

ARTICLE: Paperboy found not to be employee

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Introduction

The parents of a paperboy recently took his former employer to Tribunal after he ceased working for them. Having examined the terms and practice of the work in light of the Children & Young Persons Act 1937, the Employment Appeal Tribunal (EAT) concluded that the paperboy could not be an employee. This article follows on from our previous article on the DCSF's guidance on the employment of children:

http://www.davidsonlargelaw.com/downloads/nov09employing_children.pdf

The facts

From the age of 14 to 15, the Claimant was a paperboy working for Sturry News (at the time owned by Mr Cole, subsequently taken over by Miss Palmer – the Respondent). The Claimant attended school and was using the paper-round to supplement his pocket money until he was 16 years old and could get a job in a supermarket.

There was no written contract, only a verbal agreement. The Claimant got paid £18 per week for delivering newspapers to 12-13 houses. He was given a trolley at the weekend to carry the newspapers and a bag during the week when he delivered them on his bike. It took him less an hour each day to complete his round. He subsequently undertook additional deliveries, for which his pay increased to £20. This level of payment was maintained even when the additional deliveries stopped.

On 16 August 2008, the Claimant and another paperboy were asked to turn up at 6.30am, although it was not intended for them to start deliveries until 7am (the earliest time permitted by the Respondent's Child Employment Permit). The Claimant's mother misunderstood this arrangement and there was an altercation between her and the Respondent. After this the Claimant ceased work, despite an offer to re-employ him. The Claimant, through his father, brought claims of unfair dismissal, breach of contract and age discrimination (although the latter was not, in the end, pursued due to the parents' misunderstanding of the law).

The Tribunal's decision

The Tribunal examined the essential features of the arrangement:

- there was no obligation on the Respondent to provide the Claimant with work;
- there was no obligation pay him if he did not work (for example, if the papers were not delivered to the shop and he could not do his round):
- there was no obligation to pay if the Claimant was sick or on holiday:
- the Claimant could take as long as he wanted to complete his work – it did not affect how much he got paid:
- if the Claimant failed to turn up, the round was covered by one of his colleagues and the Respondent was not concerned if this happened. The Claimant was expected, as a matter of courtesy, to telephone if he was not going to turn up but it did not matter if he did not and the Respondent would arrange for someone else to do the round;
- if the Claimant did not turn up, he would not be subject to any disciplinary sanctions,

and there was no provision for raising grievances.

It was restated by the Tribunal that mutuality of obligation and control are the “irreducible minimum” requirements for an employment contract to exist. Personal service and the right to send a substitute was also relevant (see our previous articles at <http://www.davidsonlargelaw.com/downloads/jul09substitutionandsham.pdf>)

With these principles and the facts of the case in mind, the Tribunal held that the Claimant was not an employee and so could not claim unfair dismissal.

The EAT’s decision

The EAT stated that the difference between an employment contract and a contract for services was not uncontroversial and repeated the three conditions which must be present for an employment contract to exist (the “irreducible minima”):

- The individual agrees, in return for a wage or remuneration that he will provide his own work and skill in the performance of his duties
- The individual is subject to an element of control in the performance of his services
- The other provisions of the contract are consistent with an employment contract

The EAT also considered the Children & Young Persons Act 1933 (CYPA), which dictates what type of work a child might carry out (see our previous article above). It described a “bold” submission put to them by the Claimant that the effect of section 18 of the CYPA was that a child might not undertake work unless he or she became an employee, since that would be the only way to ensure children were protected by way of risk assessment in relation to hours, breaks, etc. This was rejected by the EAT.

When asked to conclude whether the finding of the Tribunal in relation to the obligation of the Respondent to provide the Claimant with work was wrong, the EAT was reluctant to comment conclusively since they did not have the evidence before them that was before the Tribunal. However, it was more sure when it came to the issue of whether there were mutual obligations. There was clear evidence that, even should the Respondent be obliged to provide work, the Claimant was not obliged to accept it. As such, there could be no mutuality of obligation and no contract of employment.

Conclusion

The EAT was asked to bear in mind the consequences of its decision on other paper boys and girls throughout the country, as well as wider issues such as employers’ compulsory liability insurance. However, it commented that it did not see this as a suitable test case and emphasised that any case involving the employment of children is likely to be fact-specific.

Nevertheless, this shows employers of those under the age of 16 that if there is truly a “casual” relationship in place with no mutual obligations, then a child will be a worker rather than an employee. It is possible that other cases will follow, given that the EAT stated this was not a suitable test case. There is also a question of, if a child is held to be a worker, even a casual one, whether they may be entitled to holiday pay (something which was not argued here).

In any event, the area of employment of children is still a complex one and legal advice should be sought if there is any confusion or concern about the working arrangement.

If you would like further information on this case, please contact David Hill at dhill@davidsonlarge.com or Lucy Bond at lbond@davidsonlarge.com.

Royal House
110 Station Parade
Harrogate
North Yorkshire
HG1 1EP

† +44 (0)1423 727272
f +44 (0)1423 727200
e info@davidsonlarge.com
dx 25520 Harrogate
w www.davidsonlarge.com



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