CHARTERGATES

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Dewhurst v Citysprint UK Ltd

Introduction

There has been considerable recent media interest in the so-called 'gig economy'. The use of 'zero hours' contracts, the treatment of agency workers by companies including Sports Direct and the miss-classification of workers as independent self-employed contractors have all attracted significant attention. With regard to the last issue, we reported back in October 2016 on the decision of the Employment Tribunal that a group of Uber drivers in London were 'workers' rather than being self-employed, as Uber had claimed. Uber has stated that it intends to appeal the decision.

The Dewhurst case - general

The London Central Employment Tribunal has recently decided another employment status case with some similarities to the Uber case. In *Dewhurst* v *City Sprint UK Ltd*, the Tribunal found that whilst the Claimant, Ms Dewhurst, a bicycle courier, was not an employee of City Sprint, she did fall into the hybrid category of 'worker' and that she was therefore entitled to the holiday pay that she was claiming. The right to paid holiday is one of the more limited employment rights that derive from the status of 'worker' as opposed to the full suite of employment rights enjoyed by those who are employees.

As with the Uber case, those representing and backing Ms Dewhurst have proclaimed her victory as ground breaking and a 'game changer' for employers in the 'gig economy' whereas Citysprint have said that the judgement applies only to her and that the implications for its wider business (and by implication for other employers engaging self-employed contractors) are therefore limited.

Perhaps unsurprisingly the truth lies somewhere in the middle and it is useful to look at exactly why Citysprint lost at the Tribunal in order to establish the potential significance of the case for our clients. Before doing so however, it is important to note that, like the Uber case, Dewhurst is a 'first tier' decision of an Employment Tribunal and does not therefore change the law on employment status and it is not binding on any future Tribunals.

Why did Citysprint lose?

In Dewhurst the Claimant accepted that if the actual agreement between her and Citysprint was as set out in the written terms they had purported to agree that she could not be a worker. However, in its judgement the Tribunal applied the decision in the key employment status case of *Autoclenz* in which the Supreme Court found that if the terms of a contract do not reflect the reality of the situation then the Tribunal is entitled to treat the contract as a sham. If it decides that the contract is indeed a sham, the job of the Tribunal is then to set aside the written terms of the contract and to establish for itself what was the true agreement between the parties. In this case the tribunal concluded that Ms Dewhurst was a worker and

not an independent self-employed contractor as set out in her contract with Citysprint. In reaching its decision the Tribunal took the following factors into account:

- Couriers underwent a two day recruitment and induction procedure rather than tendering for business. Once the procedure was passed however, couriers were issued with an eight-page document entitled "Confirmation of Tender".
- As part of the interview/induction process potential couriers completed a standardised electronic 'tick list' of statements designed to emphasise the self-employed nature of the work.
- Couriers had no discretion as to the manner in which they carried out their work, this was dictated to them by Citysprint.
- Although Citysprint operated a self-billing system in practice individual couriers did not "touch the invoice from beginning to end".
- The substitution clause in the contract was "contorted and self-destructive" as a result of Citysprint clearly not really wishing to allow couriers to send substitutes to protect their brand image whilst at the same time realising the necessity of such a clause to be effective in order to show that there was no requirement for 'personal service', a key requirement for employee or worker status.
- There was no evidence provided of any substitutes being sent in practice and the reality was, given that the substitution clause effectively restricted substitution to existing Citysprint couriers, that there would never be any reason for a courier to send a substitute; rather the work would simply be allocated to another courier.
- Couriers were provided with key equipment and required to wear uniforms.
- Although the terms of the contract allowed couriers to choose when to work, in practice couriers worked regular days and were expected to be available to work on those days.
- Although the terms of the contract allowed couriers to choose whether or not to accept any individual delivery job, once couriers were "on circuit" (signed in to Citysprint's systems and available for work), couriers did not refuse jobs as they believed that this would have a negative effect on their being offered further work.

In addition to the above, Ms Dewhurst was primarily engaged to deliver medical supplies for which she was required to have individual personal identification and to be registered on the IT systems of Citysprint's client. It would also have been a breach of the contract between Citysprint and their client for her to have sent a substitute. Finally, a somewhat telling piece of evidence presented to the Tribunal was a recording of a Citysprint courier controller talking to another courier and describing the idea that couriers were actually self-employed as "bullshit" and that if they were genuinely self-employed that Citysprint "….wouldn't have a business would we really".

Summary

As stated above and like the Uber case, the Dewhurst judgment does not change the law on 'worker' status. It does however, implement the current law including the Supreme Court judgment in *Autoclenz*. As both judgements make clear there is a danger in a reliance on arrangements or agreed documentation that do not reflect the reality of the situation. Where a party does agree or implement sham arrangements then a Tribunal will be entitled to ignore the arrangements or documentation.

This case is yet a further reminder that where a party agrees contracts with clients and/or operatives they must ensure that the terms they agree are a genuine reflection of the reality of arrangements. For example,

if it is agreed that a substitute can be sent (with a client and operative) and in reality a substitute cannot be sent then a Tribunal may find that the clause (and the contract) is a sham.

In short, the lesson from the Dewhurst case is not a new one. Don't agree terms or create artificial arrangements which do not reflect what is happening in practice. If you do, a Tribunal may well find it is a sham and they will be disregarded.

Citysprint have not stated whether or not they will appeal but in any event given the nature of the judgement against them we do not believe an appeal would have any great prospect of success. There are a further 3 similar cases due to be heard in March/April 2017 against other courier companies which we will, of course, report on in due course, as well as any appeal by Uber.

If you would like any further advice on the issue raised in this newsletter, or any other aspect of employment law, please contact a member of the Chartergates team.

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