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EMPLOYMENT LAW bulletin

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You scratch mine...

Philip Jones and Dorothea Gartland outline mutuality in employment contracts.

The vastly increased use of contract workers, agency workers, consultants and "zero hours" contracts in the modern "flexible" labour marketplace has challenged Courts and Tribunals (and the advocates appearing before them) to embark on a new analysis of the contract of employment. At the heart of that analysis has been the concept of mutuality – the employer's obligation to offer work and the employee's obligation to do it. This has been so both in relation to cases seeking to determine the status of a worker who may work intermittently and also in relation to the problem of determining the employer of an agency worker.

The agency worker problem was considered by the Court of Appeal in *Dacas v Brook Street Bureau* [2004] IRLR 358 which, by a 2:1 majority, suggested that there might have been an implied contract of employment between the worker and the end-user client. That decision came under attack in *Cable & Wireless v Muscat* [2006] IRLR 354 (CA) but was unanimously affirmed. The Court referred to the House of Lords' decision in *Carmichael v National Power* [2000] IRLR 43 and the statement in that case that if the employer had no obligation to provide work and the employer no obligation to perform it, the "irreducible minimum" of mutuality of obligation to support an employment contract would be absent. The fact that there existed a sufficient degree of mutuality between Mr Muscat and C&W was enough for him to be considered C&W's employee, despite the fact that he was paid via an agency.

In *C&W v Muscat* the existence of the mutual obligations was not disputed – the issue was whether the other circumstances of the tripartite relationship pointed away from the existence of an employment relationship. However, a number of recent cases have looked directly at the issue of mutuality.

In *Wilson v Circular Distributors Ltd* [2006] IRLR 38, the EAT grappled with the position of an area manager who worked under a contract which stated that there were no regular or guaranteed hours of work and that there would be occasions when no work would be available. The company's position was not helped by the fact that the contractual documentation appeared to have been drafted on the basis that Mr Wilson was an employee and that in response to questions ordered by the Tribunal it had referred to the "employment relationship". However, the Tribunal found that the company was under no obligation to offer work to Mr Wilson and that there was accordingly no mutuality of obligation. Although the Tribunal made no decision on the point, it appeared uncontentious that had

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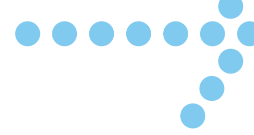

Mr Wilson been offered work, he was required to do it. The EAT reminded itself of what was said in *Carmichael* and of the fact that there was not necessarily any obligation on an employer to provide work. The absence of an obligation on the company to provide work did not therefore negate the existence of an employment contract. For that to occur, there would have also to have been an absence of obligation on the part of Mr Wilson to accept the work when offered. In fact, on construing the contract, the EAT found not only an obligation on Mr Wilson to do the work but also an obligation on the company to offer him work if there was work available. There was a sufficient degree of mutuality and Mr Wilson was an employee.

A certain amount of confusion has surrounded the concept of "mutuality", since without some element of mutual obligation, there may well be no contract at all, regardless of how that contract might be categorised (see Elias J in **Stephenson v Delphi Diesel Systems** [2003] ICR 471 at para. 11). As was pointed out by HHJ Peter Clark in *A D Bly Construction v Cochrane* (UKEAT/0243/05/MAA, 23.11.05), the true question is not whether there is mutuality but the nature of the mutual obligations undertaken. Within a very short time HHJ Peter Clark was asked to revisit the question of mutuality in *Younis v Trans Global Projects Ltd* (UKEAT/0504/05/SM, 2.12.05). Mr Younis claimed both to be an employee and a "worker" within the meaning of the Working Time Regulations. He had been engaged by the company as a consultant to introduce it to business opportunities mainly in the Middle East and Gulf states. His letter of appointment contained provisions for the payment of a daily rate and reimbursement of expenses. In fact, Mr Younis billed the company a fixed amount each month. The Tribunal found that the company were not obliged to supply leads to Mr Younis and he was not under any duty to carry out any particular task. Accordingly, there was no mutuality and Mr Younis was neither employee nor worker. The EAT disagreed. Mr Younis had been appointed for 3 years, terminable on 60 days' notice. He was obliged to introduce the company to his contacts in the Middle East. The company provided him with an unlimited opportunity to work on those introductions and paid him on a retainer basis. On this factual matrix the EAT concluded that there was sufficient mutuality for a contract for services. However, the Tribunal had been entitled to find that the company exercised insufficient control over Mr Younis' activities for the relationship to have been one of employer and employee. Mr Younis was therefore permitted to advance his claims based on his status as a worker but not those that depended on his being an employee.

The facts in *Cornwall CC v Prater* [2006] IRLR 362 (CA) were rather different. Mrs Prater worked for the Council between 1988 and 1998 as a home tutor. The Council was under no obligation to offer her pupils to tutor and she was under no contractual obligation to accept any such pupils. In fact, Mrs Prater had not rejected any pupils and had worked for the Council throughout almost the whole of the 10 year period. For some periods during the 10 years Mrs Prater was not working for the Council. However, on appeal, the Council accepted that these were temporary cessations of work (within s.212(3)(b) ERA) which would not affect Mrs Prater's continuity of employment if she were an employee. It was common ground that there was no umbrella contract covering the 10 year period. The Council argued Mrs Prater was no more than a casual worker, free to work when she pleased. However, the Tribunal had found that once Mrs Prater agreed to take a pupil, both sides regarded her as being committed to teaching that pupil for as long as necessary. The Council therefore argued that additional mutuality was required – there had to be an obligation to offer or to accept further work at the end of each engagement. The Court of Appeal rejected that argument. The required mutuality was no more than that inherent in each engagement – Mrs Prater was obliged to teach the individual pupil and the Council to pay her for teaching the pupil whom they continued to make available for teaching by her. In effect, each individual engagement was a contract of employment and they were all linked together by s.212 ERA.

It is notable that the test for the irreducible minimum of mutuality in *Carmichael* was expressed in the negative – mutuality is absent if neither the employer is obliged to offer nor the worker to accept work. Bearing in mind the reminder in *Wilson* that an employer may not necessarily have to offer work, it is the worker's position that is crucial. In these circumstances, mutuality means no more than that the worker (having agreed to do the job) has to see the job through and the employer to pay for it. If the personal service/control tests are also met, this is very likely to be a contract of employment.

Continuity of course is another question. If there is no umbrella contract, an employee who is retained on a casual basis will be caught by the decision in *Carmichael* unless he or she can demonstrate that the gaps between engagements are no more than temporary cessations of work, not necessarily an easy matter to demonstrate.

◆ **Philip Jones** and **Dorothea Gartland**

Philip Jones' employment practice includes: unfair dismissal claims, sex race and disability discrimination, TUPE disputes, the legality of termination payments under statutory regimes (principally the NHS (Remuneration) Regulations), wrongful dismissal claims and claims relating to directors' duties/breach of trust. Dorothea Gartland was made a tenant upon completion of her pupillage at 9 Gough Square in 2005 and is able to a variety of work.

Mum's the Word: the future for maternity rights

In early 2006, the DTI published the Government's latest proposals for legislative changes to the law on maternity, paternity and adoption leave rights. The publication of these proposed changes follows a year-long period of consultation with interested groups, including the EOC, on how the Government can best implement its Ten Year Strategy on Childcare. Expected to come into force in April 2007, the new law will change the face of maternity rights – here, Louise Jones considers the key changes.

Throughout the consultation period, the DTI has been keen to balance the competing interests of the employee and employer in the development of the new law. On the face of it, a balance appears to have been struck – while there are clear 'gains' for employees, such gains are accompanied by employer-friendly measures that aim to ease the burden of administering maternity and adoption rights in the workplace.

The employee's most significant 'gain' in the proposed law is undoubtedly the extension of the period of statutory pay – the period of statutory maternity pay and statutory adoption pay will be extended from the present 26 weeks (6 months) to 39 weeks (9 months) from April 2007. Moreover, for the purposes of this statutory period, it seems that the Government intends to remove the qualifying condition, namely that an employee should have at least 6 months' service with an employer by the 14th week before the week in which the baby is due in order to qualify for additional maternity leave. This means that all pregnant employees will be able to take the extended period of maternity allowance, statutory maternity pay or adoption pay, if they so choose. After the period of statutory pay, the right to 12 months' maternity leave will be extended to all employed women.

Aimed at improving the management of women returning to work after maternity leave, employees will be required to give 8 weeks' notice (rather than the existing 28 days) of their impending return to work. Although, of course, some employers may not require the full period of notice of a return date, this obligation on the employee should ease, administratively, her return.

A further key change is the introduction of Keeping in Touch Days – these will enable mothers to work for a limited number of days during the statutory pay period without losing their statutory payments for that week or ending their leave. The Government's intention is, it seems, to leave the precise mechanics of Keeping in Touch Days to the employer and employee to agree, one of the main aims of the days being to keep employers and employees in contact during the period when an employee is away on maternity leave.

The potential benefits of such days for employees are great – an opportunity to stay involved with the day-to-day workplace without any reduction in fundamental maternity rights. However, it should not be the case that an employer can insist upon an employee participating in Keeping in Touch Days. To that end, it is likely that these days will be the subject of an addition to s96 of the ERA 1996, in that if an employee declines to undertake such work on Keeping in Touch Days and is dismissed because she has so declined, she will automatically be unfairly dismissed.

April 2007 is also likely to see a change to fathers' rights, in that they are likely to be given a right to a maximum of six months' additional unpaid leave, with paternity pay at the flat rate **IF** the mother returns to work before taking her full entitlement to statutory maternity pay and maternity allowance. It is not clear why fathers' rights to extended periods of paternity leave need to be so intrinsically dependent on the amount of time that mothers have taken off work. Aside from confirming that it is still women who have the primary right in relation to parental leave, this is perhaps for economic reasons. The cost to the economy of having two parents on statutory pay (and still more the cost to an employer if both parents are employed in the same workplace) has to be put in the balance with the social and domestic advantages of granting of paternity leave in addition to (rather than as an alternative to) maternity leave. The precise detail of the changes to paternity rights that next year will see is yet to be worked out, but one concern, perhaps, is that there is nothing by way of an incentive in the proposed legislation to encourage men to take extended time on paternity leave.

More information and resources will undoubtedly emanate from the DTI in the year ahead as the date for introduction of the new law nears. Happily, the DTI seems to have taken on board the recommendation of the EOC that checklist leaflets should be available to both employers and employees, detailing key rights and responsibilities in relation to parental rights for distribution at an early stage in a pregnancy. April 2007 will also see the introduction of new regulations on flexible working, which will extend the existing right to request flexible working to carers of adults, although the precise definition of 'carer' awaits clarity. The proposed new law looks set to provide some improvement in respect of maternity rights and family friendly working, representing a redefinition, to some extent, for employees seeking to balance work and family life. ◆ **Louise Jones**

Louise Jones completed her pupillage at 9 Gough Square and was taken on as a tenant on 3rd October 2005. As a junior tenant she is able to undertake a variety of work.

Legislation Updater!

The following provisions came into force in April 2006[1]:

- From 2nd April 2006 the standard rates of Statutory Maternity Pay, Statutory Paternity Pay and Statutory Adoption Pay increased to £108.85 per week.

- The *Transfer of Undertakings (Protection of Employment) Regulations 2006* have (just about!) come into force: indeed they narrowly avoided annulment at the beginning of May when the House of Lords voted 79-77 against a motion to revoke them. The new Regulations give effect to the Acquired Rights Directive (No.2001/23). Helpful guidance on the effect of the Regulations can be found on the DTI website www.dti.gov.uk/er/individual/tupeguide2006.regs.pdf

- The *Working Time (Amendment) Regulations 2006* have removed the partly unmeasured working time exemption from the Working Time Regulations 1998.

- The *Occupational and Personal Pension Schemes (Consultation and Miscellaneous Amendment) Regulations 2006* require employers with 150 or more employees to undertake consultation before making changes to occupational and personal pension schemes. The *Information and Consultation of Employees (Amendment) Regulations 2006* have made minor amendments to the Information & Consultation of Employees Regulations 2004 to remove the overlap created by the introduction of the pension consultation regulations.

- The revised "Code of Practice on Racial Equality in Employment" is now in force pursuant to the *Race Relations Code of Practice relating to Employment Order 2006*.

- On the 1st May 2006 the revised "Guidance on matters to be taken into account in determining questions relating to the definition of disability" came into force, replacing the earlier version which was issued by the Secretary of State on the 25th July 1996. Do note that the earlier guidance will continue to apply in relation to any claim arising out of an act of discrimination occurring before the 1st May 2006.

[1] Measures came into force on the 6th April 2006 unless otherwise stated.

Case Law Updater!

- The first major appellate decision on the Part-time Workers Regulations 2000 has finally been handed down in *Matthews v Kent and Medway Towns Fire Authority* [[2006] ICR 365. This House of Lords judgment has in particular made it easier for part-time claimants to identify a full-time comparator.

- The House of Lords, in *Rutherford & Anor v Secretary of State for Trade and Industry* [2006] UKHL 19, has unanimously decided that Sections 109 and 156 of the Employment Rights Act 1996, which impose an upper age limit of 65 for claims for compensation for unfair dismissal and redundancy pay, do not have an adverse impact on a substantially higher proportion of men than women and therefore did not constitute indirect discrimination on the ground of sex. The upper age limits are of course due to be removed on the 1st October 2006 in any event!

- In *Powerhouse Retail Limited & Ors v VM Burroughs & Ors & Secretary of State for Education* [2006] UKHL 13, the House of Lords ruled on time limits for bringing an equal pay claim, in circumstances where an employee had a succession of contracts with the same employer and on transfer of an undertaking.

- The ECJ, in *Federatie Nederlandse Vakbeweging v Staat der Nederlanden* (Case C-124/05) ruled on the 6th April 2006 that a national law which allows workers to receive payment in lieu of annual leave carried over from the previous year's minimum leave entitlement is a violation of the Working Time Directive (No.2003/88).

- Watch this space! For all those stress claims issued in the wake of the Court of Appeal's decision in *Majrowski v Guy and St Thomas' NHS Trust* [2005] ICR 977 (employer could be vicariously liable for the acts of employees under the Protection from Harassment Act 1997), this case was heard in the Lords in May 2006. Judgment is expected imminently.

All Change!

- Laura Elfield has now taken over from Susan Belgrave as the Chambers Employment Team Co-ordinator and editor of the Employment Bulletin. Laura has a mixed civil practise specialising in employment and personal injury work.

She would be pleased to receive any suggestions for topics you would like to see covered, either in articles or seminars. Please feel free to contact her on lelfield@9goughsquare.co.uk.

Laura Elfield has a mixed civil practice focusing on personal injury and employment law. She is co-ordinator of Chambers' Employment Team.

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