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BCR LAW REPORT Q1

This report highlights key proposals introduced in the States Assembly, legislation that has been recently passed, and important decisions made by courts and tribunals in Q1.



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QUARTERLY ROUNDUP OF NEWS HEADLINES

Proposal to amend minimum statutory notice periods

A proposition was lodged by Deputy Andrews to amend the minimum statutory notice periods to be given to employees. This was debated on 16th April 2024 and rejected (39 votes to 4) We provided our analysis on this proposition which can be accessed [here](#).

Data Breach

The Jersey Financial Services Commission confirmed earlier during the quarter that there was a system flaw in its company registry system that allowed public access to a confidential register containing the names and addresses of 66,806 individuals. The Cosmetic Dental group were also subject to an attack. Both of which reinforce [the importance of Cyber Security and Cyber Hygiene](#). The Jersey Office of the Information Commissioner has confirmed that it has launched an investigation into this.

LEGISLATION ADOPTED

The following legislation has been adopted during Quarter 1, but has not yet been enacted:

1. Employment (Amendment No. 15) (Jersey) Law 202-

This was adopted on 17 January 2024 and a copy of our observations on the same can be accessed [here](#).

2. Planning and Building (Amendment No.8) (Repeal) (Jersey) Law 202-

This was adopted on 17 January 2024 and repeals the Planning and Building (Amendment No.8) (Jersey) Law 2022 which sought to make various changes to the Planning and Building (Jersey) Law 2002.

3. Wills and Successions (Amendment No.3 - Collateral Succession of Immovable Estate) (Jersey) Law 202-

This was adopted on 7 February 2024, and enacted on 26 April 2024. It will change how land is distributed in circumstances where one dies intestate (without a valid Will in place) and without direct descendants (i.e. a spouse and/or children). It is important to note that this amendment has no effect should the deceased be survived by a spouse and/or children.

At Present, the law provides that freehold property/land will revert to the side of the family from which it was inherited by the deceased.

If it cannot be established which side of the family the property originated, however, preference will be given to the paternal side. Although this principle underpins Jersey's succession law, the amendment seeks to address inherent issues of inequality and bring Jersey in line with its obligations under the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW').

Favourable treatment of the paternal side of the family in relation to the succession of movable assets where there is equal proximity between multiple heirs (whether of paternal or maternal origin), was abolished in 1993, so it is perhaps time that the same be considered in respect of Jersey immovable property.

The ultimate intention is to avoid the exclusion of certain blood relatives simply by virtue of the fact that they are on the maternal side of the family.

4. Crime (Public Order) (Jersey) Law 202-

This was adopted on 7 February 2024 and seeks to update Jersey's public order legislation. For instance, Jersey presently has no offence of threats to kill, rape or cause serious physical injury and currently such behaviour has to be captured, sometimes inadequately, by other minor offences.

This law will collate all relevant public order offences in to one area.

The draft Law will also codify the customary offence of affray and provide powers for Centeniers to levy fines summarily at the Parish Hall in respect of some minor public order and traffic offences and the possession of small amounts of controlled drugs.

5. Employment (Amendment No.14) (Jersey) Commencement Order 2024

This was made on 13th March 2024. The effect of this piece of legislation introduced parental bereavement leave with effect from 18 March 2024 to parents who face the unimaginable loss of a child under 18 or a stillborn child after the 24-week stage of pregnancy.

The law provides for this type of leave to be unpaid and to be a minimum of two weeks, which can be taken at any time from the date of death of a child (or in the case of a stillborn, the date of the child's birth) up to and including 56 weeks after the death or birth.

Employers should consider updating their existing policies and procedure to reflect this positive development.



ROYAL COURT JUDGMENTS OF INTEREST ISSUED DURING QUARTER 1

Representation of Craigmonie Hotel Limited [2024] JRC009

KEY WORDS: Trusts; Mistake; Trusts



The Representor bought an application to set aside a trust that it had established on grounds of mistake.

The trust was established by the now deceased owners of the Representor following advice received by Baxendale Walker (a firm of lawyers in the United Kingdom) whose advice has led to a number of similar cases being determined by the Royal Court.

The advice the beneficial owners (who were husband and wife) of the Representor obtained from Baxendale Walker is that they should transfer three properties that they owned at the time to the trustees of the trust and the trustees would then agree to provide a deferred annuity income to them and that their children may also benefit.

However, the trust instrument that was executed stated, in the Excluded Persons section that not only was the Representor an excluded person, but also 'any person connected with the Representor'. This also extended to 'the Enforcer' (who was expressed to be the beneficial owners of the Representor) and any person connected with the Enforcer'. The Trust Instrument stated that the words 'connected with' were to have the meanings ascribed to them in the Income and Corporation Taxes Act 1988. That Act makes clear that a 'person is connected' with the Representor if they have control of the same. In the case of individuals, the Act makes clear that a 'person is connected' with an individual if they are a relative of the individual.

Accordingly, not only were the beneficial owners of the Representor were duly excluded from benefit, but also their children (given that they were relatives of the beneficial owners). This resulted in none of the family members being able to access any of the assets subject to the trust, on the basis that to allow them to do so would constitute a breach (the power of amendment did not extend to amending the Schedules where the Excluded Persons section was included).

The Court applied the settled test that it must apply when considering whether to declare a Jersey law governed trust invalid on the grounds of mistake namely:

- Was there a mistake on the part of the Representor – The Court held that the Representor, through its beneficial owners believe the advice that they and their children could benefit.
- Would the Representor not have entered into the transaction but for the mistake
- Was the mistake so serious a character as to render it unjust on the part of the trustee to retain the assets in question

The Court answered all of these questions in the affirmative which resulted in the trust being declared void, with the resulting trust fund being declared to be held by the trustee for the Representor.

Representation of Viberts Executors Limited [2024] JRC055

KEY WORDS: Estates; Enforcement of Foreign Revenue Claims

The Representor brought an application for a blessing by the personal representatives of the Jersey estates of two deceased individuals (A and B) to enter into a memorandum of understanding committing them to pay a contribution to the Executors of A's United States estate in relation to the worldwide taxes payable on the entirety of A's estate as a matter of US law. This liability arose because A, throughout her life, was a US citizen, although she may have acquired a domicile of choice in Jersey. B was a UK citizen and also contended that he had acquired a domicile of choice in Jersey. A and B were married and at the time of their death had lived in Jersey for a number of years with Jersey being their home.

At the heart of this matter is whether this decision to enter into a memorandum of understanding represented an indirect attempt to enforce a foreign revenue claim. The basic principle is that the Royal Court will not enforce a foreign revenue claim.

The Court ultimately blessed the decision of the Executors on the basis that the proposed settlement was in the interests of the beneficiaries of the respective estates. However the Court made it very clear that it granted this blessing on the basis that some of the assets of the estates were in the same country where a claim to enforce the foreign tax could have been made. It made clear that if all of the assets of the estates had been in Jersey, it would have refused to approve the Representor entering into the compromise unless some form of peril to either the personal representatives or the beneficiaries could be established.

Representation of Equiom Trust (CI) Limited [2024] JRC068

This case concerned a will of a person who died in 1979 (which thus pre-dated the enactment of the Trusts (Jersey) Law 1984) that purported to create various trusts which included an accumulation period of 20 years and then life interests of income to the testator's two nephews. On the death of those nephews, the final disposal of residue was to a discretionary trust with the Greek Government as trustee (the "Intended Trust").

The Intended Trust had two further components. Under one, the Greek Government had discretion as trustee how to employ income on the trust fund to provide interest free loans to intelligent and promising young men of Greek Orthodox faith born in Greece of Greek, Greek Orthodox parents, for the purpose of them undertaking further university education in specified countries (the "**Criteria**"). Under the other, the testator's grand-nephews and great-grand-nephews would have priority to trust funds for further university education, again in the trustee's discretion, but not have to repay any sums advanced (the "**Nephew Exemption**").

The issues the Court had to address

The Court identified the following issues that need to be addressed:

- Did the Intended Trust create a trust?
- If the Intended Trust created a trust, was it invalid due to: (i) a lack of certainty of beneficiaries; or (ii) its indefinite duration?

- If it was otherwise invalid, is it nevertheless a valid charitable trust?
- If it was not a valid charitable trust, can the charitable aspects be saved or severed?
- Did the Intended Trust create a trust?

The Court concluded that when read in the context of the will, the Intended Trust was intended to create a trust. This was because of the following:

- The wording of the Intended Trust was very different to other parts of the will where absolute gifts were provided.
- The Intended Trust was given a name.
- The Court also rejected an argument from the Greek Government that the Intended Trust was simply a gift subject to a condition subsequent. The Court was satisfied that the Intended Trust showed an intention to impose a trust obligation on the Greek Government.

Was the Intended Trust invalid?

The Court held that the Criteria established the class of beneficiaries for the Intended Trust. However the Court noted that it was necessary for an individual to satisfy the entirety of the Criteria in order to be regarded as a beneficiary of the Intended Trust. As a result, the Court held that this created a lack of certainty of the class of beneficiaries.

As to the intended duration of the Intended Trust, it contained no provision for the vesting of the capital to any person who satisfied the Criteria. Given that it predated the enactment of the Trusts (Jersey) Law 1984, it was necessary to determine what the position in Jersey was prior to the enactment of this piece of legislation. The Court held that the rule against perpetual or indefinite trusts (which exists as a matter of English law) also forms a part of Jersey law (given that Jersey case law, most recently **Rawlinson & Hunter Trustees SA v Chiddicks** [2019 (1) JLR 87] confirmed that: “*it is apparent that in seeking to identify and to apply the trust law of Jersey, one should look to what is the trust law of England and to the English case law on trusts save where these may need to give way to customary law and Jersey legislation.*”) Upon analysing the customary law of Jersey, the Court noted that it was clear that Jersey, in common with other civil law jurisdictions (such as France) had created structures to prohibit property from being inalienable. As such the Court regarded it highly unlikely that the customary law of Jersey would have permitted an indefinite trust of movables to be created by a will.

Is the Intended Trust a valid charitable trust or could the charitable aspects be saved or severed?

A charitable trust, unlike a normal trust does not require certainty of objects. In addition, a valid charitable trust can last indefinitely.

In order for a charitable trust to exist, it must be: (i) exclusively for charitable purposes; and (ii) for the public benefit (i.e. it benefits the community or a section of the community). It was accepted that at least on the face of it, the Intended Trust did seek to further a charitable purpose. The difficulty arose by the inclusion of the Nephew Exemption (this is because the class of beneficiaries of a charitable trust must not be dependent upon their relationship to a particular individual). As such the Court declared that the Intended Trust was not a valid charitable trust.

The Court concluded it was possible to sever the Nephew Exemption from the Intended Trust upon the death of the last surviving nephew.

Discrimination

It was accepted that the Claimant was disabled as a result of a personality disorder, however the Claimant did not actually disclose their disability to the Defendant during their employment- the closest they came was to tell a manager in a jocular fashion that he had special needs with a certificate to prove it. The Tribunal ruled that this jocular comment did not result in the Defendant having actual knowledge of the Claimant's disability.

The Tribunal therefore rejected the Claimant's allegations of discrimination.

We recently hosted a seminar on managing and minimising the impact of discrimination in the workplace and defending discrimination claims in the Tribunal which can be accessed [here](#).

Constructive Unfair Dismissal

The Claimant relied on six incidents that he said individually or collectively amounted to a fundamental breach of contract. The Tribunal did not consider any of those incidents amounted to a fundamental breach of contract.

EMPLOYMENT TRIBUNAL JUDGMENTS OF INTEREST ISSUED DURING THE QUARTER

Noel Harrison v CT Plus Limited [2023] TRE 142

KEY WORDS: Unfair Dismissal

The Claimant issued proceedings citing unfair dismissal against the Defendant. The proceedings centred around an incident where the Claimant, a bus driver, allegedly drove dangerously in a bid to save time during his route. The Defendant conducted investigations, which led to the Claimant's dismissal. However, the Claimant contested the dismissal, claiming it was motivated by personal animus from the managing director of the Defendant.

The Defendant conducted an appeal of the original decision which found no evidence to support the Claimant's assertion of personal vendetta. The person who conducted the appeal highlighted the Claimant's dismissive attitude towards safety concerns and his failure to take responsibility for his actions. Despite the Claimant's assertion of unfair treatment compared to other employees, the Defendant was able to demonstrate consistent disciplinary actions based on employees' attitudes towards safety and accountability.

Ultimately, the tribunal found the Defendant's decision to dismiss the Claimant fell within the bounds of reasonable responses, given the seriousness of his actions and his attitude towards safety.

Trevor Jones v Bellpumps and Pollution Control Limited [2023] TRE 169

KEY WORDS: Unfair Dismissal; Wrongful Dismissal

The Claimant was a drainage engineer for the Defendant from May 10, 2022, until his dismissal without notice on September 13, 2023. The Claimant filed a claim for unfair dismissal and damages for failure to give notice.

The act that resulted in the Claimant's dismissal occurred on August 24, 2023, where the Claimant nudged an employee near an open sewage pumping chamber. The Claimant admitted to the nudge but stated it was playful and harmless. The other employee, however, felt threatened by the action.

The Defendant, after an investigation, dismissed the Claimant without notice, citing gross misconduct. The Claimant argued that the dismissal was unfair and that he was entitled to notice. The tribunal found that the Defendant's decision to dismiss was fair, considering the potential risks of the Claimant's actions and his admission of wrongdoing. However, the tribunal determined that the dismissal without notice was unjustified, as the Claimant's actions did not constitute a deliberate violation of contractual terms warranting summary dismissal. Therefore, the tribunal awarded the Claimant damages equivalent to his notice period.

Rabet v Pizzapie Limited t/a Dominos Pizza [2023] TRE 122

KEY WORDS: Wage slips; Discrimination; Constructive unfair dismissal; rest periods

The Claimant resigned and subsequently brought claims against the Defendant for Constructive unfair dismissal, discrimination, a failure to provide payslips and a failure to provide rest breaks.

Failure to provide payslips

The Claimant's evidence was that prior to 2022 pay slips were rarely provided unless by direct request. The Defendant's evidence was that since 13 March 2022 pay slips were individually emailed to staff and prior to that they were emailed as one document to the store where they were printed and distributed to staff when they next came on shift.

The Tribunal held that the practice that existed prior to 13 March 2022 did not comply with the requirement under the Employment (Jersey) Law 2003 that an itemised pay statement must be provided at or before the time payment is made, as the Defendant admitted that some staff would receive their pay slips the day after payment was made or even later than that.

Whilst the Tribunal held that there were occasions when the Claimant received his pay slip late, there was no suggestion that the Claimant had suffered any detriment but nevertheless awarded the Claimant compensation equivalent to one week's wages.

Rest periods

The Tribunal reminded itself that the Employment (Jersey) Law 2003 provides for:

- An uninterrupted rest period of no less than 20 minutes in each continuous period of no less than 6 hours during which the employee works
- A weekly rest break of not less than 24 hours in each 7 day period

A breach of this provision occurs if an employee has been prevented by the employer whether by the employer's refusal or otherwise from taking a rest period.

The Tribunal held that there were a small number of occasions where the Claimant was not afforded an uninterrupted 20 minute break. However, the Tribunal held that as the breaches were few it did not consider it appropriate to award any compensation.

Myles Flint v MJ Hudson Services (Jersey) Limited (In Liquidation) [2023] TRE 141

KEY WORDS: Payment of wages; Holiday pay; Notice Periods; Redundancy

It was not in dispute that the Claimant was dismissed as a result of redundancy. The key question was whether the dismissal process was fair.

The Claimant acknowledged that they were made aware that they would be made redundant as a result of the Defendant entering liquidation. The Claimant was the sole employee of the Defendant. In this case the Tribunal accepted that there were no options for redeployment given that the Defendant entered liquidation.

The Tribunal also found that a consultancy period took place prior to the Claimant's employment being terminated.

This resulted in the Tribunal finding that the dismissal process was fair.

However, notwithstanding that the dismissal process was fair, the Tribunal did find that the Claimant was entitled to: (1) unpaid wages; (2) unpaid holiday pay; (3) their notice pay (which was not paid); and (4) a redundancy compensation payment (which again was not paid).

Gary John Benton v La Trape Proprietes (Divers) A.R.L. [2023] TRE 179

KEY WORDS: Wage slips; Written statement of terms

The Claimant alleged failures by the Defendant to provide:

- itemised pay statements; and
- a written statement of terms

On the written statement of terms, it was found that some terms were contained in a letter from the Defendant listing key terms of employment which was countersigned by the Claimant (referred to as the **Key Terms Letter**) but also that there were additional documents available on an online portal respectively titled 'Employee Handbook' and 'Statement of Main Terms of Employment'. The Defendant stated that it expressly told the Claimant of the existence of these documents and where they could be accessed.

A discussion took place as to whether access along to these documents satisfied the requirements under the Employment (Jersey) Law 2003 (the "Law") that an employer must 'give to' an employee a written statement of terms.

The Tribunal found that making those documents available online and telling the Claimant of their existence did satisfy the requirement. However, the Tribunal noted that neither of these documents were signed on behalf of the Defendant and nor were they specifically referred to in the Key Terms Letter. On this basis the Tribunal held that there was a breach of the Law as the Key Terms Letter did not actually set out all of the terms required under the Law.

This emphasises the importance of ensuring that a Contract of Employment: (a) satisfies the requirements under the Law; and (b) makes express reference to any other documents relevant to the Employer-Employee relationship and if they are not included in the contract itself, the contract expressly states where they can be found.

On the failure to provide pay statements, it was found that some were provided in a timely manner, but others were not. The Defendant's method of providing the payslips was via 'in-trays'. The Tribunal stated that this method satisfied the requirement under the Law provided it was possible for the Claimant to access them at will and that it was a reasonable way to provide them based on the Defendant's size and resources.

However, the Tribunal found that leaving payslips in an in-tray, when the Claimant had been suspended did not comply with the requirements under the Law and that the payslips were only accepted as being given to the Claimant when they were emailed to the Claimant. The payslips in question were emailed later than is required under the Employment law and therefore resulted in the Defendant being held in breach of the requirements under the Law.

Neil Le Boustouler v Jersey Deep Freeze Limited [2023] TRE 93

KEY WORDS: Constructive Unfair Dismissal

The Claimant brought a claim of constructive unfair dismissal. At the time of the Claimant's resignation, he was one of seven employees. The other six were also shareholders of the Defendant. As shareholders they received dividends. They also received slightly more paid holiday than the Claimant, 25 days rather than his 21 days. At times the Defendant has employed other non-shareholder employees all of whom received the same holiday entitlement as the Claimant.

The Claimant had always been aware that shareholder employees received dividends from the Defendant, the size of the dividend surprised him and he felt that the situation was unfair. The Claimant subsequently lodged a grievance seeking fair treatment in terms of more pay, larger bonus and more holiday. A meeting took place to discuss the Claimant's grievance. It was alleged that one of the shareholder employees indicated that the reason the Claimant was not on the same terms as the others was he was not capable of doing the work of the other engineers, (ii) he didn't have their skillset, (iii) he couldn't be sent on 90% of the jobs because he wasn't qualified or capable and (iv) he couldn't take him to a particular and let him do any of the wiring because he didn't have a City and Guilds certificate. The Claimant alleged that he felt worthless as a result of this meeting. He couldn't understand why if he was lacking in skillset he hadn't been told before or sent on courses. He resigned the next day.

The Tribunal rejected the Claimant's suggestion that the disparity in pay, bonus and holiday between the Claimant and the other employee shareholders was unfair or a fundamental breach of the implied term of trust and confidence.

Frumusachi v Hotel de Normandie (1984) Limited and De Freitas [2023] TRE 105

KEY WORDS: Disability Discrimination; Constructive unfair dismissal; Wrongful dismissal; Witness evidence.

The Claimant was employed by the Respondent, initially on a zero-hour contract but this was subsequently converted to a full-time contract which included the following pertinent terms:

1. That their job title did not form part of their contract and may be changed by the Respondent from time to time.
 2. The Claimant may from time to time be required to undertake additional or other duties as necessary to meet the needs of the business.
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3. The Claimant was expected to take at least half an hour's unpaid lunch break.
4. The Respondent may from time to time at its sole discretion change the duties to be performed by the Claimant provided the Respondent acted reasonably.
5. Whilst the contracted hours are as stated, the Respondent reserved the right to amend an employee's working hours to meet operational requirements.

The Claimant understood very little English. However, the Claimant's witness statement was written in English. During a Case Management Hearing, the Tribunal questioned how the Claimant could sign such a witness statement in a language they barely understood. It was explained that there was a Romanian version of the witness statement located on the Claimant's daughter's computer. The Claimant was ordered to: (i) disclose the Romanian version of the statement located on the computer unedited with the meta data intact and (ii) provide a Romanian version of the English statement signed by the Claimant.

However, when the original version of the Romanian statement was disclosed it showed that it had been edited after the Case Management Hearing. The explanation offered was that the document had been incomplete and so the Claimant's daughter completed the statement before it was sent to the Respondent. It also became apparent that the Romanian statement was not a complete translation of the English language.

The Tribunal expressed its disappointment with this state of affairs. It reiterated that where a witness speaks little English, the statement should be written in their native language and translated into English, not the other way round.

The remainder of the judgment focussed on whether the Claimant was: (i) discriminated against; (ii) constructively unfairly dismissed; or (iii) wrongfully dismissed.

It was accepted that the Claimant was disabled. The Claimant made various allegations of discriminatory acts being committed by the Respondent. The Tribunal held that such acts did not amount to discrimination as the actions taken by the Respondent were not due to the Claimant's disability but rather were focussed on staffing needs, operational changes and further were within the Claimant's capabilities.

However, the Tribunal did find that the acts did justify a claim that the Claimant was constructively unfairly dismissed. This is because the acts amounted to unilateral changes to the Claimant's contract of employment. The Tribunal emphasised that any variations to a contract of employment must involve an element of consultation.

It is therefore important that employers ensure that they are aware of the terms of their contracts of employment and to the extent that they seek to amend the terms (whether for better or worse) they must ensure that employees are consulted about them.



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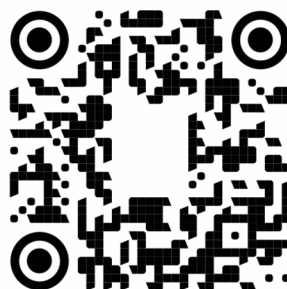
Ashley joined BCR Law in January 2019 and qualified as an Advocate with the firm in 2023.

Ashley specialises in Business Law, including matters relating to Employment Law, dealing with a broad range of both contentious and non-contentious matters focused on serving the local business community.

Ashley's particular areas of expertise include Construction, where he has a background of industry experience, employment, where he has significant experience in advising both employers and employees, and trust matters.

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