Albion Chambers, Broad Street, Bristol BS1 1DR

Telephone 0117 927 2144
Fax 0117 926 2569
DX 7822 Bristol
clerks@albionchambers.co.uk
www.albionchambers.co.uk

Number 22 November 2015

Albion Chambers EMPLOYMENT AND PROFESSIONAL DISCIPLINARY TEAM NEWSLETTER

Healthcare professional disciplinary

The new duty of candour

The Francis Report

The Francis Report recommended that a statutory obligation of candour should be imposed on medics and healthcare professionals. With remarkable speed, within two years of the publication of the Francis report, legislation has been implemented to impose a duty of candour on NHS bodies *(Regulation 20 Health and Social Care Act 2008 (Regulated Activities) Regulations 2014) and other CQC registered providers (Health and Social Care Act 2008 (Regulation Activities) Regulations 2015).*

This does not go as far as the Francis report recommended: the duty extends to organisations only, and not to individuals. Instead of legislating against individuals, the government required professional regulators to strengthen their guidance for healthcare professionals. How, then, does the duty of candour affect the professional standards required of doctors, nurses and midwives?

Further guidance

Significant assistance is provided by joint guidance released by the NMC and GMC on 29 June 2015. The guidance addresses two central duties:

(i) the duty to be open and honest with patients; and

(ii) the duty to be open and honest with healthcare organisations, a duty which includes whistleblowing.

The NMC/GMC guidance gives practical information on how to implement the existing core principles (set out in *Good Medical Practice* and *The Code: Professional Standards of Practice and Behaviour for Nurses and Midwives*) in the light of the duty of candour. The professional codes, of course, already imposed duties to be open and honest when mistakes were made, and to report mistakes which could compromise patient safety. The new guidance purports to expand on those existing duties rather than create new requirements.

The NMC/GMC guidance includes references to a document which has yet to be published: the 2015 update of the GMC's *'Sanctions Guidance for the Fitness to Practice Panel'*. This is a document used by fitness panels to encourage consistency in the sanctions imposed for professional misconduct.

Sanctions

The previews of the updated sanctions guidance tells us that it will include these elements which are unlikely to come as a surprise to any professional:

(i) An apology to patients may be seen as evidence of insight (thus leading to a lower sanction);

(ii) A more serious sanction will be considered where there is evidence of an attempted cover up;

(iii) A more serious sanction will be considered where there is evidence of a failure to raise a concern.

Despite such moves to simplify and clarify the duty of candour as it relates to individuals, the subject remains complex and fraught. The Department of Health has very recently agreed to consult on changing the duty of candour regulations following a legal challenge based on the difference in wording between the duties imposed on private healthcare providers, and NHS Trusts. The results of the consultation and any change in legislation will need to be further considered by healthcare regulators to seek to ensure consistency between professional guidance, statutory requirements, and employers' policies on whistleblowing and candour.

Kate Brunner QC

Selling sex

An employment law guide

Selling sex or, at the very least, sexuality, is big business. Governments of countries other than the UK have had a far greater level of engagement between state and the industry, taking a commercial approach to the issues associated with it. Recently, for instance, Madrid has begun consulting as to whether prostitutes working on the street should be governed by the health and safety obligations applicable to street workers; the most florescent consequence would be the obligation to wear hi-visibility tabards, just like any other street worker.

In addition, even in the relatively conservative USA, a jurisdiction that shares a very similar body of contract case law with the UK, has begun to apply that body of case law to the various facets of the adult-services industry.

As a result, the writers have decided to draw together what strings there are from domestic case law, to borrow principles

from neighboring industries, in an attempt to establish what principles can properly be applied to the adult-services industry.

Union representation

Unions play a vital role in maintaining the equilibrium between employer and employee, employer and worker and engager and contractor. The difficulty with the adult-services industry is the broad church which that term represents. The other difficulty, in terms of union representation, is the fact that many workers in the industry are told, are perceived to be, and perceive themselves to be self employed. Whether or not they are self employed is to be determined by reference to case law about employment status (dealt with below), not the label one is given. Nevertheless, this perception of self employment may be one reason why wholesale and active engagement in the union is not apparent.

For further reading the writers would recommend a very informative article by *Webber* of the GMB and *Lopez*, an academic at the University of the West of England, Bristol. The article covers, in depth, union engagement with the adult-services industry, particularly the creation of the GMB Adult Entertainment Branch in 2002; the group covered the legal and semi-legal corners of the industry. The group undertook a number of initiatives, including education, and for migrant workers 'know your rights'. It is in this area that the union's endeavors may be best targeted, challenging the label, the assumption of 'self employed', for these workers at the fringes of legitimate employment.

Illegality as a defence

No comprehensive missive on the adult-services industry can sensibly ignore the domestic legal framework, both criminal and civil, in which or around which, the industry must operate. This is not a note on the criminal law but it is necessary, when assessing the employment law rules that may apply to a given role, to have some familiarity with this jurisdiction.

First and foremost, it is not criminally unlawful to pay for, or be paid for, sex. Where the criminal law becomes more active is where either, the provision of sexual services becomes more organised, for instance in a brothel, or where there is specific legislation banning the particular activity, such as street prostitution/ solicitation, and those who use those services.

Illegality is important for a worker who is trying to claim that they are employed (and claim the employment rights that follow). If the contract is illegal from inception, or it is performed in an illegal way, the notional employee may not be able to enforce his or her rights. However, it is not just the criminal law that can render something illegal (for the purposes of employment law), the operation of licensing laws, as an example, may do likewise. Let us imagine a strip club that had a strict 'knickers-on' licence condition which was routinely breached by the workers, on instruction of the management. If one party or another was seeking to enforce an employment contract, the unlawful/in breach of licence way in which the contract was performed, may render it unenforceable.

Ignorance is no defence… to the defence?

Turning to the legal framework, as a starting point *Corby v Morrison (t/a The Card Shop)* [1980] IRLR 218 and *Salvesen v Simons* [1994] ICR 409, establishes the principle that ignorance of the law cannot constitute an excuse when a party is participating in illegal behaviour. Therefore, if the party knows what they are doing, knows that they are participating but is unaware the activity is illegal, they will have difficulty in enforcing their employment rights, by claiming that they are an employee. Applying this to the case of a Madam, operating in the middle management of a brothel, it is unlikely that she would be able to enforce her employment contract rights, despite her ignorance of the criminal law.

However, knowledge and participation of the acts (that are unlawful) are not conclusively determinative. In *Hewcastle Catering Ltd v Ahmed and Elkamah* [1992] ICR 626, CA the Tribunal upheld complaints by two waiters, who claimed that they had been unfairly dismissed by their employer after being interviewed by and giving evidence for Customs and Excise, in respect of charges of fraudulently evading VAT against their employers. The waiters had been involved in the scheme, although they derived no benefit from it.

The Court of Appeal dismissed the employer's appeal argued on the basis that the general principle is that the *ex turpi* causa defence, that a contract is unenforceable on grounds of illegality, applies if in all the circumstances it would be an "affront to the public conscience" to grant the employees relief, because in doing so the court would appear to assist or encourage the illegal conduct. The court held that the illegality defence will not succeed where the employer's conduct in participating in an illegal contract is so reprehensible in comparison with that of the employees' that it would be wrong to allow the employer to rely on it.

One can easily transpose this rationale to a situation where a non-EU citizen was working in the UK as a sex worker, but was treated so poorly, was exploited so completely by his or her employer, that the ineligibility of the employee to work in the UK would not prohibit them from pursuing their employment rights under contract in the Tribunal.

Collateral illegality

The situation where the illegal acts may be collateral to the main contract was addressed in *Coral Leisure Group v Barnett* [1981] ICR 503, EAT. The Tribunal held that an employee who claimed that he was required by his employer to procure prostitutes for its clients was permitted to have his claim for unfair dismissal heard and for a decision to be reached on the facts as to whether or not public policy on enforcing immoral (but not criminal) contracts ought or ought not to prevail in the circumstances of a particular case.

The EAT held the Industrial Tribunal had erred in holding that the question whether or not to enforce an immoral contract depended upon whether, on the facts of each case, the public policy against enforcing immoral contracts so requires, and noted that it had been established that contracts for sexually immoral purposes were contrary to public policy. Notwithstanding this ruling, the EAT dismissed the appeal on the basis that the Tribunal did have jurisdiction to hear the claim and observed that a distinction must be drawn between cases in which there is a contractual obligation to do an act which is unlawful, and cases where the contractual obligations are capable of being performed lawfully and were initially intended so to be performed, but which have in fact been performed by unlawful means. The fact that a party has, in the course of performing a contract, committed an unlawful or immoral act will not by itself prevent him from further enforcing that contract unless the contract was entered into with the purpose of doing that unlawful or immoral act or the contract itself (as opposed to the mode of performance) is prohibited by law.

Discrimination actions

The rights of an employee to bring an action under discrimination legislation may be somewhat wider than under the contract of employment, even if

the employment was unlawful. Claims for discrimination are (now) brought under the Equality Act 2010 and in this context legal rights do not flow directly from employment contract. As discrimination is a form of statutory tort, the effect of the illegality on the tort action needs to be considered.

Until recently *Hall v Woolston Hall Leisure Ltd* [2000] IRLR 578, CA provided the principle guidance in this area. The Tribunal held that an employee's contract was tainted with illegality by virtue of the fact that she was receiving part of her wages without deduction of tax or National Insurance contributions, and therefore was not entitled to compensation for sex discrimination.

The Court of Appeal allowed the appeal and confirmed that the fact that a contract was tainted with illegality did not disqualify someone from bringing a claim of sexual harassment against their employers. It clarified that public policy did not prevent an employee from receiving compensation for discrimination where the contract of employment was tainted by illegality. The court gave the following guidance;

- A discrimination claim was not based on any rights or obligations arising out of a contract of employment.
- The test in such cases is whether the claim arises out of, or is so closely connected with the illegal contract that the court could not allow someone to recover compensation without appearing to condone that conduct.

In the same vein in *Wijesundera v Heathrow 3PL Logistics Ltd* [2014] ICR 523, EAT a case for sex discrimination, harassment and discriminatory dismissal were dismissed on the basis that the employee, who was a foreign national, knew that she did not have the necessary work permit. The EAT overturned the decision holding that she was permitted to make a complaint of harassment on the basis that the Equality Act 2010, the act contemplated that a person who was not an employee might successfully complain of harassment where they had applied for employment; and that the employee had no knowledge at that stage that her employment might involve illegality.

This was the law prior to the Supreme Court decision in *Hounga v Allen* [2014] UKSC 47. Unfortunately, *Hounga* has confused the situation somewhat.

The facts of *Hounga* can readily be amended to cover the all-too-common situation through which sex workers find themselves working in the UK. The employee had been knowingly brought illegally to the United Kingdom, was coerced into unpaid domestic service where she was abused, and when ejected from the house, she brought several claims for discrimination. When the case reached the Supreme Court, the only matter in issue was the employee's claim for racially discriminatory dismissal.

The Supreme Court allowed the employee's appeal against the ruling of the Court of Appeal setting aside an order for compensation awarded to the employee by the Tribunal for injury to feelings. The Court of Appeal reached this decision on the basis that illegality of the contract of employment had formed a material part of the employee's complaint and that to have upheld it would have been to condone that illegality.

The Supreme Court held that the employee's racial discrimination claim was not defeated by the defence of illegality, in light of public policy against human trafficking. The majority of the Supreme Court reached the following conclusions;

- This case required the balancing of the public policy requirement to protect immigration law and preserve the integrity of the legal system with the policy of suppressing human trafficking.
- To apply the illegality defence in this case would breach international obligations such as the UN 'Palermo' Protocol of forced labour and servitude, the Council of Europe Convention and Article 4 of The European Convention on Human Rights.
- If the 'inextricably linked' test between the claim and the illegal acts applied in this case, the employee does not fall foul of it.

The minority agreed with the decision, but disagreed with the majority on two important points:

- There was no 'public policy' test, the only test is the 'inextricably linked' test, also taking into account the seriousness of the illegality in question, the employee's knowledge and intention and the closeness of the connection. The employee succeeded in this case because there was no sufficiently close connection between her transgressions of the law and the discriminatory dismissal claim.
- The law on human trafficking was not a deciding factor in a case such as this – this employee was not covered by the conventions in question as she was arguably smuggled into the United Kingdom, rather than trafficked and had hoped to obtain something from this course of action.

Employment status: independent contractor, worker or employee?

Disregarding illegality for a moment, determining a worker's status is important in this field in order to establish what rights a worker may have under their individual contract, can they sue as a contractor, a worker or an employee. This determination may have a dramatic effect on the type and level of remedy available to the individual.

A short summary

A quick review of employment status - we know that for a contract of employment, there must be an obligation imposed on a person to provide work personally, there must be a mutuality of obligation between employer and employee, and the worker must expressly or impliedly agree to be subject to the control of the person for whom he works to a "sufficient degree". Depending on the precise interaction of these three key principles (there are of course others), an individual may be self employed, may be a worker or an employee.

It is worth noting that in the US, where the 'contract of, or contract for service' debate is underpinned by a very similar body of case law to the UK, sex workers have increasingly been recognised as employees - of course, these determinations are fact specific.

Strippers

Mutuality of obligation is what the claimant in *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735 fell foul of. The claimant lap dancer was dismissed. Her claim of unfair dismissal was initially rejected at Tribunal because she was not an employee. On appeal, the EAT found that the regular performances of work and/or by the judge's findings on the claimant's expectation of work meant that the relationship was one of employment.

The Court of Appeal, with the leading judgment from Elias LJ, found that she was a contractor, not an employee. They looked at the facts as found by the tribunal: that she negotiated her own fees with clients, worked under a contract where she accepted that she was an independent contractor, she paid her own tax, the respondent did not pay her but she paid to dance at

their venue, and she was not required to work.

Stringfellows, in this case, were particularly organised: their contract with the dancers could not have been clearer and the way that the club was managed established a distinction between employee and the self-employed. However, the case is not authority for the proposition that a stripper in a club cannot be an employee, the case was very much fact specific. Whilst most other similar venues do consider/assume their dancers to be contracted in a similar way, whether they are or aren't employees will very much depend on how they arrange their legal contracts, and how they 'deal' with their workers. The added complication is that many workers in strip clubs and similar venues report that, while they are considered, or labeled as self-employed and do, in principle, have the ability to work in other venues, they feel that they are not permitted to work elsewhere and must show up for the shifts that they are allocated, without the choice of when they work.

If the lower tribunal had decided the facts in *Quashie* differently: say that she did not have the choice of when to work and that she was required to work at Stringfellows and nowhere else, the decision faced by the Court of Appeal may have been substantially altered.

Models

Moving to consider adult models, most fashion models are considered to be self-employed. However, in *BHS Ltd v Walker* [2005] All ER (D) 146 (May), the EAT held that a fashion model, who was 'at all material times self-employed' fell within the wider definition of an employee contained in Section 82 of the Sex Discrimination Act 1975, but only at such times as the claimant was actually engaged on photo shoots for BHS.

The case involved a model, Ms Walker, who had been supplied by Premier Model Management to BHS for a (non-adult) photographic shoot as part of its advertising campaign. Ms Walker complained that she was sexually harassed by the photographer, before, during and after the photo shoot and brought claims under the SDA against the photographer, BHS and the Agency. It was held that the photographer had sexually harassed Ms Walker and that BHS were vicariously liable for those acts.

Actors

For porn actors, the question has been thrown wide open by *MacAlinden (t/a Charm Offensive) v Lazarov and Ors* UKEAT/0453/13/JOJ. In that case, the widely held assumption that actors fell within the definition of "workers" was called into question by the EAT. The claimants in this case were inexperienced actors who applied for roles in a play at St Leonard's Church, Shoreditch, London. Their pay was to be a profit share of the producer's profits. It soon became apparent from audience numbers and the number of members in the cast that, if there was a profit, the actors' share of it would be minimal. The claimants signed an 'actor's contract' which set out the parameters of the relationship concerning working hours and days, place of work and remuneration (namely profit share). The actors claimed that they should have been paid the national minimum wage and holiday pay. The employment judge upheld their claim.

On appeal by the producer, the EAT held that the employment tribunal had not approached the question of worker status correctly (having used an IDS brief handbook rather than any legislation or case-law). The Tribunal should have examined the way the claimants carried out their work: whether they actively marketed their services as an independent person *"to the world in general, picking up or attempting to pick up work where available from a variety of sources, this may be a powerful indication that they were not workers"*. The case has been remitted to a fresh tribunal for reconsideration.

The writer queries whether the government had this issue in mind when they changed the National Insurance status of "entertainers" (persons who are employed as actors, singers, musicians or in any similar performing capacity) from 6 April 2014. They are now categorised as self-employed for national insurance purposes.

Remedies

While the majority of remedies seem straightforward, a number of issues arise in this industry because of the nature of the work required. For adult models, porn actors and glamour models, they may find themselves in a similar situation to actors, musicians or dancers: what they really want from their claim is the ability to keep doing their job/the contract they were supposed to perform, or to do it free from harassment.

In *Ashworth and others v Royal National Theatre* [2014] EWHC 1176 (QB), the claimants were professional musicians who had been engaged by the defendants to play instruments on stage as a military band in the acclaimed production War Horse. The defendants decided to change to recorded music and gave the claimant notice of termination of their contract on the grounds of redundancy.

The claimants brought proceedings for breach of contract but also for an interim injunction or specific performance to require the defendants to continue to engage them in the production until trial of their claim. The judge held that the loss of confidence in such a contract was fact-specific and that the production of a play entailed close co-operation between all those involved. There was clearly an absence in personal confidence on the part of the defendants. There was also a clear engagement in the Article 10 right of freedom of artistic expression of the defendants. The relief could not be granted as it would be essentially the court dictating how the play could be produced.

Conclusions

The fact that sex workers, workers in adult services are often seen to be on the periphery of legitimate employment has meant that there is a dearth of directly applicable case law to assist the workers and their employers in determining what their status is, or may be. The unions have a part to play, traditionally, the unions have been at the forefront of employee rights and protections, and there is an opportunity for a union, or more than one of them, to take the initiative.

The case law selected as part of this article has, by necessity, been chosen 'by analogy'. The writers hope that it will be of assistance. Cases have been chosen where the role concerned can be readily substituted for a role in the sex industry, for this reason proper principles can be discerned.

Illegality as a defence to employment claims is a fast developing area of law. *Hounga* is an unsatisfactory judgment and leaves the law in a state of flux. Lord Hodge (who was one of the panel on *Hounga*) speaking recently at Albion's Employment and Professional Disciplinary seminar acknowledged the difficulties *Hounga* causes and expressed the view that further authority was required. The writers wait with interest.

Richard Shepherd
Erinna Foley-Fisher

Scotland moves to abolish tribunal fees as Court of Appeal rules against Unison

Nicola Sturgeon is nothing if not an opportunist. The ink had barely dried on the recent Court of Appeal judgment in *Unison v The Lord Chancellor* [2015] EWCA Civ 935 before the First Minister for Scotland was printing copies of her new Programme for Government 2015-16 which, among other things, promises to abolish fees for employment tribunals, "ensuring that employees have a fair opportunity to have their case heard".

The exact details of her proposals are never fleshed out in the 85-page document, although of course they don't need to be. While it took a four-part Act to introduce the fees, scrapping them is much simpler. Under the devolved powers promised in the Scotland Bill, the country will have greater autonomy over the Employment Tribunal system, and the ability to abolish fees.

The timing of such action is the great uncertainty. At best it can be described as a stated intention, but with the Scotland Bill yet to go through Parliament, the abolition of fees in Scotland could be some way off. Even if the powers currently proposed were to feature in an eventual Scotland Act, the Scottish Government has said that fees would only be abolished "when we are clear how the transfer of powers and responsibilities will work". That may take time.

Meanwhile, Unison has indicated its intention to appeal to the Supreme Court following the Court of Appeal's rejection of their latest appeal. Interestingly, the Court of Appeal's reasoning differed slightly from the High Court, in a manner which may give Unison hope for the future.

Unison had put their case on various occasions before the High Court based on two categories of evidence: notional claimants and actual claimants. On the first occasion the High Court had dismissed the claim because it ruled that the idea of notional claimants was not a proper evidence basis, and there needed to be evidence of how the scheme was operating in practice. As it was too soon for that data to be available, the claim was destined to fail.

The Court of Appeal differed slightly. Underhill LJ said, "I see no reason in principle why well-constructed cases of notional claimants could not be used to assist in proving that the fees would be realistically unaffordable for at least some typical claimants".

The hurdle that must be overcome, of course, is the discretion of the Lord Chancellor to direct a remission of the fees where he is satisfied there are exceptional circumstances for doing so. The Court of Appeal placed significant emphasis on this aspect saying, in effect, that if a claimant couldn't afford to pay the fees because they were too high, then the exceptional circumstances provisions would operate to ensure fairness.

It seems that whether by political pressure, legislative reform or judicial review, the race is now on to find a way to abolish the tribunal fees which have had such a dramatic effect on the number of recent claims. Practitioners will hope it is not achieved too late.

Alexander West

Holiday season

Wednesday, 1 July 2015 will be remembered as the hottest July day ever recorded in the UK, with temperatures in London being higher than in both Rome and Athens. It also saw the limiting of claims for backdated holiday pay to a two year cap. And whilst BBQ season was well under way and British holidaymakers were wondering whether they should be staying at home for their 'two weeks in the sun', the courts were busy considering further issues relating to annual leave and holiday pay.

Backdating claims

Section 23 of the Employment Rights Act 1996 was amended by regulation 2 of the Deduction from Wages (Limitation) Regulations 2014 by the inclusion of new subsections (4A) and (4B):

"(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j)."

Regulation 4 provides that the amendment made by regulation 2 only applies in relation to complaints presented to an employment tribunal on or after 1 July 2015.

The amendment to section 23 was brought in as a direct result of the EAT's highly publicised decision in the case of *Bear Scotland Ltd and others v Fulton and others* [2015] IRLR 15. Most press reports at the time suggested that as a result of that decision overtime must be included in a worker's holiday pay. Strictly, however, the Bear Scotland was not concerned with purely voluntary overtime. Langstaff J drew a distinction between "voluntary overtime", being overtime which an employer asks an employee to do but which the employee is free of any contractual obligation to perform unless he agrees at the time to do so, and "non-guaranteed overtime", which an employer is not obliged to offer but, if offered, an employee is contractually required to work (guaranteed overtime is that which an employer is obliged by contract to offer as overtime; the employer is obliged to pay for it even if there is none available to offer at the time). The EAT's decision was that *British Airways plc v Williams* [2012] IRLR 1014 did apply to the Working Time Regulations and covers non-guaranteed overtime (subject to a temporal component as to whether payment has been made for a sufficient period of time to justify being labelled "normal pay").

Patterson v Castlereagh Borough Castle

Following *Bear Scotland*, some commentators opined that the decision,

far from excluding it, supports an argument for voluntary overtime to be included by an employer in the calculation of normal pay for statutory annual leave under regulation 13 of the WTR. That question has now been considered, albeit somewhat cautiously, by the Northern Ireland Court of Appeal in the case of *Patterson v Castelereagh Borough Council* [2015] IRLR 721. Mr Patterson, a plant engineer, argued that voluntary overtime that he regularly worked should be included in the calculation of his statutory holiday pay. At first instance, the industrial tribunal rejected this part of his claim. It held that, following the decision and reasons in *Bear Scotland*, Article 7 of the Working Time Directive did not require the inclusion of Mr Patterson's voluntary overtime in the calculation of his normal remuneration. On appeal, the NICA held that the industrial tribunal had erroneously determined that voluntary overtime could not as a matter of principle be included in the calculation of holiday pay for the purposes of the WTR.

The case is not binding in England and Wales although it will be of persuasive authority. The Court, though, did not hear full argument on the point as the Respondent's Counsel conceded that the Tribunal had fallen into error on the point of principle. The Respondent's argument, rejected by the Court of Appeal, was that the Tribunal had not in fact fallen into such error but had simply found that Mr Patterson had failed to establish factually the earnings he received pursuant to voluntary overtime and therefore the Tribunal had dismissed his case on the basis of a simple factual finding on the evidence, or rather on the lack thereof. Nevertheless, the NICA concluded that, in the light of *Bear Scotland, British Airways v Williams, Lock v British Gas* [2014] IRLR 648 and the opinion of the Advocate General in the *Williams* case before the CJEU ([2011] IRLR 948), the Respondent's Counsel had been correct to concede that there was no reason in principle why voluntary overtime should not be included as a part of the determination of entitlement to paid annual leave. No guidance was given by the Court as to the test an employer needs to apply in determining what is a sufficiently representative reference period, the Court saying that it will be a question of fact for each tribunal to determine whether or not voluntary overtime was normally carried out by the worker and carried with it the appropriately permanent feature of the remuneration to trigger its inclusion in the calculation.

Carrying over annual leave

In *Plumb v Duncan Print Group* [2015] IRLR 711, the EAT (Lewis J) considered two principal issues that arose in light of the case of *NHS Leeds v Larner* [2012] IRLR 825. In Larner, the principal issue was whether an employee must make a request to take sick leave or carry it forward and whether, if no request was made, the annual leave was lost. The Court of Appeal held that no such request was required. It also observed that it would be possible to interpret regulation 13(9) of the WTR to be compatible with Article 7 of the Working Time Directive so as to allow annual leave to be carried over to a new leave year "where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave...."

The first issue considered by the EAT in *Plumb v Duncan Print Group* was whether an employee on sick leave was required to establish that they were not able to take annual leave by reason of their medical condition or whether it was sufficient that they were absent on sick leave and did not choose to take annual leave during the period of sick leave. The EAT held that Article 7 does not require an employee to show that he/she was unable to take the leave by reason of sickness. In Lewis J's judgment, the Court of Appeal in *Larner* was not seeking to lay down a principle of law that an employee must be able to demonstrate that they are physically unable to take annual leave before they are treated as being unable to exercise the right to rest and relaxation encompassed within the right to take annual leave. The language used in the Court of Appeal's judgment simply reflected the factual situation in *Larner*. Lewis J held that the real underlying concern in the case law is that an employee should not be able to accrue annual leave over a number of years and then seek to take that leave many years later even when the taking of annual leave no longer reflected the aim of ensuring that a person had a period of rest and relaxation from work for health and safety purposes. As Lewis J explained, national law is entitled to impose certain limitations on the ability of an employee to carry over periods of accrued annual leave. "The problem is....properly to be addressed by consideration of the limitations that may be imposed on carrying-over leave, not by the adoption of a restrictive approach to the circumstances governing the acquisition of the entitlement to take annual leave."

That brings us to the second principal issue considered by the EAT: "is there any limitation on the period for which an employee may take unused annual leave accrued in one leave year in later years?" On this issue, the EAT held that it is clear from the wording and purpose of the Working Time Directive and the case law of the CJEU that national law is not required to permit unused leave to be carried over and claimed in subsequent years without limit. Rather, it is clear, that, at most, the Directive requires that employees who are on sick leave during a leave year may, if they wish to, take their annual leave within 18 months of the end of the leave year in which it is accrued and that national law may impose shorter periods. Regulation 13(9) should be read as follows: "Leave to which a worker is entitled under this regulation may be taken in instalments but, - (a) it may only be taken in the leave year in respect of which it is due *save that it may be taken within 18 months of the end of that year where the worker was unable or unwilling to take it because he was on sick leave and, as a consequence did not exercise his right to annual leave"* (with the exception read in the Court of Appeal in *Larner* in and the additional words reflecting the extent of the exception underlined). The EAT held that the Claimant was entitled to payment in lieu of annual leave for 2012 but not for 2011 or 2010.

Simon Emslie

Albion Chambers
Employment and Professional Disciplinary Team

Team Clerk
Stephen Arnold

Ignatius Hughes QC
Call 1986
QC 2009 Recorder

Adam Vaitilingam QC
Call 1987
QC 2010 Recorder

Kate Brunner
Call 1997 QC 2015
Recorder
Upper Tribunal Judge

Nicholas Fridd
Call 1975

Robert Duval
Call 1979

Stephen Mooney
Call 1987

Fiona Elder
Call 1988

Paul Cook
Call 1992 Recorder

Nicholas Sproull
Call 1992

Alan Fuller
Call 1993

Giles Nelson
Call 1995

Jason Taylor
Call 1995

Sarah Regan
Call 2000

Richard Shepherd
Call 2001
Team Leader

Stephen Roberts
Call 2002

Fiona Farquhar
Call 2005

Monisha Khandker
Call 2005

Simon Emslie
Call 2007

Erinna Foley-Fisher
Call 2011

Alexander West
Call 2011

Alexander Small
Call 2012