



Talkback: is guidance just guidance or not?

'Substantial' meals & staying at home: Fred Philpott compares current guidance with the actual law

I hope to expand upon the excellent article by the employment lawyer Juliet Carp in *NLJ* of 4 December 2020 ('What is 'guidance', & do we have to comply with it?', 170 *NLJ* 7913, p9–11). I also pay tribute to the incisive piece on the subject by Lord Sumption in *The Daily Telegraph* ('It is not the police's job to enforce the lockdown whims of ministers', *The Daily Telegraph*, 12 January 2021, [bit.ly/3pCereh](https://www.telegraph.co.uk/news/2021/01/12/it-is-not-the-police-s-job-to-enforce-the-lockdown-whims-of-ministers/)).

I wish to review some previous authorities dealing with guidance, and give two examples of how it has been used in the current situation.

I will start first with the coronavirus (COVID-19) example. Some official guidance has been promulgated as regards the work exemption. Some guidance has said, for example, that one must have some sort of formal presentation in order to get within the exemption. That is not so. It illustrates how so many lawyers (including the judiciary) but also businesses, government departments themselves, members of Parliament, the media, and therefore the public treat guidance as the law, rather than the law itself. The working exemption for Tier 2 is actually quite simple and needs no elaboration. It is provided for in para 5(6) of Sch 2 to the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 (SI 2020/1374) under Exemption 4, namely that: "That the gathering is reasonably necessary –(a) for work purposes ...".

Another non-statutory 'rule' in respect of the work exemption is that it only applies if leaving home for work is 'essential'.

I will return to a more commonly used interpretation or commentary on the regulations at the end of this article. Meanwhile, it is worthwhile summarising how the courts have dealt with guidance over the years.

Executive opinions

The persuasive limits of even statutory guidance has been considered by the courts. An early example is *Laker Airways Ltd v Department of Trade* [1977] QB 643. Lord Denning MR said that the guidance can be way of 'explanation or amplification of, or supplement to, the general objectives: but not so as to reverse or contradict them'. Guidance issued by the Civil Aviation Authority entitled 'Sale of air package arrangements: advice on the need to provide consumer protection' was challenged in *R (on the application of the Association of British Travel Agents Ltd) v Civil Aviation Authority* [2006] EWCA Civ 1356. The Court of Appeal ordered that the guidance note be withdrawn because it was misleading as regards the rights of consumers.

A particularly forthright (and, it is suggested, entirely correct) judicial commentary on guidance was given in *R (on the application of L) v Metropolitan Police Comr* [2007] EWCA Civ 168.

Longmore, LJ said: 'Subsequent official guidance is usually no more than an arm of the executive expressing an opinion about the meaning of a statute'.

Official guidance from various sources such as central government, local government and government agencies can undoubtedly be helpful, but there has been a great tendency to consider what the guidance says rather than the legislation. This has been particularly so in the field of consumer credit, where many lawyers have agonised about the various meanings of words and phrases in guidance, whereas they have to some extent ignored the words of the actual legislation.

Two pints of lager & a packet of crisps

Finally, the most common use of guidance as opposed to the law was in respect of the Tier 2 provisions relating to the consumption of alcohol in a public house. There can be few people who do not think that the law says that a meal with alcohol consumption has to be 'substantial'. The law does not use the word 'substantial'. It is worthwhile for this purpose to set out that which para 14(2) of Schedule 2 to the regulations states as regards the meal. It must be: '... part of a table meal, and the meal is such as might be expected to be served as breakfast, the main midday or main evening meal, or as a main course at such a meal'.

That is somewhat of a mouthful, and there is no criticism of guidance which summarises all those words into the word 'substantial'. However, it illustrates how easy it is for something which is mere government or quasi-government guidance to become what is thought of by nearly everyone to be the law, as opposed to what is the law. **NLJ**

Fred Philpott, barrister, Gough Square Chambers ([goughsq.co.uk](https://www.goughsq.co.uk)).