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EMPLOYMENT LAW
BULLETIN

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TEMPORARY AGENCY
WORKERS: Another door closes

Employment practitioners and readers of this bulletin in particular will be familiar with the case of *Dacas v. Brook Street Bureau* [2004] EWCA Civ 217. There, a door to protection under the Employment Rights Act 1996 for agency workers was opened by the Court of Appeal when they adverted, obiter, to the possibility of an implied contract between agency workers and end users. For most temporary agency workers the Court of Appeal have now closed that door in their decision in *James v. Greenwich Borough Council* [2008] EWCA Civ 35.

In *James*, the Claimant was an agency worker who had worked for the Defendant Local Authority for three years but was replaced by a different agency worker when she was absent due to sickness. The Claimant was found not to be an employee of the Local Authority and therefore was not entitled to statutory protection from unfair dismissal.

The EAT, with Elias P. presiding, applied the test laid down by Bingham LJ. in *The Aramis* [1989] 1 Lloyd's Rep 213 which held that a contract should only be implied where it was 'necessary' to do so to give business reality to what was happening. It was found that the express contracts between the Claimant and her employment agency and between the employment agency and the Local Authority reflected the business reality of the relationships and it was not necessary to imply a further contract. Such a necessity arose only if there were conduct inconsistent with such a contract. The passage of time was considered insufficient to necessitate an implied contract. Elias P. noted the tribunal's suspicion "that it will be a rare case where there will be evidence entitling the Tribunal to imply a contract between the worker and the end user".

Even before the guidance of Elias P. was upheld by the Court of Appeal, the application of the necessity test was considered determinative of whether or not a contract could be implied. It has proved a very high evidential burden for claimants. In *Heatherwood and Wexham Park Hospitals Trust v Kulubowila* UKEAT 0633/06/2903 the necessity test in *Aramis* was applied and the Employment Tribunal's finding that a contract could be implied on the basis of mutuality of obligation and control was overturned.

The Court of Appeal in *James*, expressly approved of the guidance given by EAT and considered that "just as it is wrong to regard all "agency workers" as self-employed workers outside the protection of the 1996 Act, the recent authorities do not entitle all "agency workers" to argue successfully that they should be treated as employees in disguise" (para 51).

The Court of Appeal's decision in *James* may not spell the end of employment rights for all agency workers. Some claimants have successfully met the evidential burden of the necessity test as demonstrated by *National Grid Electricity Transmission Plc v Wood* 2007 WL 3002010 and *Harlow District Council v O'Mahony* [2007] UKEAT/0144/07. Both these cases were decided following the EAT decision in *James* and expressly considered and approved the EAT's guidance.



Laura Elfield



Catherine Atkinson

In *Wood* the Claimant had been selected by the company and was personally obliged to do the work. Unlike most agreements between agencies and clients, the agency could not simply replace the Claimant. The Claimant had also negotiated directly with the Defendant end user over notice, pay and holidays. The EAT, with Elias P. presiding, considered that it was necessary to imply a contract in order to reflect the business reality.

In *O'Mahony* it was similarly considered that a contract could be implied based upon the conduct of the parties. The Claimant had directly negotiated a pay increase, had raised a grievance and had been subject to discipline by the Defendant Local Authority. Overtime, holiday pay and absence through sickness were dealt with by the Local Authority. The conduct of the parties and the reality of the relationship were consistent only with a contract between them.

However, with only a 'rare' set of circumstances necessitating an implied contract, the vast majority of temporary workers are left without recourse to statutory employment rights. In his postscript to the judgment in *James*, Mummery LJ acknowledged the need to balance arguments for a flexible labour market, on the one hand, and on the other, "the growth of a two tier workforce, one tier enjoying significant statutory protection, the other tier in a legal no man's land being neither employed nor self employed, vulnerable, but enjoying little or no protection" (para. 60). However, he commented that it was not for the courts or tribunals "to express views about a change or to initiate change. This is a matter of controversial social and economic policy for debate in and decision by Parliament ..." (para. 58).

Following the Government's announcement of a deal with unions and employers in relation to the beleaguered Agency Workers Directive, a solution may finally be on the horizon. The proposals involve agency workers receiving equal treatment as employees on pay and basic working conditions after 12 weeks 'in a given job' but will not apply to sick pay or pension rights. The Government now needs to seek European Commission agreement on the proposed terms. Employment ministers met on 9 June to confirm this agreement but it will still be subject to further scrutiny by the European Parliament in the autumn. The Agency Workers Directive may yet extend employment rights to many temporary workers but this particular door may be very slow to open.

Laura Elfield & Catherine Atkinson



EQUAL PAY: An Update

Where are we now?

Since the Equal Pay Act 1970 came into force 30 years ago the pay gap between men and women has undoubtedly narrowed. However, it has far from disappeared. Recent figures published by the Employment Lawyers Association place it at 17.2% for full time workers and 35.6% for part time workers. The gap remains significant and is reflected in most professions, the legal profession included. A recent survey carried out by the Law Society identified that male solicitors earn on average £19,000 more than female solicitors.

Reductions in the gap have slowed over recent years with only a 3.5% reduction since 1997, despite the fact that the number of equal pay claims reaching the ET in 2006/7 was more than double the numbers in 2005/6. Furthermore, with 150,000 anticipated equal pay claims this year alone, such a huge number of claims are set to clog up an already over stretched tribunal system.

The vast majority of those claims are likely to come from claimants employed by local government and the health service. The large scale job evaluations and re-grading exercises undertaken by local authorities and the NHS, in the form of Single Status and Agenda for Change, have clearly had the effect of pushing equal pay to the forefront of many employees' concerns. Pay adjustments, for better and worse, have created discontent about both past and future pay.

The promotion of Conditional Fee Agreements by employment solicitors has encouraged more claimants to bring equal pay claims such as for backdated pay which due to costs restrictions would not in previous years have been embarked upon. As a result of this increased litigation there is now a wealth of legal issues arising out of equal pay claims that the appellate courts are facing for the first time, notwithstanding the fact that the legislation has been in force for a considerable time.

Comparators

The current structure of equal pay law: like work, work rated as equivalent and work of equal value has the effect (or at least should have the effect) of prompting regular job evaluation exercises (or Job Evaluation Schemes "JES") by employers and subsequent necessary changes to pay and grading. An employer will have an absolute defence to an equal pay claim if the claimant was rated lower than the comparator the claimant relies upon.

Several recent cases have highlighted some of the issues raised in equal pay claims as a result of the inherent difficulty with respect to the evidence required regarding comparators and the appropriate selection of a comparator. Claims are frequently based on comparisons between dissimilar roles often, in different departments, and jobs which have absolutely nothing in common. Following Agenda for Change some NHS administrative staff found themselves on the same grade as maintenance employees whose jobs are obviously materially different.

During the course of an action the claimant's or their comparator's role may over time change, affecting its value for the purposes of the Equal Pay Act 1970. Thus, the identification of when the correct comparison period is for the evaluation of equality becomes a crucial case management issue.

The EAT considered how to approach this problem in *S Potter & Others, L Casson & Others v North Cumbria Acute Hospitals NHS Trust* (2008), EAT (Underhill J, P Tatlow, S Yeboah) LTL 17/4/2008, a conjoined appeal concerning a procedural dispute arising out of a group of claims brought by nurses, led by claimants who were part of a massive multiple equal pay claim brought by NHS employees. The claims went back over significant periods, in some cases six years.

The EAT had to consider the Tribunal's case management decision that the correct comparison period for the evaluation of equality by the independent expert is at the date of the presentation of the claim with respect to both

claimants' and comparators' jobs, as opposed to some earlier date within the claim. It was held that it was a proper exercise of the Chairman's discretion initially to limit the expert's consideration to the facts as they stood at the date that the claims were presented, and that there needed to be some fixed point at which a claim can be evaluated.



Esther Maclachlan

This decision does not mean that issues regarding any earlier job changes are not relevant or would not be decided upon later. The EAT emphasised that tribunals had to consider whether the claimant's and the comparator's work were of equal value in respect of every part of the claim period. The question of equal value is not indivisible. The EAT held that an employment tribunal could split the issues in order to manage complex litigation. It did not follow that the tribunal would then have to appoint an independent expert to report on each of those issues. It was entirely possible that the tribunal would feel able, having had the benefit of expert reports on the base facts, to reach a safe conclusion on the impact of any job changes without requiring a further report. The tribunal did not have to hear detailed evidence relating to every part of the claim period.

In the recent case of *Walton Centre for Neurology & Neuro Surgery NHS Trust v D Bewley* (2008) LTL 23/5/2008, Elias J, the EAT considered whether a successor could be relied upon as a comparator. The employer appealed against the Tribunal decision that the respondent employee could compare herself with a successor for the purposes of her equal pay claim. Allowing the appeal it was held that the Tribunal Judge need not have felt constrained by the decision in *Diocese of Hallam Trustee v Connaughton* (1996) 3 CMLR 93 EAT as it had been decided per incuriam and as such, was not a binding authority. EU Law did not, in principle, allow a comparison with a successor because it was hypothetical and required analysis of how events would have progressed had things been otherwise. ECJ jurisprudence put comparison with a successor outside of the scope of the rights conferred by Article 141.

Sex discrimination within Equal Pay Claims

Employers are also now also facing sex discrimination claims in relation to the agreements negotiated with trade unions about back pay, pay protection and the new pay and grading structure. In *GMB v Allen* [2007] IRLR 752 female members brought claims against their own union who, they alleged, had discriminated against them in failing to safeguard their interests sufficiently during negotiations with the local authority employer over the new pay structure. The Claimants believed the union had wrongly advised them to accept a settlement they had negotiated with Middlesbrough Council without fully explaining how much compensation may have been available had the case gone to a tribunal. The Tribunal decided in June 2006 that there had been victimisation from the union and indirect discrimination on the basis that the policy or practice adopted by the union could not be justified in accordance with the Sex Discrimination Act 1975. This decision reverberated throughout unions and had a salutary effect on pay negotiations in the public sector with many unions withdrawing from negotiations in the North East equal pay litigation.

The GMB successfully appealed and no doubt unions across the country breathed a collective sigh of relief. The EAT held that there was indirect discrimination but that it was justified, in the sense of there being a legitimate union aim (maximising future benefits for the majority of its members) which had been pursued proportionately. Regarding the Tribunal's scathing remarks about some of the union's tactics in trying to get their members to agree to its policy (until assisted by the solicitor), the EAT held that the fact that underhand tactics may have been used did not necessarily mean that, overall, there could not still be a proportionate pursuit of a legitimate aim. We await the Court of Appeal's decision with bated breath.

Esther Maclachlan



LEGISLATION UPDATER

Information and Consultation of Employees Regulations SI 2004/3426

From 6 April 2008, the right of employees to agree with their employers on procedures for consultation relating to work issues was extended to undertakings with 50 or more employees.

Sexual Discrimination Act 1975 (Amendment) Regulations SI 2008/656

An amendment to the 1975 Act that came into force on 6 April 2008 introduces a '3 strikes' policy in relation to an employer taking reasonably practicable steps to prevent harassment of an employee by a third party.

An employer will be in breach of the 1975 Act if:

1. A third party subjects the woman to harassment in the course of her employment;
2. The employer has failed to undertake reasonably practicable steps to prevent the third party from harassing the woman.

The above 2 conditions do not apply unless the employer knows that the woman has been subject to harassment in the course of her employment on at least 2 other occasions.

This amendment marks a paradigm shift in that the employer must not only know about the harassment complained of, there must also have been 2 previous occasions of harassment. It does not matter if the 'third party' is the same or a different person on each occasion.

There have also been important changes that broaden the definition of harassment as it will now become unwanted conduct "related to her sex", instead of "on the grounds of sex". This new definition will cover a wider range of conduct as the harassment is only required to be associated to the victim's gender, not caused by it.

Income Tax (PAYE) Regulations 2008 SI 2008/782

Changes have been made to the tax collection regime via the PAYE mechanism. They include HMRC's new power to transfer PAYE liability from employer to employee.

Social Security Up-Rating Order 2008

This order makes the following increases in social security payments:

1. Statutory sick pay increases from £72.55 to £75.40
2. Statutory maternity, paternity and adoption pay increases from £112.75 to £117.18

Ed Lamb

CASE LAW DIGEST

Enfield Technical Services v. Payne; Grace v. BF Components Ltd. [2008] ALL ER (D) 300 Apr

A decision of the EAT [2007] IRLR 840 was affirmed by the Court of Appeal. The judgment involved 2 joined cases where if first: the Claimants were claiming unfair dismissal. The Tribunal found that both Claimants' contracts of employment were unenforceable by reason of unlawful performance and therefore no claim for unfair dismissal could succeed. The EAT held that in fact both Claimants were employees.

The Court of Appeal distinguished between cases where; first a contract of employment might be unlawfully performed if there were misrepresentations, express or implied, as to the facts and, second, those that were solely an error of categorisation. The instant cases fell into the latter category and 'it would be absurd if a contract were held to be illegal because the parties in good faith thought that it could legitimately be considered to fall into one legal category whereas in fact it fell into another'. The Court of Appeal therefore confirmed the EAT's decision whilst noting there were limits to this principle.

Swann v. GHL Insurance Limited Case No: 230628/2007 (Unreported)

The Claimant, who was 51 years old, claimed she had been unfairly treated by her employer because the cost of private medical insurance through a new flexible benefits scheme was more expensive for her than for younger peers. The scheme's premiums were linked to age whereas the Claimant's previous cover was funded by her employer. As a part-time worker, however, her flex allowance was not sufficient to cover the new premiums.

The Tribunal ruled in favour of the Respondent. Whilst the Tribunal found that the calculation of the insurance premium was age-related and therefore amounted to less favourable treatment on the grounds of age, they found this treatment was justified, not least as the Claimant's flex allowance was the same as other colleagues of her grade, regardless of age.

Shaw v. CCL Limited [2008] IRLR 284 EAT

The potential for sex discrimination in relation to a request for flexible working is well known. The EAT has reminded us that although there is no right to return to work on a part time basis, the refusal of such a request may amount to unlawful indirect sex discrimination. This may enable the employee to resign and claim constructive unfair dismissal.



Ed Lamb

Kuzel v. Roche Products Ltd. [2008] ALL ER (D) 234 Apr

At Tribunal the Respondent employer had argued that the employee had been dismissed for some other substantial reason. The Claimant argued that she had really been dismissed for whistleblowing and therefore the dismissal was automatically unfair. The Tribunal found the Claimant had been unfairly dismissed as it found the Respondent had not made out their reasons for the dismissal. However the Tribunal also rejected the Claimant's claim that it was automatically unfair as it held the Claimant had not made out her claim of whistle blowing. The Claimant appealed to the EAT.

The EAT concluded that the tribunal had in effect placed the burden of proof on the Claimant to show that she had been dismissed for whistleblowing and that this was wrong in UK Law. However, it was unable to accept the Claimant's argument that her employer's failure to prove the potentially fair reason relied on should automatically result in a finding of unfair dismissal under S.103A ERA. The case was remitted to Tribunal.

On appeal to the Court of Appeal, the Claimant argued that having found against the employer, the Tribunal should have automatically found in her favour and on the reasons advanced by her. The Respondent cross-appealed the decision to remit to Tribunal.



The Court of Appeal confirmed that it is for the employer to establish the reasons or principle reason for the dismissal of a Claimant. If however the tribunal is not convinced by the employer's explanation of the reason for dismissal, it may find the dismissal was for the reason asserted by the employee. However, the Court of Appeal confirmed that there is no legal obligation to do so, although in practice it often will. Mummery LJ went further and commented that the case showed 'how worked up lawyers can get about something like the burden of proof.'

Amicus and others v Dynamex Friction Ltd and another [2008] All ER (D) 251 (Apr)

The Court of Appeal held that the Tribunal had correctly held that dismissals made by an administrator fell within the 'economic, technical or organisational' defence in an insolvency case to which the TUPE Regulations 1981 applied.

The question the Court of Appeal were concerned with was whether an administrator had been used as an 'unwitting tool' by a director of the Respondent company. This Director was later to buy back the assets and business from the administrator. Did this make the dismissals transfer-related and unfair? Further, whether the director had stage-managed the placing of the company in administration knowing that the dismissals were inevitable and that a sale of the company would have shortly followed?

The Court of Appeal held, overturning the EAT's decision, that the EAT had failed to consider the question of whether the administrator had been an unwitting tool in the director's 'plan'. It held that the dismissal effected by the administrator had been made in the proper exercise of his professional duties. Absent evidence of collusion between the administrator and director and given that the 'controlling mind' at the time of the dismissals was the administrator, the dismissals were not transfer related and unfair.

Spiked: inadmissible documents & failed claims

Whilst disputes as to the admissibility of documents before the ET are relatively common, it is not often that the outcome of that dispute will determine the success or failure of the claim. However, that was the situation in the two cases considered below – one was a victimisation claim based on two documents in previous proceedings, the other a constructive dismissal claim in which the "last straw" was said to have been a "without prejudice" letter from the employer's solicitors. The Respondent in each claim objected to any attempt to rely on the documents in front of the Tribunal.

First, the victimisation claim: **South London & Maudsley NHS Trust v Dathi** [2008] IRLR 350. Mrs Dathi had brought a discrimination claim against the Trust. She succeeded and even had an award of costs in her favour. During the course of those proceedings the Trust's advisors had written two letters. In the first they refused to give disclosure of witness statements taken in the investigation of an outstanding grievance brought by Mrs Dathi. In the second letter they set out the reasons why they would be resisting the costs application. Mrs Dathi alleged that these matters constituted unlawful discrimination and victimisation and brought further proceedings.

The Trust took the point that the two letters attracted absolute immunity because they had been brought into existence for the purpose of legal proceedings (relying on **Lincoln v Daniels** [1962] 1 QB 237, CA). The EAT agreed. Assisted by a concession made on behalf of Mrs Dathi, HHJ McMullen QC considered that the costs letter was a "necessary precursor" to the Trust's argument in the ET. It was therefore akin to a pleading and protected by absolute immunity. Similarly, the disclosure letter had come into existence for the purpose of the proceedings and pursuant to the Tribunal's Order relating to disclosure and bundle preparation. It too attracted absolute immunity. Mrs Dathi was therefore able to base her claim on neither letter and it was struck out.

Ms Brodie, a teacher, was in dispute with her employer over alleged non-payment of contractual sick pay. In a letter marked

"without prejudice" her employer's solicitors wrote suggesting a settlement that involved her resignation. Ms Brodie considered this to be the final straw, resigned and claimed unfair dismissal. The employer contended, and the ET held, that the letter was privileged so that Ms Brodie was unable to rely upon it. The EAT agreed: **Brodie v Ward** UKEAT/0526/07/LA (7.2.08).



Philip Jones

Ms Brodie attempted to invoke two exceptions to the without prejudice rule. The first (relying on **Independent Research Services v Catterall** [1993] ICR 1) would apply where suppression of the without prejudice communication would lead to "something amounting to a dishonest case" being put forward. The second applies where exclusion would be a cloak for "unambiguous impropriety" – an exception given particular consideration in discrimination/victimisation cases (see **BNP Paribas v Mezzotero** [2004] IRLR 508 and referred to in **Brunel University v Vaseghi** [2007] IRLR 592). However, the EAT held that the facts of the case could not be stretched to fit into the exceptions – the attempt to settle had been a perfectly proper one.

These cases illustrate the powerful effect that sometimes esoteric arguments as to admissibility are capable of having. What is perhaps surprising is that the EAT has not yet been asked to consider the admissibility of a step 1 letter under the statutory grievance procedure. If ever there was scope for a claim to depend on one document, that is it. However, there is no doubt time for the question to crop up before the SDRPs are abolished in (hopefully) April 2009. In the meantime, the Brodie case gives a foretaste of the arguments that might be expected.

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