



# The Agency, the client and the dismissed worker

Mrs. Dacas had worked exclusively as a cleaner for the London Borough of Wandsworth for more than five years when she was suddenly dismissed for allegedly being rude to a visitor at the residential care home which she cleaned. She worked as a result of a contract between her and Brook Street Bureau, a well known employment agency, and it was they who dismissed her.

As a cleaner she had to do what she was instructed to do by Wandsworth. They provided her with cleaning materials and equipment. She worked hours which they prescribed on a two week rota. She was settled in her job; she did not want to be dismissed and so she brought a claim for unfair dismissal. Whether she was dismissed fairly or not was never decided because the employment tribunal held that despite the long work history, she was not employed by anyone. One can be sure that Mrs. Dacas will have been very surprised to learn that she was self-employed.

## Employment tribunal decision

The reason for the tribunal's decision was that there was no contract at all between Mrs. Dacas and Wandsworth, let alone a contract of service. There could therefore be no mutuality of obligation. Her labour was supplied to Wandsworth by the agency. It had to be conceded that there was no overall or "umbrella" contract of service with Brook Street, but it was argued that her particular assignment to Wandsworth by Brook Street constituted a contract of service, relying on *McMeechan v Secretary of State for Employment* [1997] IRLR 353.

The employment tribunal found both of the "irreducible minimum" requirements for a contract of service were present. There was mutuality of obligation - she had to work when she had accepted the assignment and Brook Street had to pay her.

Brook Street exercised control over her in numerous ways and the day to day control exercised by Wandsworth was that delegated to them by Brook Street, pursuant to the contracts between them and Mrs. Dacas and them and Wandsworth. There were other features of the relationship which were neutral and of no assistance in determining whether Mrs. Dacas was an employee of Brook Street. But the tribunal held that there was nothing in the arrangements relating to the particular assignment that added anything to the general contract between the two parties, which was admitted not to be an umbrella contract of service, and that therefore there was no McMeechan contract.

## EAT decision

Mrs. Dacas appealed to the EAT in relation to her claim against Brook Street. She accepted the argument that there was no mutuality of obligation between her and Wandsworth and the ET had made no findings of fact which would have supported a claim against them. She argued that the ET had found both of the irreducible minimum requirements of a contract of service were present and all other features were neutral. In those circumstances, the only conceivable finding the ET could have made was that she was employed by Brook Street. The EAT agreed and the appeal was allowed.

## The Court of Appeal decision

Brook Street appealed to the Court of Appeal. Wandsworth were not a party to the appeal, but were asked by the court to appear and be represented. The Court of Appeal were clearly troubled by the legal difficulties occasioned by the triangular arrangement of agency, client (end user) and worker. Although it is a common enough situation, the legal authorities on the subject are often difficult to reconcile and the problem was described by Mummery L.J. as "the most intractable as well as the most basic in the whole of employment law". The Judge said that employment tribunals require guidance in the interests of consistency and predictability. Unfortunately, the guidance given by the three judges of the Court of Appeal was itself not consistent!

The one thing about which all three members of the court were agreed however was that Mrs. Dacas was not employed by Brook Street, pursuant to a contract of service and so the appeal from the EAT was allowed.

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### Mummery LJ

- ❖ He said that if there were no interposed employment agency, there would be no doubt that, even in the absence of an express contract, Mrs. Dacas worked under a contract of service with the Council. The outcome which accords with practical reality and common sense is that *"if it is legally and factually permissible to do so, the applicant has a contract, which is not a contract of service with the agency and that the applicant works under an implied contract, which was a contract of service with the end user."*

Mrs Dacas' work obligations and the power to dismiss her were contained in the express contract between her and Brook Street but that did not prevent them from being *"read across the triangular arrangements into an implied contract and taking effect as implied mutual obligations as between Mrs. Dacas and the Council"*.

Mummery LJ. allowed the appeal on the basis that Brook Street had no obligation to provide the applicant with work and she was under no obligation to accept any work offered. The Judge did not really deal with the suggestion that when she accepted an assignment and went to the client's premises to work, she had an obligation to work, and Brook Street had an obligation to pay her for the work. That was the basis of the finding of fact by the ET. He said there was one contract between Mrs. Dacas and Brook Street, which was not a contract of service (which was common ground) and there was no basis for finding another contract between them governing her work at the residential care home.

In relation to Wandsworth. Mummery L.J. said that the ET ought to have considered the possibility that there was an implied contract of service between them and Mrs. Dacas. That her work was under the day to day control of Wandsworth pointed away from the probability of her employment by Brook Street and away from her being self employed. This aspect of control may well have been sufficient to satisfy the control criterion of a contract of service. The Judge hinted, without ruling, that the end user ("the ultimate paymaster") paying for the work done under its direction and for its benefit would be sufficient to satisfy the mutual obligation test.

### Sedley LJ

- ❖ He started from the basis that the conclusion of the ET that Mrs. Dacas was employed by nobody was simply not credible. He accepted that Brook Street could have moved Mrs. Dacas daily from job to job and it would have been difficult, but not impossible, to spell out a contract of service between her and Wandsworth in those circumstances. But, he said, once arrangements had been in place for more than one year, an inexorable inference would arise that there was a contract of employment. It is not altogether easy to understand how the contractual arrangement could change merely by the effluxion of time and it does not appear that Sedley L.J. was saying it did. He seems to be saying that the ET could use the fact that it had gone on for a long time as evidence of what was to be implied from the beginning. Given that in most cases it is not known at the beginning how long the arrangement is likely to last, the concept of using what subsequently transpired to establish what was intended from the start is not free from difficulty in this context.

- ❖ On the other hand, if he merely means that if the arrangement is capable from the beginning of being a long term arrangement, the contract of service is to be implied - then in most cases there will be a contract of service with the end user (and in any event, until one year has passed there is no protection against unfair dismissal).

- ❖ Sedley L.J. decided that the principal reason for agreeing that Brook Street was not the employer was that the evidence pointed to the conclusion that Wandsworth was. He left open the possibility of a trilateral contract of service in which one side's obligations are divided or shared between two of the three parties.

### Munby LJ

- ❖ He agreed that Brook Street were not the employers for the reasons given by Mummery L.J., but he went on to explain that he had very serious misgivings about whether Wandsworth were the employers. He pointed out that industry had assumed there was no contract of service in a situation such as this (although the many conflicting authorities suggest this would not be a reasonable assumption to make). He suggested that a contract of employment does not generally oblige the master to provide work - only to pay the wages - and, given that the end user does not remunerate the worker, there are no mutual obligations and there can be no contract of service. If control is vested in the end user there can be no contract of service with the agency.

- ❖ One thing all the court seemed to be agreed on was that the current position is unsatisfactory and that legislation may be the only way to produce a satisfactory state of the law.

### CONCLUSION

- ❖ It seems that the Court of Appeal did not address head on the ET findings of fact that the arrangement between Mrs. Dacas and Brook Street did result in mutuality of obligations and control, but the result of this case is likely to be that in the ordinary agency worker arrangement it will be very difficult to establish a contract of service on a *McMeechan* basis (a contract for the particular assignment) or on any other basis. Indeed it remains to be seen how much is left of the decision in *McMeechan*.

- ❖ Further, the Court did not criticise or address the approach of the EAT that the ET had made findings of fact which the appellate court could not challenge and that the findings of fact all pointed in the direction of a contract of service with Brook Street.

- ❖ The good news for applicants is that it should be easier to establish a contract of service in which the end user is the employer, based on the majority judgments of Mummery and Sedley LJJ., although, for the reasons given by Munby J. such a claim would not necessarily be plain sailing.

- ❖ It would have been helpful if the whole difficult, but frequently occurring topic could be considered by the House of Lords. Unfortunately, that is not likely to happen in this case. Mrs. Dacas was represented by the Free Representation Unit, but she could not take the risk of incurring third party costs in an appeal to the House of Lords and the premium for insuring her potential liability would be prohibitively expensive to her and Brook Street were not willing to agree that there should be no order for costs in respect of any appeal to the House of Lords.

◆ JOHN FOY Q.C.

*John Foy Q.C. was leading counsel for Ms. Dacas in the Court of Appeal.*

# Calderbank

## offers, costs & unreasonable litigants

Whether acting for applicant or respondent in employment tribunal proceedings, if the other side takes an unrealistic and entrenched view of the strengths and weaknesses of their case it has been difficult to find a mechanism to force them to reconsider and start to negotiate sensibly. Parties faced with such recalcitrant opponents have often resorted to sending Calderbank letters - offers made "without prejudice save as to costs", named after the family case *Calderbank v Calderbank* [1975] 3 All ER 333. In theory, if at the end of the case the applicant recovered less than the respondent had offered to pay, an application for costs could be made on the basis that the offer should have been accepted. In practice, even after the new procedural Rules in 2001, tribunals seemed highly reluctant to take such offers into account.

However, the EAT's decision in *Kopel v Safeway Stores plc* [2003] IRLR 753 should change this. Miss Kopel had brought a claim for unfair dismissal, sex discrimination and, inventively, torture and slavery contrary to her rights under the European Convention on Human Rights. She claimed compensation of £22,000 with awards for injury to feelings and aggravated damages on top. Safeway was apparently willing to do a deal but Miss Kopel would not enter into meaningful negotiations either directly with them or via ACAS. Some time before the hearing, Safeway offered Miss Kopel a settlement of £5,700 on a Calderbank basis. The offer was dismissed out of hand, with Miss Kopel reiterating the full pleaded value of her claim.

At the hearing Miss Kopel lost on all heads of her claim. In particular, the tribunal described her claims under the ECHR as "frankly ludicrous". The tribunal found that the failure to accept Safeway's Calderbank offer had been unreasonable and ordered Miss Kopel to pay a contribution of £5,000 towards Safeway's costs of £18,000. Miss Kopel appealed against the costs order.

The EAT pointed out that the principle set out in *Calderbank v Calderbank* could not be applied strictly in employment tribunals.

## "It's a game of two halves, Gary"

Faced with an unmeritorious claim and the prospect of many days in tribunal it may become overwhelmingly tempting for an employer to try to get the applicant's case kicked out at 'half-time'. The Court of Appeal has recently provided a firm reminder that the temptation should be resisted. In *Logan v Commissioners of Customs & Excise* [2003] EWCA Civ 1068 it was confirmed that submissions of no case to answer are generally to be frowned upon in ET proceedings. In *Logan* the tribunal had dismissed the applicant's constructive dismissal case after she had called her evidence, on the basis that there was no case to answer. The matter wound its way up to the Court of Appeal, which decided the tribunal had erred.

Ward LJ stated the outcome was "...one of the very reasons why submissions of no case are dangerous to make and to allow.

A party's failure to beat a Calderbank offer should not lead automatically to an award of costs against that party. However, the offer would become a relevant factor if the tribunal concluded that the party had been unreasonable in rejecting it. On the facts of Miss Kopel's case, the tribunal had been entitled to find that the rejection of the offer was unreasonable and therefore to award costs against her under rule 14 of the 2001 Rules.

The EAT did not lay down any express guidelines as to the approach to be taken in future. However, it is clear from the decision and the unreported EAT decisions cited in the decision what such guidelines might be:

- (1) Calderbank offers should not be a back-door means of introducing into tribunals a costs regime equivalent to that in the courts;
- (2) in evaluating whether or not an offer should reasonably have been accepted, tribunals should not employ a mechanistic or "rule of thumb" approach. What seems to be required is a substantial disproportion between the sum offered and the award that could reasonably have been expected. The necessary level of disproportion can only be identified on an individual case basis;
- (3) many arguments may well turn on what a party could reasonably have expected out of the proceedings. If the other side have an unrealistic expectation, it is going to be very worthwhile setting out in correspondence precisely why it is unrealistic;
- (4) a failure to enter into sensible negotiations when offered the chance is likely to be an important factor in considering unreasonableness;
- (5) as in the courts, it is likely that an unjustified refusal to participate in a process of alternative dispute resolution would be considered unreasonable;
- (6) a party cannot rely on the absence of a costs warning to justify pressing on in the face of a reasonable Calderbank offer. Of course, the existence of a costs warning will be highly relevant if it has been ignored.

The EAT's decision stops a long way short of creating the highly effective settlement machinery which CPR Part 36 has implemented in the courts. However, the decision in *Kopel* is important in giving authoritative recognition to the efficacy of Calderbank offers. As a result, there is no good reason not to make a Calderbank offer in every tribunal claim in which financial compensation is sought.

◆ PHILIP JONES

The shortcut has once again led to a longer journey for the parties at greater expense".

### NO CASE TO ANSWER

Ward LJ approved the following short summary of the law as to submissions of no case to answer:

- 1 there is no inflexible rule of law and practice that a tribunal must always hear both sides, although that should normally be done;
- 2 the power to stop a case at "half-time" must be exercised with caution;
- 3 it may be a complete waste of time to call upon the other party to give evidence in a hopeless case;
- 4 even where the onus of proof lies on the applicant, as in discrimination cases, it will only be in exceptional or frivolous cases that it would be right to take such a course;
- 5 where there is no burden of proof, as under s.98(4) of the Employment Rights Act 1996, it will be difficult to envisage arguable cases where it is appropriate to terminate the proceedings at the end of the first party's case.

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### THE FACTS IN *LOGAN*

In April 1997 the applicant complained that she was subjected to a verbal assault by her line manager ("SD"). She invoked the grievance procedure, and in October 1997 her complaint was rejected. The ET concluded that the manner in which the initial grievance had been determined involved a breach of contract on the employer's part. Having been posted to another job within the same building as SD the applicant became ill with stress in February 1998. She complained to a senior manager about her anxiety at working near SD, but was told that if she would not return to work she would be presented with the option of medical retirement or face the possibility of dismissal. She went on to resign in May 1999 and claimed constructive unfair dismissal.

The ET concluded there was no case to answer because nothing the senior manager did could properly be regarded as a "final straw" for the purposes of a constructive dismissal. Furthermore, given the 18-month gap between the defective grievance hearing and eventual resignation the applicant had to be regarded as having waived the breach and affirmed the contract.

### THE COURT OF APPEAL'S DECISION

Ward LJ felt that the tribunal had made two basic errors in dismissing the case. The first concerned application of the "last straw" doctrine to a case involving a series of acts which in their totality amount to a repudiatory breach by the employer.

The tribunal has to consider as a question of fact (not law) if there is any "proximity in time or in nature" between the acts. This was a factual enquiry that the tribunal had not completed. It could not assume that the 18-month gap in itself scuppered the applicant's case. To do so would be to elevate a factual enquiry into an inflexible proposition of law.

The second error the tribunal had made was in failing to provide reasons for finding that the senior manager's response to the applicant's ongoing complaint was not a last straw. Ward LJ confirmed that the principle in *English v Emery Reinbold and Strick Ltd* [2002] 1 WLR 2409 applies to ET proceedings. Justice will not be done if it is not apparent to the parties why one has won and the other has lost. The issues the resolution of which were vital to the tribunal's conclusion had to be identified and the manner in which they were resolved explained.

### CONCLUSION

*Logan* confirms that, painful though it may be, the safe course for both respondents and tribunals is to ensure that unmeritorious claims are properly killed off at first instance by a full hearing of the evidence.

◆ Daniel Lawson

# Case Law Digest

### HM WILLIAMS v MINISTRY OF DEFENCE [TLR 04.11.03]

Ms Williams was a highly-regarded officer in the Royal Air Force. She wished to undertake a course and took the test in which she achieved joint top score. She then discovered that she was pregnant and would give birth at about the time the course was due to take place. When she returned from her maternity leave, she discovered that she would have to sit the test again.

She claimed that the Ministry of Defence had discriminated against her on the grounds of sex. She also argued that being required to return to work after the expiry of her ordinary maternity leave while she was still breast-feeding amounted to sex discrimination. She was successful at first instance and the Ministry of Defence appealed.

The EAT approved the finding by the ET that there would not have been any practical difficulty in simply allowing Ms Williams to begin the course after the birth of her child without having to take the qualifying test again. The ET was entitled to conclude that the factor which caused her to be excluded from the course was her pregnancy and that clearly disproportionately affects women and was, therefore, sexually discriminatory. The Ministry of Defence's appeal on the breastfeeding issue allowed. The protection afforded to women ended on the expiry of ordinary maternity leave unless there were particular health and safety issues, of which there were none in this case.

### L PAY v LANCASHIRE PROBATION SERVICE [2004] IRLR 12 EAT

Mr Pay was a probation officer dealing with sex offenders. His employers accepted that he was good at his job. He was dismissed when his employers discovered that he was a director of a company that sold, via its website, products connected with bondage and sado-masochism. Mr Pay had also told his employers that he performed at hedonist and fetish clubs.

Mr Pay claimed unfair dismissal and relied on Articles 8 (right to privacy) and 10 (right to freedom of expression). He was unsuccessful at first instance and appealed.

The EAT approved the decision of the ET as well as its reasoning. Firstly, the probation service was entitled to take the view that Mr Pay's views were incompatible with his particular duties assisting sex offenders and that public knowledge of Mr Pay's activities was likely to damage his employer's reputation. Secondly, Article 8 was not engaged because the appellant publicized his activities on his company's website and performed in public. Article 10 had been engaged but the employer's aim was a legitimate one, namely to protect its reputation, it was entitled to take proportionate steps to achieve that end. Mr Pay was not willing to desist from the conduct complained of.

◆ Busola Johnson

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