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Mutuality of obligation, and why Gorman v. Terence Paul (Manchester) Ltd. doesn't actually change a thing

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It has now been a few weeks, months even, since the significant media coverage and subsequent commentary surrounding the Tribunal's decision that an ostensibly self-employed hair stylist was, in fact, not. Although the dust has mostly settled, I am still asked about the implications for salons generally, and whether their stylists are now to be considered employees.

The 'rent-a-chair' model is one that is widely adopted, and which now seems under threat. My answer to questions about the consequences of the *Terence Paul* decision for 'rent-a-chair' is that, not only was it a case determined on its own facts, but that the Tribunal did not deal squarely with that issue, meaning that it provides no wider guidance on the point.

At the core of any salon's case, and Terence Paul's was no different, is that 'rent-a-chair' deprives any arrangement with its hair stylists of mutuality of obligation, and without mutuality of obligation, there can be no contract let alone a contract of employment. The manner in which 'rent-a-chair' operates is that the salon may or may not direct customers wishing to book an appointment to a particular stylist. The only payment that a stylist receives is that which their customers pay for the particular treatment received, or it may be a percentage of that payment. Importantly, no payment ever emanates from the salon itself, it only ever passes through. If there is never any obligation on the part of the salon to either provide work, or on its part to give the stylist its own money for his or her services, any claim to employment status falls at the first hurdle.

The importance of this obligation as a foundation to employment status is traceable back to *Ready Mixed Concrete* in which mutual obligations (to work for consideration), personal service, and control were identified as the irreducible minima, to be identified by a Tribunal before going on to examine and assess all other relevant factors to determine the classification of the contract between the parties.

It was a lack of obligation in the pay arrangements that undermined employee status in *Stringfellow Restaurants Ltd. v. Quashie*. Whilst there were obligations on the claimant lap dancer to work certain days, and there was not insignificant control exerted by the respondent 'employer', she was never paid by that company. Payment was made by the respondent's customers to her in the form of vouchers, which the claimant paid into a safe at the end of her shift. The respondent then converted those vouchers into cash and paid that to the claimant, less deductions it was entitled to make. However, again, the respondent never paid the claimant, nor did it have an obligation so to do. As a result, the claimant could not be an employee.

Granted, there is a distinction between the pay arrangement in that case, and the 'rent-a-chair' pay arrangement. In the former, the claimant collected her fees direct, and was free to negotiate them. She made her own money, and accounted for commission later. In the latter, the stylist is potentially bound by the salon's price list, and it is the salon that collects the fees and passes them on. That distinction is of little importance when one considers *Cheng Yuen v. Royal Hong Kong Golf Club*. In that case, the Judicial Committee held that a golf club caddie was not an employee in circumstances in which his fees were fixed by the golf club, collected by it, and passed on to him. Although he had to adhere to terms dictated by the club, and was required to wear a uniform, the fact that the club had no obligation to give him any work or pay him anything other than pass on the amount owed by the individual golfer from whom he had caddied meant that the arrangement amounted to no more than a licence by which he was permitted to offer himself as a caddie for golfers.

The employer acting as conduit for payment of fees apparently does not create an obligation to pay. However, the Employment Appeal Tribunal in *Quashie* suggested that that was not the case. It said that there *was* an obligation to pay the claimant, and the fact that payment ‘came about as a result of the [c]laimant obtaining vouchers from a customer is simply an expression of how business works when collection of moneys is in the hands of an employee of an employer. The fact that her pay came indirectly through vouchers from the customers is not material’. On the respondent’s appeal, the Court of Appeal corrected that, stating that the EAT was not entitled to conclude that the arrangement was no more than a mechanism whereby the respondent discharged its obligation to pay the claimant.

It is clear, then, that an arrangement whereby the only payment an individual receives is that which comes from a customer does not give rise to an obligation on the part of a would-be employer to pay. It would therefore follow that ‘rent-a-chair’, assuming that it is operated genuinely i.e. is not a sham to pay wages by another means, must also fail to give rise to employment status for the same reason, falling in line with *Cheg Yuen* and *Quashie*. As can also be seen from those cases, it matters not what appearance the other factors give to the relationship.

So why does the ‘landmark’ decision in *Gorman v. Terence Paul (Manchester) Ltd.* not, as the title says, change anything? The answer is that it does not engage with the issue at the core of the ‘rent-a-chair’ model – the issue highlighted above. The Tribunal was referred to *Quashie*, but there is no discussion within the judgment of the impact of that decision on the circumstances of the case before the Tribunal. The judgment records that the Claimant receives one-third of customers’ payments to the salon. That is not suggested nor found to be a sham arrangement to disguise an obligation to pay. It is accepted that the Claimant was genuinely only paid by reference to what customers paid for her services.

There are two references in the judgment to the Respondent having an obligation to pay (there are no findings that there was an obligation on the Respondent to provide the Claimant with work). The first is at para. 39: ‘The claimant was obliged to work on any clients booked for her and the respondent then was obliged to pay her for the work done’. It is not understood that the reference to ‘obliged to pay’ is intended to be anything other than the obligation to pass on the one-third of the customer’s payment. If it is anything other than that, the Tribunal does not explain the origin of that standalone obligation to provide the Claimant a wage. It is also inconsistent with the Tribunal’s second reference to the Respondent’s obligation to pay, which is at para. 45 of the judgment: ‘The respondent was obliged to and did pay the claimant the balance of its charges, after the two thirds deduction’.

In short, the Tribunal accepted, and it was not in dispute, that the Claimant was only paid one-third of anything that a customer paid for her service. It was therefore accepted that the Respondent did not pay the Claimant any more or less. The Respondent did no more than pass on fees from the customer to the Claimant. Whether or not that particular payment structure gave rise to a contractual obligation on the part of the Respondent to pay the Claimant (in the sense required for there to be obligations of the type that give rise to an employment relationship) fell to be considered. Whilst the payment method was not factually in dispute, the legal effect was highly significant. It potentially undermined employment status entirely. Without the vital underpinning of an obligation on the Respondent to pay the Claimant, there could be no employment status. The

Tribunal need not have considered the classification of the contract without first addressing the effect of *Cheng Yuen* and *Quashie*. However, within the judgment, there is no analysis of that pay arrangement in light of those authorities.

The finding that the Respondent was obliged to pass on the one-third of customer payments was, the authorities suggest, insufficient to give rise to an obligation to pay. The Tribunal did not take the next step in the analysis, and concluded in the particular case that the passage of customer payments was an obligation to pay. The Tribunal did not feel it necessary to go into the analysis suggested above, and considered the case law did not bind it to take that next step. In so doing, it cannot be said that the judgment will affect the 'rent-a-chair' model on a wider scale. The above argument based on *Quashie* and *Cheng Yuen* was not expressly dismissed and is therefore still very much alive.

What the judgment did do was to remind all employers that its day-to-day relationships with staff will affect how Tribunals will view the employment status of those staff members, and how fact-sensitive those cases are. The amount of control exerted and the integration into the workforce are two important examples of factors that will have a bearing on whether or not a 'self-employed' individual is in fact an 'employee'. If the Tribunal does find, in a particular case, that there is, in fact, an obligation to pay, and all the other factors point to employment, the consequences can be expensive.

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