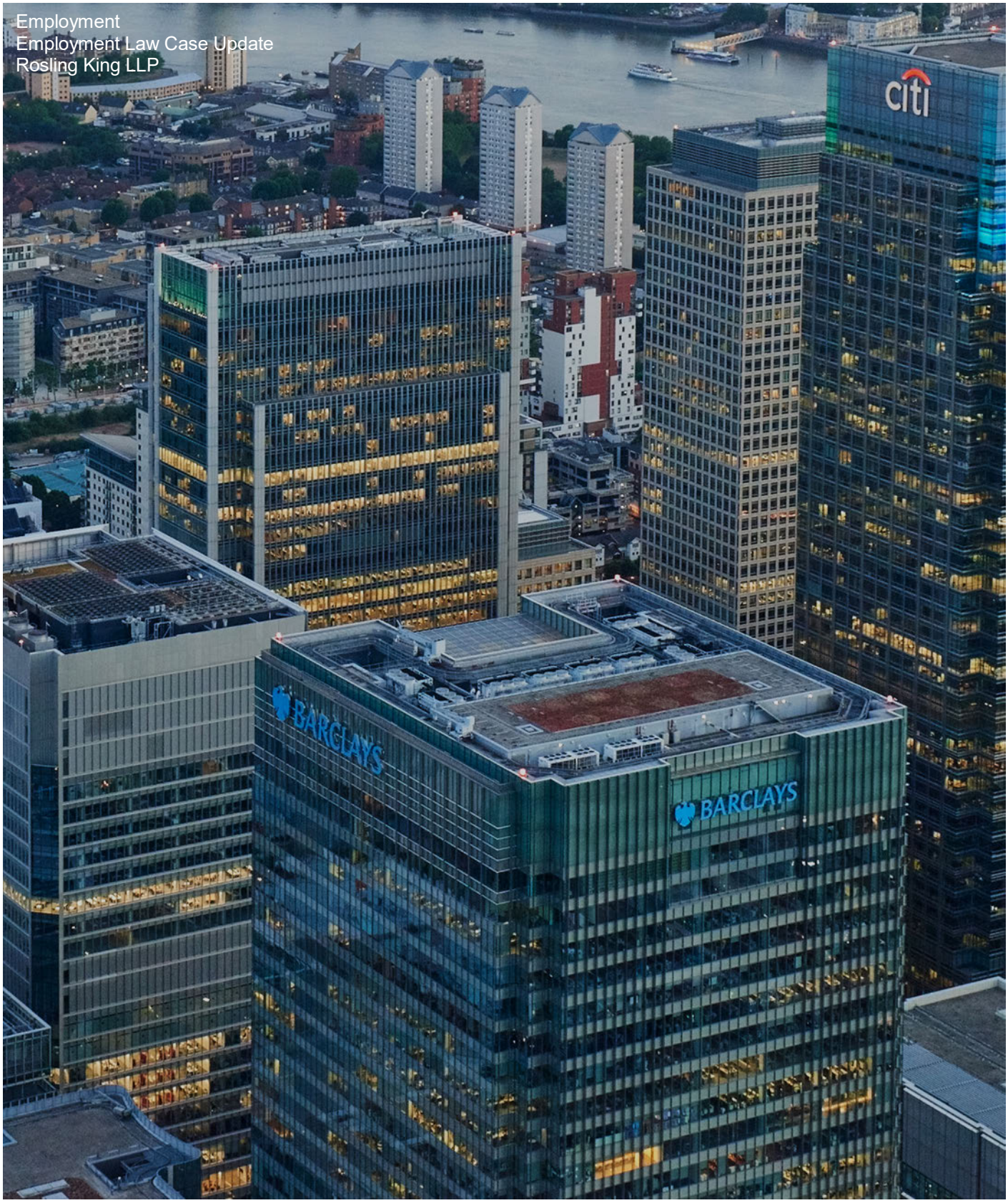
Employment
Employment Law Case Update
Rosling King LLP



The Facts

In SD (Aberdeen) v Wright the employment tribunal drew an inference that two companies were associated when a relevant director failed to give evidence to the contrary. The Employment Appeal Tribunal recently held that was acceptable.

The claimant, Robert Wright, worked for an entity or entities trading as "AMPM", comprising "AMPM Leasing" and "AMPM Service Department" from 20 May 2014 until 23 August 2016 when his working relationship terminated. Unsure of who his employer was, he brought claims against nineteen respondents, must surely be a record. All nineteen entities were represented by an in-house solicitor, also a key figure in the claimant's working life and they all contended that he was a self-employed contractor. A preliminary hearing was fixed to determine (1) whether the claimant was an employee and if so (2) the identity of his employer.

A detailed judgment decided that the claimant was an employee of the tenth respondent, Chiahealth Property Limited **("Chiahealth"**) between 20 May 2014 and 3 September 2015 and of S D Aberdeen Limited **("SD"**) the nineteenth respondent and an associated employer of Chiahealth from 3 September 2015 until 23 August 2016. Thus continuity of employment was preserved by s218(6) Employment Rights Act, giving the tribunal jurisdiction.

S D appealed against the finding that it was an "associated employer" of Chiahealth under section 231 of the Employment Rights Act 1996.

Under ERA s231 two employers are to be treated as associated if: (a) one is a company of which the other (directly or indirectly) has control, or (b) if both are companies of which a third person (directly or indirectly) has control. 'Control', according to established case law, depends on whether the controller has the majority of votes in the general meeting of a company (so called 'legal' control).

But here the EAT decided that the tribunal was entitled to draw an inference that the two companies were associated where a director (Mr Kerr), described as a "principal actor" in both companies, could have given evidence to shed light on the issue, but failed to do so. Thus, while voting control, rather than mere de facto control, is required for the purpose of section 231, the EAT held that evidence of de facto control can properly be used to draw an inference of voting control if the respondent has an opportunity to clarify the legal position, but does not.

Comment

The effect of this judgment is essentially to switch the burden of proof and may make it somewhat onerous on employers in the future. The employment tribunal system has always had an element of bias in favour of the employee, based largely on the difference between the two in terms of resources both personnel and financial and the disparity in negotiating power, but this takes matters further. Any employer in the midst of litigation should take care to put forward all the evidence they can; avoiding grey areas as much as possible.

For further information, please contact Jacqueline Kendall or the Partner with whom you usually deal.