

## Drawing inferences in non-discrimination cases

by

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3PB's Employment Law team provide legal and practical updates from time to time regarding recently reported cases of significance.

### ***The case***

The recent decision of the EAT in *Schwarzenbach and Anor v Jones UKEAT/0100/15/DM* involved a dispute over the question of whether two employers were “associated” for the purposes of s231 of the Employment Rights Act 1996, giving Mr Jones sufficient continuity of service to bring a complaint of unfair dismissal.

Stephen Wyeth of 3PB successfully acted for the claimant both at first instance and in resisting the appeal by Mr and Mrs Schwarzenbach in this reported case.

### ***The implications for employment law practitioners***

The case dealt with a rather narrow point which may not crop up often but is likely to have wider implications and serves as an important salutary reminder to employment law practitioners that it is not safe for respondents to simply ‘sit on their hands’ in circumstances where the burden of proof in employment disputes is on the claimant.

Stephen persuaded the Employment Judge to draw an inference from the failure by the respondents to produce evidence as to who the ultimate human beneficiary was of the claimant's initial employer, Culden Faw Limited. Mr and Mrs Schwarzenbach were both directors of that company but the shareholding was held by Hambledon Estate Inc (a company incorporated in the British Virgin Islands) which was, in turn, said to be owned by another offshore corporate entity, Black Bear Holdings SA. In the absence of a proper explanation from the respondents as to who ultimately owned Culden Faw Ltd, the Employment Judge concluded that Mr and Mrs Schwarzenbach and Culden Faw Limited were associated employers.

The EAT accepted Mr Wyeth's submissions that despite the claimant having the burden of proving his employers were associated, the Employment Judge was entitled to draw inferences from the fact that the respondents had not produced sufficient evidence to demonstrate who actually owned the company initially employing the claimant.

### ***Burden of proof?***

Practitioners should be aware that in cases where the burden of proof is on the claimant, a respondent seeking to exercise a form of industrial 'right to silence' may ultimately come unstuck. Where information or evidence is not within the control of the claimant but is likely to be within the control of the respondent, a failure or refusal by the respondent to produce that evidence could result in the claimant satisfying the burden of proof through the drawing of an inference from such behaviour. That is precisely what Mr Jones achieved in the above case. A full report of this case can be found on [http://www.bailii.org/uk/cases/UKCAT/2015/0100\\_15\\_0409.html](http://www.bailii.org/uk/cases/UKCAT/2015/0100_15_0409.html)

If you would like to discuss this matter further, or if you think this decision is likely to impact on your cases please contact Stephen Wyeth on [stephen.wyeth@3pb.co.uk](mailto:stephen.wyeth@3pb.co.uk) or the Employment Law Group Practice Group Director, Russell Porter, on [russell.porter@3pb.co.uk](mailto:russell.porter@3pb.co.uk)

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