CIVIL PENALTY NOTICE APPEALS – ILLEGAL WORKING VS ILLEGAL EMPLOYMENT

CIVIL WATCH – PRACTICE NOTE

As part of Goldsmith Chambers' Civil Watch series, Emma Harris, a Civil, Immigration and Public law practitioner, provides useful insights for businesses on appealing against civil penalty notices for employing illegal workers.

INTRODUCTION

1. In what may amount to good news for small businesses, our client's civil penalty was cancelled after a recent successful appeal on the basis that the illegal worker was not an employee despite engaging in work and receiving remuneration. Though the decision is unreported, it brings the definition of "employee" under the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act") in line with the definition in section 230 of the Employment Rights Act 1996 and rejects a proposed definition by the Secretary of State that was far broader in scope.

2. Section 15 of the 2006 Act requires employers to step into the shoes of border officials by conducting right-to-work checks on prospective employees. Failure by the employer to carry out these checks can have severe financial and reputational consequences.

3. A single first offence for employing an illegal worker carries a starting penalty of £15,000, increasing to £20,000 per worker for a second offence. Self-reporting to the Secretary of State reduces the fines; a £5,000 reduction if an employer self-reports the illegal worker to the Secretary of State and a further £5,000 if the employer "actively co-operates" with the Secretary of State's investigation.

4. If an employer has qualified for both of these reductions and can demonstrate that they have effective right-to-work checking practices and procedures then they can also qualify for a further £5,000 reduction.

5. Employers risk reputational damage from civil penalty notices as Immigration Enforcement routinely publishes lists of businesses that have been issued with penalties, to include the amount of penalty imposed.

6. When a civil penalty notice is issued, a business must be informed of the payment deadline and accepted payment methods. It is usually possible for businesses to pay in instalments. The notice will also usually offer a discount of 30% for payment within 21 days under the "Fast Payment Option".

7. It is important for business to understand that payment of the penalty does not constitute an admission that the penalty has been properly imposed; an employer is perfectly entitled to pay and take advantage of the discount and, at the same time, to object and appeal against the penalty.

CHALLENGING A CIVIL PENALTY NOTICE

8. A business that disagrees with a penalty must first submit an objection to the Secretary of State if it[1]:

    - denies that it is liable to the imposition of a penalty at all;
    - has a statutory excuse under section 15(3) of the 2006 Act because it can show that it complied with the prescribed requirements; and/or
    - considers that the penalty imposed is too high because it qualified for one or more of the reductions.

9. If the Secretary of State does not concede to the objections, then the business has a right of appeal under section 17 of the 2006 Act.

10. Section 17(3) of the 2006 Act provides that:

    > "An appeal shall be a rehearing of the Secretary of State's decision to impose a penalty and shall be determined having regard to
    >
    > - The code of practice under section 19 that has effect at the time of the appeal (in so far as the appeal relates to the amount of the penalty) and
    > - Any other matters which the court thinks relevant (which may include matters of which the Secretary of State was unaware);
    >
    > And this subsection has effect despite any provision of rules of court."

11. An appeal against a civil penalty notice is usually heard in the County Court. The business does not require permission to bring the appeal. The Court is not limited to considering errors of law or public law grounds of challenge; appeals under these provisions are like trials where the judge may make findings of fact on the evidence presented (which will normally include live evidence from witnesses).

12. To date there have been very few reported cases on this relatively new area of law and to some extent the Courts handling such cases are still grappling with the appropriate tests to apply.

[1] Section 16(1) IANA 2006

13. The persuasive Scottish case of *Mohammed v AG for Scotland* [2017] SC LIV 23 addressed the factors that a Court may consider and in *SSHD v Akbar* [2017] 1 WLR 1055, in addition to confirming that the Court of Appeal does have the jurisdiction to hear second appeals from the County Court in these cases, it also established that the burden of proof is on the business to show that it is not liable to pay all or part of a penalty.

14. There is, however, no clear guidance from the courts on the type of work that must be carried out by someone without the right to work in the UK to attract liability for a civil penalty notice. This was one of the issues in our appeal.

ILLEGAL WORKING VS ILLEGAL EMPLOYMENT

15. We argued, successfully, that the legislation does not give the Secretary of State free license to impose a civil penalty notice for all kinds of work, and specifically, that a penalty should not be imposed where there is no employer/employee relationship.

16. Under section 15(1) of the 2006 Act:

> "(1) It is contrary to this section to employ an adult subject to immigration control if—
>
> (a) he has not been granted leave to enter or remain in the United Kingdom, or
>
> (b) his leave to enter or remain in the United Kingdom—
>
> (i) is invalid,
>
> (ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or
>
> (iii) is subject to a condition preventing him from accepting the employment."

17. In accordance with section 25(b) of the 2006 Act:

> "(b) a reference to employment is to employment under a contract of service or apprenticeship, whether express or implied and whether oral or written."

18. It was my submission that this wording was carefully chosen to mirror the definition of "employee" contained within section 230 of the Employment Rights Act 1996 which provides as follows:

"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

19. Aikens LJ in the case of *Autoclenz Ltd v Belcher* [2009] EWCA Civ 1046 at [74] (as later endorsed by the Supreme Court) described the factors that must be met in order for an employer/employee relationship to be established:

> "In essence there are four basic requirements that must be fulfilled before it can be said that there is a contract of employment and so a relationship of employer and employee. First, the employer must have undertaken to provide the employee with work for pay. Secondly, the employee must have undertaken to perform work for pay. Those obligations are mutual. The third requirement is that the employee must have undertaken to perform the work personally; he is not entitled to sub-contract the work to another. Fourthly, it is also generally accepted that there is a further requirement before a court will hold that there is a contract of employment between employer and employee, i.e. that the employee agrees that he will be subject to the control of the employer to a certain minimum degree. These obligations have been described as the "irreducible minimum" to produce a contract of employment: Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612 at 623 per Stephenson LJ."

20. In our client's case, Immigration Enforcement attended their office and found Mr Q sat behind the front desk. It was accepted that he had no right to work in the UK. Our client's case was that Mr Q was a friend of one of the employees of the business and that he had only been helping out in the office which was a very sociable environment where family and friends would often congregate and eat together. The client's evidence showed that even people who were unconnected with the business would answer the office phones if staff were busy or on a lunch break. It was admitted that Mr Q would answer the phones and that his friend would give him some food or some money out of his own pocket when Mr Q was in the office and helping out.

21. It was clear that Mr Q had engaged in some work activity in the office. It was also clear that he had, on most of those occasions, been remunerated in some way.

22. The Secretary of State argued that the definition of employment within the 2006 Act was far broader than the definition within employment law and that its ultimate intention was to catch in its net all those who were illegally working and, by extension, all of those businesses that they were illegally working for.

23. The Judge in our case agreed that something more was required than mere evidence of work and remuneration for a civil penalty to apply. An

employer/employee relationship including a mutuality of obligation, i.e. an obligation on an individual to work and an obligation on the employer to provide or pay for that work, must be present.

24. The Judge particularly noted that:

> "where an individual is working but doing so as a favour to the other party and is doing so on days and times which the individual chooses, and where the individual has no obligation to work or to follow requests or orders, it would not be employment."

25. As a result of this finding, the appeal was allowed and the penalty was cancelled.

CONCLUSION

26. Although this was not a reported case, it follows from this that a business should only be liable for a civil penalty notice if they have employed an illegal worker *as an employee*. It appears to be open to a business to challenge a civil penalty where an illegal worker has worked for the business voluntarily, on a casual ad hoc basis (even where they have been remunerated), or on a self-employed basis.

27. Whilst the worker may be working unlawfully in most of these scenarios, the outcome in our client's case aligns with overarching policy considerations. It would be far too onerous to require businesses to carry out right-to-work checks on every person that the business has dealings with or obtains a service from without an established employer/employee relationship defined by an offer of formal or informal employment.

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