

# Making employment

IF anyone in Jersey knows more about employment legislation than Vicky Milner, then they must have impressive credentials indeed.

The Bedell Cristin lawyer heads the firm's employment law team, and her background in the subject would be hard to surpass.

The 2012 Chambers directory of the legal profession says that Miss Milner is acknowledged as 'one of the leading lights in employment'.

Her knowledge is enshrined in the appendix entitled Employment Law and Insolvency included in the local legal text book Jersey Insolvency and Asset Tracking.

She was also the Jersey branch representative of the Employment Lawyers Association for two years and remains a member.

Such is the strength of that background that she recently prepared the Jersey branch of the Institute of Directors' response to the proposals of Social Security Minister Francis Le Gresley for the introduction of anti-discrimination laws. She is a member of the IoD's industries sub-committee.

## Expertise

Miss Milner, who is a senior associate at the firm, speaks with a passion about employment law and her expertise and authority have been gleaned from years of practice in the field.

The Jersey advocate and English barrister undertook her first case when in pupillage in London in the late 1990s under a free representation scheme, as there was then no legal aid in England for employment tribunal cases. She remembers it well, as she represented a lorry driver from Essex and won the argument that he was an employee rather than a contractor, as claimed by the firm who dispensed with his services.

'He was great. He kept me on my toes. Because he was not working he went to the library and looked up the law in question, so I knew he would pick me up on it if I got things wrong,' she said.

## PROFILE

### Employment law expert Vicky Milner was lead adviser to the IoD on the new anti-discrimination laws. She spoke to business editor Harry McRandle

She undertook her pupillage at 1 Temple Gardens, a set of barristers' chambers which represented the Ministry of Defence in a number of sex discrimination cases.

After pupillage, she ended up in the UK government's legal service, defending personal injury actions and graduating overnight from handling cases worth hundreds of pounds to multi-million-pound claims, including medical negligence actions.

In early 2001, she was recruited to join the MoD's team of legal advisers and soon found herself as a specialist employment law adviser on outsourcing contracts.

'They were outsourcing all sorts of activities, from catering contracts to the maintenance of battleships,' she said.

In particular Miss Milner provided advice on the Transfer of Undertakings (Protection of Employment) Regulations, better known as TUPE, as well as advising on a wide range of other employment law matters in connection with the MoD's 100,000 civilians.

She helped to negotiate the MoD's Private Finance Initiative and Public Private Partnership contracts.

The task became somewhat more complicated as a result of the terror strikes of 11 September 2001.

'I had joined MoD legal advisers during a comparatively peaceful period. Everything

changed after 9/11,' she said. She also gained an interesting insight into how the wheels of government and the military worked, as her office was in a key MoD building in the centre of London.

In 2004, Miss Milner took a sabbatical, having spent ten years in London and wanting to return to Jersey to try something different.

'I tried to write a novel but that was not terribly successful. However, I did win the Pomme Poème prize that year,' she said.

The pull of Jersey was too much for the 'local girl' to resist. Although she was born in London, her family moved to the Island when she was only three.

## Maternity cover

'I really wanted to come back permanently and I found a position at a local firm, originally providing maternity cover,' she said.

The timing was excellent as far as a specialist employment lawyer was concerned, as Jersey was just about to introduce its own employment legislation.

'I saw the situation in Jersey before it came in and after. To get involved at that stage in 2004 was exciting,' she said.

In its first judgment the Employment Tribunal fined an employer £250 for failing to keep a record of the hours worked by its staff, as required by the Employment (Jersey) Law 2003.

'I recall at the time questioning how the tribunal had the jurisdiction to adjudicate as if it was a criminal matter,' she said.

In 2008, Miss Milner appealed against a decision of the Employment Tribunal in which it had fined an employer for allegedly committing an offence under the Employment (Jersey) Law 2003. CI Fire & Security Ltd won the argument, with the court ruling that only the Attorney General had the power to prosecute criminal offences in Jersey.

As a result of that finding, the States agreed to pay back all fines handed out by the Employment Tribunal since it first started sitting three years earlier.

She is sympathetic to the difficulties the tribunal members face, as they are making decisions on a complicated new piece of law and, as noted by the Royal Court in *Voisin v Brown*, are having to lay down guidelines for employers and employees alike.

She said that the legislation itself lacked written procedures as to how to go about contesting decisions, so that parties wishing to challenge judgments of the tribunal have had to guess at how they are meant to bring an appeal. However, she said this should be changing soon, as the Judicial Greffe was drafting an appeal procedure.

The only avenue of appeal currently is to the Royal Court.

'The problem with appeals is that they are expensive,' she said.

It is also very difficult, as the only ground of appeal is on a point of law. There is no right to appeal on points of fact if the losing party believes the tribunal got it wrong.

In the *Voisin v Brown* judgment, the then Deputy Bailiff, and now Bailiff, Sir Michael Birt, said: 'The legislature has chosen to place the tribunal in an almost unique position by providing that an appeal lies only on a question of law.'

'This means that, subject only to the very generous limit of perversity, decisions of the tribunal as to the facts are final and cannot be appealed however strongly the losing party feels that the tribunal went wrong in its decision on the facts.'

One of the problems with employment appeals that first came to light in the *Voisin* case was the uncertainty as to whether the Royal Court has the power to order costs in appeals from the tribunal.

'Normally the winner in a court action is awarded their costs,' said the senior associate.

The decision not to award costs in tribunal appeal cases to date has meant that often there may not be much point in appealing, as the cost of appealing will outweigh any benefit of overturning the judgment.

Many argue that there should be an independent appeals panel set up that would make

it cheaper for appellants to put their cases.

'There is an expectation that this would solve a lot of problems. Cheaper appeals should lead to better-quality law because decisions would be tested more frequently,' she said.

However, the likely level of costs savings is questionable.

'You would still have to have people to sit on the panel and the paperwork and arguments would still have to be prepared. It would remain to be seen how much cheaper such a system would be in practice,' she said.

She said that the majority of tribunal cases were comparatively 'low value', often around the £5,000 mark, so many people were deterred from going through the current appeal process when they might face costs in the region of, say, £20,000.

She said that if the authorities considered introducing an appeals panel, there would be a strong argument for having a single body to determine both Jersey and Guernsey appeals.

Miss Milner said that each of the five judgments that had been handed down by the Royal Court so far on decisions by the Employment Tribunal had been helpful and had impacted on how cases were dealt with.

And she said that there was still some way to go before all aspects of the law will have been tested in the tribunal or a courtroom.

A good example of this was a decision of the tribunal late last year in interpreting the Employment Relations (Jersey) Law 2007.

The tribunal ruled in this case that a dispute involving an individual employee of the States, who was a union member, could be treated as a 'collective employment dispute'.

The Tribunal decided that the phrase 'one or more employees' meant literally that. However, Miss Milner said that, looking back at the history of this legislation, it was unclear whether this is what was originally intended - noting that the words 'collective employment dispute' suggested action by a group.

'It is an interesting decision and the first one of its kind made under the Employment Relations Law,' she said.

With her expertise, she finds herself being asked to assist in a wide range of cases.

Particularly in recent times, much employment law work has been concerned with those who have just been dismissed or employers taking advice on the process of making people redundant.

## Challenge evidence

'You really feel for someone who has just been sacked. Anyone with a heart will want to help that person,' she said.

She said that a lawyer would always want to challenge the evidence and would often look at the issue from a different angle to the client.

'When you are advising a business it is helpful if you also act for individuals, because you may be able to give some guidance on how the case might look from the tribunal's perspective,' she said.

She frequently advises high net worth entrants to the Island on aspects of employment law and contracts as well as working with company directors and chief executives.

When it comes to giving advice on contracts, Miss Milner said that it tended to be mainly about helping people to understand the risks involved.

She said that people did tend to have strong feelings and reactions to employment matters.

'Work problems are incredibly personal and people really take them to heart. There is an assumption that the employee is the little man and the employer the big baddie.'

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**Of course we should have laws that tackle discrimination but you have to start by knowing exactly what it is that needs to change and how your proposed law might do that before you can go on to consider whether the laws in question will actually achieve the required effect**

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# laws work for Jersey



Vicky Milner, who heads the Bedell Cristin employment law team. Picture: MATTHEW HUTTON (01792943)

'However, businesses are owned by people who are understandably affronted at being portrayed as villains. They are protective of their long-held reputations for looking after their staff. Many businesses in Jersey are family-owned and people do not like their good name tarnished,' she said.

With a recession and given changes to Jersey law, it is hardly a surprise that there has been a growth in demand for the services of an employment lawyer. Miss Milner understands that levels of workplace stress might be rising in response to increasing business demands and unemployment levels.

'There is huge pressure on people to perform and on businesses to get as much as they can

out of staff. If the business cannot survive, then nobody has a job,' she said.

She said that some firms had gone out of business because of being taken to the Employment Tribunal. 'It is a really, really difficult time for businesses,' she said.

Miss Milner was lead adviser to the IoD on the new anti-discrimination laws and she is sceptical about aspects of the proposed legislation.

'There is discrimination everywhere and there is a need to ensure that people are not unfairly discriminated against,' she said.

But, 'and it is a big but', she said, little or no research had been done on the impact of the draft legislation and whether it would actually solve the problems that might exist. There was

a risk that legislation designed to help employees could in fact deter businesses from taking on more staff.

She noted the findings of the 2012 Jersey Annual Social Survey, which reported that a quarter of Islanders reported at least one occasion of discrimination over the past 12 months.

## Independent analysis

She felt that more detailed, independent analysis of the problems faced by Islanders would have been valuable, before legislation was implemented.

'Until that analysis is properly conducted,

you will not get a law that addresses the real problems,' she said.

Miss Milner said that it was difficult to have a frank and open debate on proposals for the introduction and scope of anti-discrimination laws, with a risk of being branded a heretic.

'Of course we should have laws that tackle discrimination but you have to start by knowing exactly what it is that needs to change and how your proposed law might do that before you can go on to consider whether the laws in question will actually achieve the required effect,' she said. 'It is important that in every area of law we have legislation that is appropriate for Jersey and is not just imported wholesale from the UK.'

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