12
King's Bench Walk

Case comment: Varnish v (1) British Cycling (2) UK Sport (Employment Tribunal, 16 January 2019)

On 16 January 2019, judgment was handed down at the Employment Tribunal in Manchester following the preliminary hearing in the case of **Varnish v (1) British Cycling & (2) UK Sport**.

Background

Jess Varnish competed as a cyclist for British Cycling until from 2003 – 2016, winning a large collection of medals along the way. In April 2016, having failed to qualify for the Rio Summer Olympics, British Cycling terminated Ms Varnish's Athlete's Agreement. It was alleged that the technical director of British Cycling told Ms Varnish to "go and have a baby".

Varnish brought claim against British Cycling and UK Sport for sex discrimination, unfair dismissal and public interest disclosure detriment.

Following a case management hearing, the case was listed for a preliminary hearing on the following issues:

1. Whether or not Ms Varnish was an employee who worked under a contract of employment within the meaning of section 230(1) and (2) Employment Rights Act 1996 by British Cycling or UK Sport;
2. Whether Ms Varnish was employed as a worker within the meaning of section 230(3) Employment Rights Act 1996 by British Cycling or UK Sport; and
3. Whether the Ms Varnish was employed as an employee under a contract of employment, a contract of apprenticeship or a contract to do work personally within the meaning of section 83(2)(a) of the Equality Act 2010 by British Cycling or UK Sport.

The preliminary hearing took place between 10 – 17 December 2018 and judgment was handed down on 16 January 2019.

Judgment

It was held that there was no mutuality of obligations between the Respondents and Ms Varnish as the Respondents did not provide work to the Ms Varnish who was, in any event, not performing work.

In Employment Judge Ross's words:

· "I find there was no wage/work bargain in this case. The claimant did not work in exchange for a wage. The first respondent did not provide work for the claimant to do" [140].

· "The claimant was training as an athlete, an elite sprint cyclist in the hope she would be selected to represent Great Britain in international competitions. She was not working for either the first or the second respondent or both of them under a tripartite arrangement" [192].

· "The claimant was not personally performing work for British Cycling. She was training in accordance with the rider plan in the hope she would be selected to compete in international competitions" [242].

Following these findings, the judge was bound to answer the three preliminary issues posed in the negative. The claim was dismissed.

Comment

In short, British Cycling could have terminated Ms Varnish's contract with a sexist motive, but such matters will not concern the Employment Tribunal. The question that arises from the litigation: what recourse will a professional sportsperson have in such circumstances?

On these facts of the case, a claim for breach of contract would have merit. However, this rather underplays the reasoning behind bringing the claim in the first place: an alleged act of sex discrimination.

Such a claim could be brought separately, outside the Employment Tribunal in the Civil Courts, both as a breach of contract claim, and for discrimination in the provision of services under ss13 and 29 Equality Act 2010, on the basis that British Cycling were providing training services to Ms Varnish (as found by Employment Judge Ross at [192] of his judgment). Civil claimants for discriminatory acts outside of employment relationships can seek both damages and declarations of discrimination. Civil cases of this kind are relatively rare, since the facts of such cases rarely give rise to distinct pecuniary losses, but there is no reason in principle why losses that are shown to be linked to the discrimination are not recoverable. Ms Varnish would, however, not have the costs protection afforded in the Employment Tribunal; her claim would also be time barred, since s118 of the Equality Act 2010 provides for a six month limitation period, although the same jurisdiction to extend time so far as the court considers "just and equitable" exists for civil discrimination claims as for employment claims.

Provided Ms Varnish can overcome her limitation hurdle, on the facts presented in the ET she is likely to have some reasonable prospect of success in the Civil Courts. As a result, athletes who are subjected to such sex discrimination should not be deterred from bringing claims to hold those responsible to account, although they should be wary about the arena in which they choose to compete.