntary unpaid role.

This month also saw us host our employment law conference on the theme of 'Leading Through Change' at the Double Tree by Hilton in Leeds. It was a great day with inspirational talks by our guest speakers, Ruth Busby and Anj Handa, and of course by our own employment team covering topics such as leading and managing change, equity, diversity and inclusion, hybrid working, whistle blowing, data protection and grievance handling. It was great to be back in person this year and to see so many of you in attendance.

Thank you to all that came and made it such an enjoyable day. We are already looking forward to next year!

Our next free virtual **Employment Brunch Briefing** takes place on 1 August where we will consider some of the trickier aspects of redundancy consultation and decision-making. We hope you can join us there. Please click on the link below to book your place.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

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Consultation launched on tackling non-compliance in umbrella company market

Article published on 28 June 2023

Proposals seek to define umbrella companies and set out minimum standards and enforcement options.

Workers may supply their services to end clients in a variety of ways, whether as a sole trader, in partnership with others or via a service company or umbrella company. These various ways of providing services have formed part of a surge in the numbers of workers in what has colloquially been termed the 'gig economy', typified by an individual having a distant relationship to an employer or client in exchange for flexibility.

There is no statutory definition of an umbrella company. HMRC describes them as a company that employs temporary workers who work for different end clients.

In effect, umbrella companies act as a middleman. They employ the individual who agrees to provide their services to end users. The umbrella company does not find work for the individual, rather this is done by a recruitment agency (known as an "employment business").

Because of the nature of this arrangement, which involves agreements between the worker and the umbrella company, the umbrella company and the employment business and then the employment business and an end user, tricky questions around employment law rights and liabilities as well as tax issues arise. Indeed, the lack of a clear definition of what an umbrella company is together with the segmented relationship between the worker and end client has led to accusations from some workers and workers' groups that umbrella companies take advantage of the uncertainty, deny employment rights and engage in exploitative practices.

Review of the umbrella market

At the end of November 2021 HM Treasury published a call for evidence on the so-called 'umbrella company market'. A summary of responses was published on 6 June 2023.

More than 400 responses were received, and a broad picture was established of the need for reform. One response described the umbrella company market as 'the wild west' and workers outlined various disadvantages of being engaged via an umbrella company. In particular, attention was drawn to the practice of umbrella companies charging workers for services (including for processing pay), employment businesses directing workers to use umbrella companies in which they hold an interest and the problems with enforcing employment rights.

As a result of the evidence, HM Treasury updated its guidance Working through an umbrella company and the Department for Business and Trade published guidance for agency workers paid through umbrella companies.

The government considers that the responses to the call for evidence support state enforcement and regulation of umbrella companies as part of a broader approach that addresses tax issues.

On the same date the responses were published, HM Treasury published a consultation – Tackling non-compliance in the umbrella company market which will close on 29 August 2023.

The government has outlined a two-step process for tacking compliance. First, primary legislation will define what an umbrella company is and the government will then consult on the specific requirements/ standards to be placed on umbrella companies before implementing them.

Defining an 'umbrella company'

The consultation seeks views on two definition options.

1. Limit engagement in the recruitment sector to four permitted methods including an umbrella company, which would be defined as a 'corporate work-seeker not controlled by the individual doing the work'.

2. Alternatively, set out three conditions that a business should meet to be considered an umbrella company:

a. there should be two separate businesses (an employment business and end client) involved in supplying the worker in addition to the umbrella company;

b. the umbrella company has a direct contractual relationship with the individual to be supplied to an end-hirer under which it pays the individual the agreed rate; and

c. the umbrella company receives a form of commission or fee for the service they have provided as an umbrella company which is commonly deducted from the individual's gross pay.

Setting standards

The government proposes to create minimum standards for umbrella companies to comply with. The consultation sets out two options for this and seeks further input on these:

1. Set minimum standards in key areas, including how pay and holiday pay are administered. Prevent umbrella companies from making employment contracts conditional on individuals agreeing to pay for additional services, and put umbrella companies under a duty to provide key information documents (KIDs) to workers, which contain key information on pay, deductions, as well as holiday and other benefits entitlements.

2. Minimum standards are set for the performance of umbrella company functions. Examples given include employment businesses ensuring only suitably qualified staff are supplied to perform work, and/ or requirements about pay rates that employment agencies and businesses must comply with when advertising jobs with the aim of making the individual's gross pay clearer.

Enforcement of standards

The consultation also seeks views on which body should enforce umbrella company regulations and how proactive this should be.

The government's preferred approach is to expand the remit of the Employment Agency Standards Inspectorate (EASI), which already regulates the recruitment sector where umbrella companies are used. The government's view is that the EASI would be able to use its current enforcement powers (which includes the power to enter premises), to seek enforcement undertakings and orders, prohibit individuals from running recruitment businesses and prosecute where it is in the public interest.

The consultation seeks views on whether civil penalties should be extended to wage arrears arising from breaches of the regulations when these come into force, and at what level they should be set.

The consultation sets out two approaches to enforcement activity for the regulating body:

1. Maintain the same reactive/ proactive approach it currently takes with employment agencies and businesses as part of a compliance-based approach. This would mean EASI would first try to educate an umbrella company upon receipt of a complaint and try to correct the breach, only taking enforcement action if necessary. EASI would also apply its current practice of proactive inspections based on risk information and could focus its inspections geographically or by sector.

2. Alternatively, EASI could take a purely reactive approach to enforcement (similar to an Ombudsman) and would mean it only responds to complaints from an individual, whilst carrying out proactive visits to enforce existing standards for employment agencies and businesses, as it does now.

Other proposals

The government is considering introducing a broad statutory due diligence requirement, with all forms of tax non-compliance (including error avoidance and fraud). Penalties for non-compliance would be fixed or linked to the amount of tax not paid. Views are sought on the need for safeguards.

Another option considered for enforcement from a tax perspective is that HMRC would be given the power to collect an umbrella tax debt from another business in the labour supply chain. The intention is to encourage employment businesses and end-user clients to take greater care in selecting umbrella companies. This proposal would target unpaid income tax and NICs but may include VAT and others.

The consultation is also considering introducing legislation to deem another party in the labour supply chain as the employer for tax purposes and responsible for operating PAYE (i.e. the umbrella company would no longer be responsible for this). The consultation proposes this responsibility lies with the end-user client.

Comment

This response and consultation follows in the footsteps of the Taylor Review published in 2017, which observed that umbrella companies sometimes played questionable roles in relation to lower-skilled agency workers. The Taylor Review touched on the fact that umbrella companies obscure who is responsible for employing and paying workers and charge confusing administration fees.

There is a sense that the practices of a rogue few have tarnished the wider reputation of umbrella companies and so it will remain to be seen whether those companies seeking to comply with the letter and spirit of the relevant employment laws will help the government to root out the more unscrupulous elements.

Could schools and charities be liable for the wrongdoing of unpaid volunteers, including trustees and governors?

Article published on 6 June 2023

Supreme Court rules religious organisation was not vicariously liable for rape by community elder.

A recent Supreme Court case has provided helpful clarification of the circumstances in which an organisation will be found vicariously liable for the wrongful acts of an individual carrying out a voluntary unpaid role.

What is vicarious liability?

Vicarious liability is the principle that it is just for an organisation benefiting from activities to be liable for losses caused by wrongdoing committed in the course of those activities where the wrongdoer is integrated into the organisation. There is no need for the activities in question to be profit-generating. Voluntary and not-for profit organisations can be found to be vicariously liable in the same way as commercial organisations.

For detail on recent developments in the case law on vicarious liability, please see the following articles, available on our website:

https://www.wrigleys.co.uk/news/employment-hr/employer-not-vicariously-liable-for-the-vengeful-act-of-an-employee/

https://www.wrigleys.co.uk/news/employment-hr/was-an-employer-negligent-or-vicariously-liable-for-injury-sustained-during-an-office-party-at-work-premises/

https://www.wrigleys.co.uk/news/education/when-might-a-school-be-liable-for-a-wrongful-act-of-an-employee/

When does vicarious liability arise?

The courts will ask two key questions to decide whether vicarious liability arises:

1. Is the relationship between the organisation and the wrongdoer one of employment or "akin to employment"?

When the individual is not in employment, the court will consider a range of factors to decide whether the relationship is "akin to employment", including:

- how integral the work carried out by the wrongdoer is to the organisation;
- the extent of the organisation's control over the wrongdoer in carrying out the work;
- whether the work is being carried out for the organisation's benefit or in furtherance of the aims of the organisation;
- what is the situation with regard to appointment and termination; and
- whether there is a hierarchy of seniority into which the relevant role fits.

No one factor will be decisive. An unpaid volunteer or trustee could be found to be in a role "akin to employment" where the work they carry out is integral to the organisation, the volunteer's work is controlled by the organisation and is being carried out to further its aims – which will often be the case with charitable and educational organisations.

An organisation will not be vicariously liable for the acts of an independent contractor genuinely in business on their own account. However, there can be a grey area as to whether a particular individual is in fact an employee or worker despite the wording in their contract. Organisations should be alert to the risk of vicarious liability claims in such cases.

2. Is there a close connection between the wrongdoing and the acts the wrongdoer was authorised to do?

If there is found to be an employment relationship or one "akin to employment", the court will go on to consider whether there is a close enough connection between the wrongdoing and the duties of the wrongdoer.

The question is whether the wrongful conduct was so closely connected with acts that the wrongdoer was authorised to do that it can fairly and properly be regarded as done by the

wrongdoer while acting in the course of their employment or (in the case of a volunteer) quasi-employment.

The Supreme Court affirmed the close connection test in *Mohamud v WM Morrison Supermarkets plc*. For more detail on this case see our article from 2016: When might a school be liable for a wrongful act of an employee? (available on our website). In this case, the Supreme Court found the supermarket was vicariously liable as the employee's physical assault of a customer was within the "field of activities" assigned to him and it did not "consider that it is right to regard [the employee] as having metaphorically taken off his uniform the moment he stepped from behind the counter".

The "close connection" test and vicarious liability for sexual abuse of children

The "close connection" test arose in the difficult 2001 House of Lords case of *Lister v Hesley Hall Ltd* in which a boarding school was found liable for the damage caused by a house warden who sexually abused children resident in his boarding house. The court in that case stated that the school was vicariously liable because the house warden was specifically employed to look after the children who had been abused. In this case the wrongdoing was so closely connected with his duties that it was held to be fair and just to hold the employer vicariously liable.

The *Lister* judgment stated: "[the house warden] did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys."

If the wrongdoer's duties had been unconnected with the care of children or the employee had no special position of responsibility for children, it is unlikely that the school would have been found vicariously liable.

Is the outcome just?

In difficult cases, a final check should be carried out by the court to ensure that the outcome is consistent with the policy underlying the principle of vicarious liability. In other words, is it fair and just that the organisation should bear the cost of the wrongdoing in the circumstances?

A recent Supreme Court judgment considered whether a religious organisation was vicariously liable for losses arising from the wrongdoing of an unpaid religious elder.

Case details: ***Trustees of the Barry Congregation of Jehovah's Witnesses v BXB***

Mr S was an elder of the Barry Congregation of Jehovah's Witnesses (the Congregation). Mr and Mrs S developed a friendship with Mr and Mrs B. Mr S became depressed and began abusing alcohol. He began to flirt with Mrs B and at one stage asked her to run away with him, which she refused. Mr S's father (also an elder of the Congregation) encouraged Mr and Mrs B to provide emotional support to Mr S.

After a morning door-to-door evangelising together, the two couples went for lunch to a local pub. There was an argument. Mr S told Mr B he wished to divorce his wife and stated that he would convince his wife that he had committed adultery. Later that day, Mr S raped Mrs B at his home.

Thirteen years later, Mrs B reported the matter to the police and Mr S was convicted of rape. A further four years later, Mrs B brought a claim alleging that the Watch Tower and Bible Tract Society of Pennsylvania and the Congregation were vicariously liable for her personal injury, including psychiatric harm.

The High Court and the Court of Appeal agreed, finding that the Congregation was vicariously liable for the rape.

The Supreme Court decision

The Supreme Court did not agree with the lower courts that the organisation was vicariously liable and reversed the decision.

Role of elder was "akin to employment"

The Supreme Court agreed that the role of elder was akin to employment given that:

- Mr S was carrying out work on the organisation's behalf and assigned to him by the organisation;
- Mr S was performing duties in furtherance of and integral to the aims and objectives of the organisation;
- there was an appointments and removal process for elders; and
- there was a hierarchy of which the role of elder was part.

Wrongdoing was not closely connected to authorised tasks

The Supreme Court reversed the decision of the High Court and Court of Appeal citing six reasons why the close connection test was not satisfied:

- The rape was not committed while Mr S was carrying out any activities as an elder on behalf of the organisation. Mr S was at home and not engaged in any pastoral care, religious activity or service.
- Mr S was not exercising control over Mrs B because of his position as an elder at the time of the rape. The primary reason that the rape took place was not because abuse of Mr S's position as an elder but because he was abusing his position as a close friend of Mrs B when she was trying to help him.
- Unlike in the case of Mohamud, Mr S was not wearing a "metaphorical uniform" as an elder at the time of the rape.
- It was true that but for Mr S's role as an elder, Mrs B would not have continued her friendship with him and she would not have been with him at the time of the rape. However, the test for vicarious liability is not a "but for" test. In other words, there must be more than a causal link between the role and the wrongdoing; the close connection test must be met.
- The case was not akin to the gradual grooming of a child for sexual gratification by a person in authority over that child as the rape was a one-off attack. But even if that was the case, the prior events owed more to the close friendship with Mr S than to his role as an elder.
- There was no relevance, except as background, in the role of Mr S's father, or the finding that the elders knew of and permitted inappropriate kissing when welcoming female members of the congregation.

The Supreme Court as a final check also considered the policy underpinning vicarious liability and concluded that there was "no convincing justification" for the organisation to bear the cost or risk of the elder's wrongdoing.

Comment

This case is helpful in clarifying the circumstances in which a charity or school might be found liable for the acts of a volunteer, governor, trustee, or indeed an employee.

Where volunteers are integral to the organisation, controlled by it, and carrying out work to further its charitable or educational purposes, it is likely that they will be found to be in a role "akin to employment". The key question will be whether the volunteer's wrongdoing was closely enough

connected to their authorised tasks. The Supreme Court confirmed in this case that the same two stage test should apply in "akin to employment" cases.

The Supreme Court pointed out in its judgment that this case is "significantly different" from sex abuse cases, such as Lister, where the employee was "ostensibly performing their duties" at the time of the wrongdoing. It is certainly more likely that the close connection test would be met where volunteers or employees responsible for the care of children or vulnerable people engage in sexual, physical or emotional abuse of those in their care. This is because the wrongdoing is likely to be found to be carried out while ostensibly carrying out that caring role. And this could be the case even if the wrongdoing does not take place on work premises or in work hours.

The Supreme Court also confirmed in this case that the final check of considering the policy behind vicarious liability should only be considered in difficult cases after applying the two-stage test. In the case of acts causing harm to children and vulnerable people by those tasked with their care, it is arguably more likely that the court will consider it just to find the organisation vicariously liable.

ICO releases new Q&A for employers on data subject access requests

Article published on 30 June 2023

The Q&A provides a helpful reference point for employers when responding to a DSAR.

The Information Commissioner's Office (ICO) has released a Q&A series to assist employers in responding to data subject access requests ("DSARs") from an employee or former employee.

Employers will recognise that the DSAR regime is often utilised by employees, particularly where a grievance or disciplinary matter has arisen. The Q&A document includes advice on the following common queries:

- **Witness statements** - the Q&A explains how to approach the disclosure of witness statements and particularly when it is reasonable to withhold such a witness statements to protect the rights of third parties;
- **References** – confidential references are exempt from disclosure in specific circumstances. The ICO clarifies in the Q&A when a reference can properly be treated as confidential and what to do when it is unclear whether a reference is confidential or not.
- **NDAs and Settlement Agreements** – the ICO confirms that a DSAR can be made regardless of the terms of a settlement or non-disclosure agreement. Any provision restricting the right to make a DSAR is likely to be unenforceable.
- **What amounts to the employee's personal data** – it is common for organisations to recover a large amount of information when responding to a DSAR from an employee, much of which may not be their own personal data. This includes emails where the employee is copied for information and documents where there is a large amount of personal data about various employees. The Q&A addresses factors employers should take into account when determining whether the information required amounts to the employees' personal data and the steps that should be taken to ensure that the employee only receives information to which they are entitled.

The Q&A also includes useful examples to illustrate how the ICO would approach these situations.

The clarity provided by the Q&As will be of great assistance for employers in dealing with DSARs from employees. It addresses some common themes we see when assisting clients in their response to a DSAR, acting as a useful supplement to the ICO's more comprehensive guidance on the right of access.

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