SLAUGHTER AND MAY

Employment Bulletin

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Worker with open-ended contract was an agency worker

Summary: The Employment Appeal Tribunal held that a worker who had an open-ended contract of employment with an agency was an agency worker and entitled to protections under the Agency Workers Regulations 2010 (AWR). Although the worker had worked for only one client, for over four years, each assignment was for a defined period and he was therefore temporary rather than permanent (*Angard Staffing Solutions Ltd v Kocur*).

Key practice point: The protections against discrimination under the AWR apply to those supplied to work "temporarily" for the hirer. This can include someone on an open-ended contract, if the evidence shows that the worker is being used by the hirer as cover rather than being assigned on an indefinite basis. The focus of the agency worker definition is on the way in which the work is performed in fact, rather than on the provisions of the contract. It is not the contract that has to be temporary but the basis of the work for which the worker is supplied to the end-user; and this can change during the course of the agency relationship.

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Facts: K was an agency worker who had been employed by ASS and supplied as cover to ASS's only client for the whole four years of his employment. His work was done under a series of engagements, each with an express end-date; K did not know if he would be called upon to work from one week to the next; and there were some fallow periods of two to three weeks over the four years. K brought claims under the AWR. The Tribunal decided as a preliminary issue that he was "*supplied to work temporarily for and under the supervision and direction of*" the end-user, as required by the AWR. ASS appealed to the EAT.

Decision: The EAT dismissed the appeal. The Tribunal was entitled to find that K was supplied on a temporary basis and that he satisfied the definition of agency worker.

The EAT found that "supplied" refers to the basis on which the worker is to work pursuant to a particular assignment, on a particular occasion. The issue is not whether the overarching relationship between agency

and worker is temporary or permanent. A contract of employment between worker and agency is required for the AWR to apply; it forms part of the factual matrix, but is not conclusive. In this case, the work on each occasion was time-limited and this was not, in practice, affected by the frequency or number of assignments, or the fact that they continued to occur over a period of years. Every engagement over the four years was for a finite period, to provide cover.

Analysis/commentary: This decision follows the same line as *Brooknight Guarding Limited v Matei*, where the EAT found that a security guard supplied on a zero hours contract was an agency worker because he was being used as cover (see our Employment Bulletin dated September 2018).

The EAT noted that the focus on the work done in practice means that a worker can gain, or lose, protection under the AWR if there is, at any point in an ongoing relationship, a change in the way the work is supplied. In this context, it is worth noting that a mistake in assessing whether the AWR apply to workers can result in the end-user being liable for underpayment. In *London Underground Ltd v Amissah*, the agency asserted that the AWR did not apply, because of the "Swedish derogation", an opt-out of the right to pay equality with permanent workers in return for a contract guaranteeing pay between assignments. (The Swedish derogation was abolished from April 2020.) A year later, the hirer decided that the AWR did apply, and it paid the agency for the future, on the basis that the workers would be paid at the equalised rates, as well putting the agency in funds to make good the previous underpayment. The agency failed to pass on the amount for underpayment. Despite this, the Court of Appeal decided that the hirer should pay 50% of the compensation due to the workers (see our Employment Bulletin dated March 2019).

Employer's approach to alternative employment on redundancy was unfair

Summary: The EAT confirmed that redundancy dismissals were unfair because the employer's approach to alternative employment was simply to require the claimants to apply for their own jobs, with no consultation or appeal (*Gwynedd Council v Barratt*).

Key practice point: On a restructuring, it may not be unreasonable to interview for newly created positions but it is unlikely to be fair for an employer to ask employees to apply for the jobs that they were previously doing. The employer should identify appropriate selection pools and select for redundancy using fair and objective criteria.

Facts: The claimants were dismissed for redundancy following the closure of the school where they worked. They were unsuccessful in applying for positions at a new school that opened at the same location. There was no consultation over the employer's proposals and no appeal against dismissal was offered. The Employment Tribunal held that the dismissals were unfair under Section 98 of the Employment Rights Act 1996 because of the failure to provide a right of appeal, the absence of consultation and the manner in which the claimants were required to apply for their own jobs. The employer appealed.

Decision: The EAT rejected the appeal. The Tribunal had taken the correct approach to the assessment of fairness.

In the EAT, the employer argued that less stringent fairness standards applied because this was a "forward looking" selection, with an interview process to determine the successful candidate. The EAT rejected this argument. There had been no consultation about dismissal or recruitment to the new schools. It was not even clear that the appointments were to be made to "new roles"; the Tribunal found that the claimants

were required to apply for either an identical job or a substantially similar job. The EAT commented that where recruitment is to the same or substantially the same role as one that the employee was doing, then the exercise may not involve "forward-looking" criteria at all, but something closer to selection from within a pool.

Analysis/commentary: This case confirms that whether dismissal results from a "classic" redundancy selection exercise, or a failed application for a new role on a restructuring, the fairness of the dismissal must always be tested against Section 98. Employers cannot shortcut the requirement to act fairly by asking employees to apply for new roles – particularly where those "new" roles are in fact just a smaller number of their existing roles.

Refusal to give an undertaking was a failure to make reasonable adjustments

Summary: The EAT held that an employer's refusal to give a disabled employee a written undertaking was a failure to make a reasonable adjustment. The terms of the undertaking requested were that the employer would not require her to work with two colleagues whom she claimed had harassed her and, if at a later stage there was no alternative, she would be offered a severance package.

Key practice point: The EAT's finding that it was reasonable for the employer to give an extensive undertaking illustrates the continuous development of the scope of the duty to make reasonable adjustments.

Facts: H suffered from a reactive depression that she maintained had resulted from bullying and harassment at work by two colleagues, M and B. It was agreed that H did not want to work for M or B, and that they did not want to work with her. On her return to work after a period of sick leave, H asked for a written undertaking - that her employer would not rearrange duties or roles so that she had to work with or report to M or B; and that if business demands left no practical alternative, she would be offered a redundancy/severance payment under the full terms applying to employees of her contractual status. The employer refused to give the undertaking. H successfully claimed disability discrimination based on a failure to make reasonable adjustments.

Decision: The EAT confirmed the Employment Tribunal's decision. The Tribunal had found that the employer had a "practice" of not giving firm undertakings that employees would not have to work with others; instead, they gave "*words of comfort to use best endeavours*". This practice had put H at a substantial disadvantage in comparison with others not suffering a disability: she had a level of anxiety and fear about the possibility of being required to work with M and B (in the absence of an undertaking) which a non-disabled person who had been bullied and harassed would not have suffered. The EAT found that the undertaking would have alleviated that fear and that it would have been reasonable for the employer to have given it in the form requested.

The employer argued, based on previous case law, that it was unreasonable to undertake to make a severance payment in the future because the purpose of a reasonable adjustment was to keep the employee in work. However, the EAT's view was that the undertaking would have provided a backstop to enable H to work without fear that the main objective – not being required to work with M or B – would be breached. Its underlying purpose was to keep her at work, therefore.

The EAT also decided that the Tribunal, having found in favour of the claimant, could exercise its power under the Equality Act 2010 to make a recommendation. This could be a requirement for the employer to

give the written undertaking, even though it would have financial implications and would remain in place indefinitely.

European Court gives Opinion that redundancies should be counted over a rolling period for collective consultation threshold

Summary: The European Court has given an Opinion that the period over which redundancies are counted, in order to determine whether the threshold for collective redundancy consultation under the European Collective Redundancies Directive has been satisfied, should be a rolling period (*UQ v Marclean Technologies*).

Key practice point: There is just one (dated) UK authority on this issue, so the subsequent decision of the European Court will be followed with interest.

Background: The obligation to carry out collective consultation under the European Collective Redundancies Directive applies when a number of conditions are satisfied, including a condition regarding the number of dismissals that take place over a given period (30 or 90 days, depending on the choice made by each Member State).

Facts: UQ worked for a Spanish company, M, until her dismissal in May 2018. In June 2018, she brought a claim for unfair dismissal, arguing that her dismissal formed one of a number of "covert" collective redundancies. She referred to the fact that, between 31 May and 14 August 2018, seven people had ceased working for M, in addition to a further 29 on 15 August 2018 (all of whom had submitted letters of resignation on 26 July 2018). Under Spanish law, terminations (between 10 and 30, depending on the size of the employer) which take place in the 90 days prior to the date of the individual dismissal are taken into account for the purposes of triggering collective consultation. The Spanish court referred the case to the European Court, questioning whether the threshold under the Directive should be calculated retrospectively or prospectively from the date of dismissal, or whether account should be taken of dismissals taking place at any point within the 30 or 90 days.

Opinion: The view of the European Court's Advocate-General is that the obligation to consult under the Directive will be triggered if the worker is dismissed within any consecutive 30 or 90-day period in which the number of redundancies reach the threshold. The Directive refers to "*a period of 30 days*" and "*a period of 90 days*". In the ordinary sense of those terms, that means any period of 30 or 90 days. Employers are therefore required to look both backwards and forward (over the 30 or 90 days) to determine whether the threshold number of redundancies is met over the reference period.

Analysis/commentary: The requirement for collective consultation under UK law applies where 20 or more redundancies are proposed within a 90-day period. The only UK authority on the point raised by this case is a 1978 Tribunal decision, which held that the law did not retrospectively impose the obligation to consult in respect of dismissals that had already happened merely because further redundancy proposals emerged. The law at the time of that decision imposed collective consultation requirements regardless of the number of employees the employer was proposing to be made redundant; the numbers were relevant only to the length of the consultation period.

This Opinion will not automatically be followed by the European Court, but given the lack of UK case law, employers effecting redundancies in batches of fewer than 20 at a time need to take care to ensure that they do not inadvertently cross the threshold number of redundancies over a 90-day period.

Misconduct dismissal was unfair because employer applied its mitigation policy incorrectly

Summary: The EAT found that a dismissal of an employee for making unauthorised searches on her employer's database was unfair. Both the employer and the Tribunal had misinterpreted the employer's zero tolerance policy on database abuse as requiring any mitigating factors to be the direct cause of, rather than having a material impact on, the misconduct (*Martin v Home Office*).

Key practice point: In gross misconduct cases, decision-takers must tread carefully in following the employer's disciplinary policies and in assessing mitigating factors. It will not be sufficient to rely on a "zero tolerance" policy.

Facts: M, an asylum caseworker for the Home Office, was summarily dismissed for gross misconduct. At the time, she was suffering from depression amounting to a disability, as well as significant stress from a number of causes, including an acrimonious relationship break-up. M had made checks relating to the immigration status of her former partner and his family that were unrelated to her work, in breach of the employer's data security policy.

Shortly before M's dismissal, because of concern about employees' searches of the database for non-business reasons, the employer had moved to a stricter enforcement of its policy on breaches of data security. The policy change was communicated to staff by a message on the intranet, which described it as a "*zero tolerance policy*" and stated that "*inappropriately looking up information*" would be considered gross misconduct.

The guidance for disciplining officers accompanying the introduction of the new policy stated that consideration of mitigating factors was of vital importance, particularly in cases where dismissal was a potential outcome. It set out a non-exhaustive list of potential mitigating factors, such as issues relating to disability, exceptional pressure or personal trauma. The section concluded: "*Mitigation is not simply about one of the above existing but for it to have had a material impact on the behaviour*".

M's manager indicated that he felt that dismissal would be disproportionate in the circumstances and the investigatory report referred to "*compelling mitigating factors*", supported by medical evidence that demonstrated a link with her rationality and judgment at the time. However, she was dismissed on the basis that the mitigating factors had not directly caused her to commit the data breaches and did not justify her actions.

The Employment Tribunal found that, although the dismissal was at the very extreme limit of what a reasonable employer would do, it was within the range of reasonable responses. The Tribunal also dismissed M's disability discrimination claim, finding that although her errors of judgment arose from the same causes as led to the disability, her conduct was not because of something "arising from" her disability.

Decision: The EAT overturned the Tribunal's decision and remitted the claim for re-hearing. The employer and the Tribunal had misinterpreted the zero tolerance policy as requiring any mitigating factors to be a direct cause of, rather than having a material impact on, the misconduct. This was evident from the dismissal letter and other correspondence. Had the correct test been applied, the Tribunal's decision on the reasonableness of the sanction of dismissal might have been different.

The EAT also remitted the disability discrimination aspect of the case. There was a potential overlap between the application of the medical evidence to the issue of material impact in the unfair dismissal

claim and to what the EAT described as the "relatively loose" causation test in the discrimination claim (whether the conduct was "in consequence of" something arising from her disability).

Analysis/commentary: It is worth noting that the internal guidance for disciplining managers, which included the section on mitigating factors, was treated as part of the employer's policy for the purposes of assessing the reasonableness of the employer's response. It may also have been relevant that it was not clear that the "zero tolerance" approach had been adequately communicated to staff at the time.

Horizon scanning

What key developments in employment should be on your radar?

1 August 2020	Employers required to make contributions to the Coronavirus Job Retention Scheme
31 October 2020	Closure of the Coronavirus Job Retention Scheme
31 December 2020	Transitional arrangements under UK-EU withdrawal agreement expected to end unless extended
6 April 2021	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status**: *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers); *IWGB v CAC* (Court of Appeal: whether couriers are workers for trade union recognition purposes)

- **Discrimination / equal pay**: *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction); *Asda Stores v Brierley* (Supreme Court: whether workers in retail stores could compare themselves with those working in distribution depots for equal pay)

- **Trade unions**: *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Unfair dismissal**: *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits).

- **Working time**: *Chief Constable of the Police Service of Northern Ireland v Agnew* (Supreme Court: backdated holiday pay claims); *East of England Ambulance Service v Flowers* (Supreme Court: whether holiday pay must include regular voluntary overtime.

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