

Employment Status – again!

The law is still unclear as to when an agency worker is an employee of the end-user.

Mr T worked for a train company, A Transport, as an independent contractor from August 2004 to November 2006. The relationship was terminated at the instruction of A. Mr T had rejected A's offer of permanent employment more than once because he was receiving a significantly higher rate of pay under the agency arrangements than he would have received as a permanent employee. When the contract was terminated, Mr T brought a claim for unfair dismissal in the employment tribunal, arguing that he was an employee.

The employment tribunal noted that Mr T was fully integrated as a manager in A because, among other factors, he:

- managed employees;
- was authorised to recruit permanent employees;
- was authorised to discipline and dismiss permanent employees;
- signed time sheets for permanent employees; and
- had to apply to his line manager before taking annual leave.

The tribunal found that a contract of employment should be implied to explain the basis on which Mr T was working for A.

A appealed to the Employment Appeal Tribunal (EAT), arguing that the tribunal had been incorrect to imply a contract of employment. It argued that it was wholly inappropriate to imply a contract where Mr T had, on more than one occasion, rejected the offer of permanent employment and it is "impossible to imply a contract on the principle of necessity so at odds with the appellant's intentions".

The EAT explained that the starting point when deciding whether or not to imply a contract of employment is to identify **what documents there are or are not, and the conduct of the parties once the relationship had started**. The EAT found, in this case, that all of these factors pointed firmly against an employment relationship.

Mr T appealed the EAT decision to the Court of Appeal. The Court of Appeal upheld the EAT decision. The Court said that the mere fact that there is a significant degree of integration of the worker into the organisation is not at all inconsistent with the existence of an agency relationship in which there is no contract between worker and end-user.

When is a dismissal by letter effective? A small charity brought disciplinary proceedings against Ms B on allegations of misconduct. At the end of the disciplinary hearing, Ms B, who knew that she was at risk of summary dismissal, was informed that she should expect a letter with the outcome on 30 November 2006. That day, Ms B left home for the weekend with her sister and later that same day, a letter confirming her dismissal arrived at her home; it remained unopened and unread. Ms B returned home on 3 December 2006, but did not become aware of the letter until the next day when she read it. On 2 March 2007, Ms B brought a claim for unfair dismissal that, depending on when her termination was effected, was either just inside or just outside the three-month time limit.

S.97 of the Employment Rights Act 1996 (ERA) provides that an employee's effective date of termination is the date on which the termination takes effect. Previous decisions in the Employment Appeal Tribunal (EAT) have established that, where an employee is dismissed by letter, the effective date of termination is the date on which the

employee actually reads the letter or knows of the decision, or at least has had a reasonable opportunity to read the letter.

The employer argued that Ms B had had a reasonable opportunity to read the dismissal letter before 4 December, and that her claim was out of time. The tribunal disagreed. The employer failed in successive appeals to the EAT and Court of Appeal, and eventually brought the case before the Supreme Court.

The Supreme Court stated that employees as a class are in a much more vulnerable position than employers, and that an essential part of their protection is that they be informed of any possible breach of their rights. The preferred interpretation s.97 of the ERA was one that promoted those rights, rather than one consistent with traditional contract law principles. The Court rejected the charity's appeal as a whole.

Cost alone cannot justify age discrimination

Mr W was chief executive of a Primary Care Trusts. In 2006, a reconfiguration of primary care trusts in the region resulting in the loss of 21 chief executive posts; Mr W was now at risk of redundancy.

It was some months later that the newly formed Primary Care Trust (PCT) arranged to meet with Mr W to discuss his employment status. This meeting was clearly intended to be a redundancy consultation meeting.

Shortly before the meeting, the PCT realised that Mr W would turn 49 later that month and, if it dismissed him with 12 months' notice in accordance with his contract of employment, he would still have been employed by the PCT by the time he turned 50. Therefore he would have been entitled to take early retirement on "enhanced" terms at a cost of between £500,000 and £1,000,000.

The PCT decided that this risk was unacceptable and that notice of Mr W's dismissal should be given by an earlier date. The PCT gave Mr W 12 months' notice of his dismissal with immediate effect and a redundancy payment of £220,000.

Mr W brought a claim in the employment tribunal for direct age discrimination. It found that the PCT's failure to carry out any consultation with him was not connected with his age, but that he had been dismissed because of his specific age and that he was directly discriminated against. The question was whether or not the discrimination could be objectively justified. It noted that the legitimate aim was to avoid the additional costs to the PCT of Mr W reaching the age of 50 and being entitled to an enhanced payment. It found that the PCT had a reasonable need to terminate Mr W's employment without incurring cost to the taxpayer; in any event, the consultation would have achieved nothing because Mr W wanted a chief executive job where there was none.

Mr W appealed, arguing that the tribunal was wrong to take into account the factor of cost when considering whether or not the discriminatory act was justified. The EAT questioned the current orthodoxy that the consideration of cost can never by itself constitute sufficient justification. It argued that the principle of proportionality should apply to cases in which the adverse impact is trivial and the cost of avoiding or correcting it enormous, albeit that its comments are not legally binding on other tribunals.

A need for a stool for disabled employee

Employers should never reject out of hand an employee's requests for an adjustment that he or she considers reasonable.

Mrs W as a sales assistant in a hobby and craft shop. In February 2008, she went on sick leave due to osteoarthritis, and underwent a hip replacement operation in April 2008. In June, while Mrs West was still on sick leave, the company wrote to her about a potential sickness termination process. It obtained Mrs West's consent for a medical report from her GP, but did not obtain the report, because it would have cost around £200.

On sick leave Mrs W requested three or four times that the company provide her with a stool behind the shop counter, so that she could sit from time to time to ease her pain. The employer denied this request, stating that she needed to remain mobile during the whole shift, and that it was not practicable to have a stool behind the counter. The company gave no consideration to the potential cost of a suitable stool, even though Mrs W's request was supported by a letter from her GP.

Mrs W returned to work when her statutory sick pay had run out, and was told that she was not permitted to sit down when behind the counter. Later that month she went home ill, and was diagnosed after a few weeks with Cushing's syndrome, caused by a tumour on her pituitary gland. The next month Mrs W, who wanted to "tidy up" her employment, resigned. She claimed disability discrimination, in respect of the company's failure to make a reasonable adjustment by providing her with a stool, and constructive dismissal.

The tribunal found that held that Mrs W was disabled and the company had failed in its duty to make reasonable adjustments for her by denying her request for a stool. The tribunal awarded Mrs W £6,000 for injury to feelings. It rejected her constructive dismissal claim; although the company's failure to make a reasonable adjustment by providing her with a stool was a fundamental breach of the implied term of trust and confidence, that failure was not the reason for her resignation: she had resigned for a combination of reasons arising from her operation to remove her tumour, and that her delay of over two months between the last act of discrimination and her last working day was fatal to her claim.



Employers need to be aware of their statutory obligations and ignorance is no defence.

Lancaster University had a recognition agreement with the University and College Union (UCU), which has sole bargaining rights on terms and conditions of employment for academic and academic-related staff.

The university employed fixed-term staff on contracts, the length of which depended on external funding. Between 1996 and June 2009, the university's notification procedure for those postholders whose contracts were about to expire, was as follows:

1. Four months prior to the proposed expiry date, query submitted to the relevant head of department of whether the contract was to be extended or at risk of termination.
2. Letter to the affected employee, reminding him or her of the risk of termination unless funding could be renewed and inviting him or her to a meeting to discuss the reasons for the proposal and the possibilities of redeployment and/or extension to the contract.
3. Second consultation meeting before the expiry of the fixed-term contract and provide the union with a list of staff whose contracts were due to expire in the following four months.

In 2009, the union regional support officer pointed out to the university its failure to comply with the collective consultation obligations contained in s.188 of the Trade

Union and Labour Relations (Consolidation) Act 1992. The university did not change its procedure and the union submitted an employment tribunal claim for the university's failure to inform and consult collectively and sought a protective award for each affected employee.

The union submitted that the lists of information identified under the third stage of the notification process did not meet the need to consult on ways of avoiding dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissal.

The tribunal agreed with the union that the university had not complied with s.188. In making the protective award, the tribunal considered a maximum award of 90 days, to be reduced it only if there were mitigating circumstances justifying a reduction. The tribunal found that the union condoning the university's practice for around 12 years amounted to a mitigating factor, therefore reduced the award to 60 days.

The university appealed and submitted that the "top-down approach" (where a tribunal starts at the maximum and reduces it if there is mitigation) should be applied only in cases where there has been no consultation whatsoever. The university argued that the present case was not a non-consultation case and that the protective award should be reduced to no more than 30 days.

The union cross-appealed, submitting that the mitigating factor to which the tribunal referred applied to an earlier round of dismissals and not the dismissals in question.

The EAT held that the university had committed an important breach of statutory obligation, since it prevented the union from accessing the background information with which it could challenge the selection process. The EAT refused to interfere with the tribunal's award.

Continuity of employment in schools unbroken by summer holidays

S.212(3)(b) of the Employment Rights Act 1996 provides that any week during which the employee is absent from work due to a temporary cessation of work of not more than 26 weeks counts towards the employee's period of continuous employment. In *Ford v Warwickshire County Council [1983]* the House of Lords decided in favour of the employee where there existed intervals during which the employer was providing no work.

Mr H was temporarily employed as an economics teacher to cover for the illness of another teacher from April until the summer exams. On the date when the contract came to an end coincidentally the permanent postholder resigned.

A few weeks later, the college agreed with Mr H that he be employed on a permanent basis from the start of the new term. The following June he was dismissed. Mr H brought claims for unfair dismissal and discrimination in the employment tribunal.

The college argued that Mr H did not have one year's continuous service and was not entitled to bring the unfair dismissal claim. The tribunal held that, unlike *Ford*, there was no unfairness in this case because the first contract was a contract genuinely for temporary cover. The reason for the termination of the first contract was due to it being a temporary contract. The tribunal held that the intervening summer holidays of seven weeks did not count towards Mr H's continuity of employment because Mr Hussain did not have an "expectation", as opposed to a hope, of further work after the termination of the temporary cover contract.

The EAT held that it was not relevant to consider fairness or the nature of the two contracts in question and to determine this issue, it must find the reason for the termination of the first contract. The college submitted that the reason was the ending of the need for temporary cover and it was pure chance that a new contract was entered into. The EAT referred to *Ford* in which the House of Lords had decided that "the immediate cause of cessation of work is, in a sense, the expiry of the notices of dismissal; the effective cause is the anticipated cessation of work".

In this case, the EAT held that the employment tribunal had incorrectly examined the parties' expectation of further work. The reason that the contract came to an end was due to a cessation of work and the interval between the end of the fixed term contract and the beginning of the second contract was short and temporary. The EAT held that this case fell within the requirements of s.212(3)(b) and Mr H did have sufficient continuity of employment from April to bring a claim of unfair dismissal.

Dismissal for excessive personal Internet use at work

Mrs B had worked for the Golf Club since 1994 and as assistant secretary since 1999. Her line manager was the secretary. She had a good record until June 2008, when she was given a final written warning for, among other things, leaving work without permission and accepting free accommodation with a hotel in return for recommending it to club visitors.

The club had a written disciplinary procedure that gave "inappropriate use of internet" as an example of gross misconduct. It did not have a written internet policy. The club secretary did not at any time take steps to ensure that employees were aware of the club's informal stance that personal internet during working time had to be "reasonable" and not "excessive".

In May 2009, the secretary interviewed a number of employees about internet use during working hours. After he had concluded his investigation Mrs B was told that her internet use was excessive, and that her employment could be terminated because she was already on a final written warning.

A disciplinary hearing took place. While Mrs B could not deny that the usage report was correct, she complained about inconsistencies with the approach of the investigation and that the monitoring of the usage had been illegal and covert. She also argued that a grievance that she had raised against the club secretary had influenced the decision.

Mrs B was dismissed for using the internet excessively, despite being aware of the club's rules. Her appeal was subsequently rejected. The club made some concessions during the appeal process, including changing some of the dates that it used to judge the level of her internet use.

The main issue for the tribunal was how well the internet policy had been communicated to staff. It noted that there were no clear rules as to how much time an employee could spend on personal internet use during working hours, but the club's internet policy was not so vague as to make it unreliable. The tribunal found that the internet misconduct was the real reason for Mrs B's dismissal and the decision to dismiss her was within the band of reasonable responses.

One person in charge of disciplinary process? Unfair!

Ms H worked as a part-time receptionist in a tanning salon. An 18-year-old girl asked to use one of the sun-beds. The salon has a procedure whereby new customers have to fill in a self-analysis form to determine how many minutes they can spend on a sun-bed, up to a maximum of eight minutes. The girl was a new customer so she should have been asked to fill in a form. Ms H admitted that she did not ask her to fill in a form, but argued this was a "one-off incident". Her explanation was that she was feeling tired and lethargic, and that the customer seemed to know what she wanted because she had asked specifically for six minutes.

One of the directors of the company asked the customer afterwards if she had enjoyed the session and, during the course of the conversation, formed some concerns. The Director was concerned because the customer looked quite young and she had a very pale complexion. It emerged that the customer had not been asked to sign the required form.

The Director asked her daughter, a former director of the company, to carry out an investigation. She invited Ms H to an informal investigatory meeting, attended by the Director as well as her daughter. The view was formed that she should be suspended pending a formal investigation and a formal investigatory meeting was held a few days later, attended also by Ms H's line manager.

Ms H was invited to a disciplinary hearing, to answer the allegation that she had failed to comply with the procedures relating to the disclaimer and skin-analysis form. The disciplinary hearing was rescheduled several times owing to Ms H's sickness absence and annual leave; it eventually went ahead in her absence.

The disciplinary hearing chaired by the Director's daughter resulted in Ms H's dismissal for gross misconduct. She was informed in writing of the decision to dismiss her. Ms H at first did not appeal, but changed her mind well outside the company's five-day time limit for submitting an appeal.

The employment tribunal found that the company had breached the Acas code of practice on disciplinary and grievance procedures by having the Director's daughter, not an employee of the company undertake both the investigation and disciplinary hearing. The tribunal described her as Ms H's "judge, jury and executioner". As well as being contrary to the spirit of the Acas code, this was also in breach of the company's own disciplinary procedure. There was no reason why Ms H's line manager, could not have conducted the investigatory stage.

The employment tribunal went on to find that Ms H had contributed to her dismissal. She knew the importance of requiring customers to fill in the necessary paperwork in a job that she had done for five years. Her tiredness on the day in question was not an excuse. Her compensation was therefore reduced to zero.

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