

# Employment Update

March 2007

## Agency workers are agency workers

**Is this stating the obvious? No, because in 2004, the Dacas case raised widespread fears that many agency workers were in reality employees – with full employment rights. The pendulum has now swung back. Sejal Raja explains.**

The typical agency worker's case involves a three-way relationship between the parties. There is an express contract between the agency and the worker, usually expressed not to be a contract of employment, an express contract between the agency and the end user, but no express contract between the worker and the end user. Dacas was one such case.

The Court of Appeal considered the relationship and held that Tribunals should always consider the possibility of an employment relationship between the worker and the end user in such cases. One Judge went further and said that once arrangements between a worker and an end user had been in place for a year or more an inference might arise that there was a contract of employment.

The EAT has recently decided on the case of James v Greenwich Council, which provides guidance as to whether an implied employment contract exists with the end user.

This recent case concerns an agency worker who worked for Greenwich Council; there was no written contract between Mrs James and the Council. She became ill and the agency supplied the Council with a substitute. When she sought to return, she was told that she was no longer needed. Mrs James then claimed unfair dismissal against the Council. She lost her claim in the Employment Tribunal, which found there was no contract between Mrs James and the Council because there was no mutuality of obligation.

Mrs James appealed, contending that she had little contact with the agency and had worked solely for the Council under its direction for a long time, the final placement lasting over a year, she relied on the judgement in Dacas.

The EAT rejected the appeal.

The EAT confirmed that there were three elements for the test of the existence of an employment contract.

1. There must be mutuality of obligation e.g. the provision of work in consideration of payment.
2. A sufficient degree of control; and
3. Contractual provision consistent with and not inconsistent with an employment contract.

The EAT made two other points. First, the mere passage of time did not mean that an implied employment relationship necessarily arose: the provision of the same worker to the end-user for a protracted period might simply be more convenient and satisfactory for all concerned: "something more is required to establish that the tripartite agency analysis no longer holds good".

Secondly, you should consider whether it was "necessary" to imply a contract of employment. If you could have a workable relationship without implying an employment contract, then the Court would be reluctant to imply one.

This case suggests that it is going to be hard for agency workers to imply a contract of employment with the end-user which is particularly good news for organisations that require a flexible work force.

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# Case law round-up

**The last few months have seen some fascinating cases running through the court. In light of this, we have decided not to feature any particular aspect of employment law, but rather to comment on a few of the more interesting cases. The selection is, of course, highly subjective.**

## How do you avoid the Monday morning blues?

Answer: work part-time and do not work Mondays. However, there is then the problem as to what you do about bank holidays. Four of our bank holidays are guaranteed to fall on a Monday. Do you miss out on these if you do not normally work on Mondays?

Mr McMenemy worked at a call centre for Capita Business Services Limited on Wednesdays, Thursdays and Fridays. All employees' contracts contained a standard term which provided that employees were entitled to public holidays only where they fell on their normal working day. Mr McMenemy did not work on Mondays and therefore did not receive the benefit of public holidays falling on a Monday. (There are usually four a year, but last year there were six).

He quoted the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and claimed that he was being treated less favourably than a comparable full-time employee.

The case went to the Employment Appeal Tribunal which agreed that Mr McMenemy was being treated less favourably than a full-time worker. The catch was that they decided that the reason for less favourable treatment was not because he was part-time, but rather because he did not work on Mondays. The call centre worked on a 7 day schedule and it was therefore possible that a full-time employee who did not work on Mondays would also be treated in the same way and would also not be entitled to days off in lieu. He failed to prove he was disadvantaged by reference to a full-time comparator.

While this case solves the problem for businesses operating a 7 day working week, it may be difficult to align this decision in a business which only operates a 5 day working week. Here it would be more difficult to find a full-time comparator who did not have the benefit of public holidays. So the problem is not yet fully resolved. Yet we think a claim would still fail on the basis that a part-time worker who worked on Mondays would benefit from bank holidays. So the point still turns on the choice of days worked rather than the fact he is working part-time.

One way of avoiding the problem is of course for the part-time worker to work on Mondays but, while that brings the benefit of public holidays, it enables you to share in those Monday morning blues.

## Why not to fall ill during your notice period

The amount to be paid to an employee who is off sick during notice periods regularly surfaces as a problem. REG was asked to advise on this issue back in September 2005. One anomaly is that if one is giving the employee statutory notice, then pay is at the full rate but, if in your contract you have provided for at least one week more than the applicable statutory minimum, then you pay at sick pay rates.

A variant on this theme arose in the case of Ana Burlo who was employed as a nanny. On 2 March 2004, she had a row with her employers, as a result of which she was given notice and asked to work her notice period. Three days later, she was involved in a car accident (one wonders whether there was any link between the accident and the row) and she was unable to work for just over 4 months. On 8 March, her employers said she would not now be required to work out her notice. Clearly, they had to hire another nanny as a matter of urgency. Ana applied to the Tribunal claiming damages for wrongful dismissal and unfair dismissal – no proper procedure had been followed.

When assessing damages for wrongful dismissal, the Tribunal based the award on rates of sick pay as her contractual notice exceeded her statutory notice. In the unfair dismissal award, no sums were awarded with reference to the notice period on the basis that she had received damages for wrongful dismissal.

Ana felt she had been short-changed by being compensated at sick pay rates and appealed, first to the Employment Appeal Tribunal, where she lost, then again to the Court of Appeal arguing that, in assessing unfair dismissal compensation, the Tribunal should assume that she ought to receive full pay during her notice period. This argument was based on a quotation from a very old unfair dismissal case – Norton Tool Co-v-Tewson – to the effect that this was good industrial relations. She failed. If you are on sick pay rates and given notice at least one week longer than statutory notice, then it is sick pay rates which apply and you will not be able to obtain any more as part of an unfair dismissal award.

Reading between the lines, one wonders if this was a particularly emotionally charged case as the award was, in total, about £9,000 and the parties would have suffered the expense of Tribunal, Employment Appeal Tribunal and Court of Appeal hearings.

## Why is it fair to take an early retirement pension, yet be compensated in full for an unfair dismissal?

Another case going back to first principles was reported in October. Mr Knapton was made redundant by ECC Card Clothing Limited. The redundancy was unfair. Mr Knapton was approaching retirement and took an early pension, although the amount of pension was reduced for early payment. The question was whether this early pension should have operated to reduce an unfair dismissal compensatory award much in the way that incapacity and sickness benefits reduce the amount of the award.

The EAT followed a well-established line of pensions cases which analyse pensions as being deferred payment for work done in a particular year. They found that Mr Knapton had a choice as to whether or not to draw on his pension. If he did, then he was, so to speak, funding his own pension. Whether or not he drew pension, therefore, the pension was excluded in the calculation of unfair dismissal compensation.

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### NEW COMPENSATION LIMITS

The annual review of limits in connection with Tribunal awards has now taken place and is effective from 1 February 2007.

The maximum amount of a week's pay for compensation purposes goes up from £290 to £310. The maximum compensatory award for unfair dismissal has also increased from £58,000 to £60,600.

The maximum redundancy award is now £9,300 and remember that since 1 October 2006, all upper and lower age limits for entitlement of statutory redundancy pay have been removed.

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## Ask REG

For those who have not been introduced to REG

Who is REG? REG (otherwise known as RadcliffesLeBrasseur Employment Group) is a friendly, approachable and yet knowledgeable character and appears as a (fairly) regular feature in our Update to answer those employment law questions you were too afraid to ask.

REG invites you to email your questions to [reg@rlb-law.com](mailto:reg@rlb-law.com). You can also telephone or email any of us and we will pass your questions on. Look out for REG's answers to your questions in forthcoming issues of the Employment Update.

Dear Reg

I have heard that there has been a recent case, which suggests that I cannot ask the male nurses that work in my nursing home to be chaperoned. Is this true?

There is some truth in it. There has been a recent case in which a student on clinical placement at a hospital complained that he was discriminated against because he was asked to be chaperoned when required to do intimate female procedures, whereas a female nurse in a similar position did not have to be chaperoned. The Tribunal found that, under the strict interpretation of the Sex Discrimination Act, he was discriminated against on the grounds of his sex and, whilst the Tribunal did have some sympathy for the hospital, it was bound by the legislation. Therefore, if you are going to ask a male nurse to be chaperoned, then you have to make sure that female nurses are also chaperoned so they are not treated differently.

### WORKSHOP/SEMINAR NEWS

Dates for your diary:

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|-------------------|---|
| 8 & 15 March:     | Managing the grievance and disciplinary process |
| 7 & 14 June:      | Data Protection Act                             |
| 6 & 13 September: | Managing stress in the workplace                |
| 1 November:       | Annual Seminar                                  |

If you require any further information regarding the issues mentioned in this bulletin please contact Michael Elks or Sejal Raja.

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