THOMPSONS SOLICITORS

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KNOW YOUR RIGHTS
An overview of defamation law for trade unions
Pgs 6 & 7

MINIMUM RATES
Utilities excluded for NMW
Pg 4

BONUS POINTS
Maternity bonus reduced
Pg 8

MUCH OBLIGED
Employee does minimum personally
Pg 10

ALL WIRED UP
Agency worker had implied contract
Pg 11

BLACK WOMEN WORKERS

Black and Asian women are more likely to be out of work, have more problems finding a suitable job, and often have to settle for work well below their skill levels, according to a recent report by the TUC.

Black women and employment says that at 5.4 per cent, the unemployment rate among black women is almost twice that of white women. It is only slightly lower among Asian women at 4.8 per cent.

Black and Asian women are also more likely to be working in temporary, less secure forms of employment than white women. Official statistics show that just over nine per cent of black women and eight per cent of Asian women, compared to just under six per cent of white women are on fixed term contracts or working as temps with an employment agency.

The report makes a number of recommendations:

- that union equality reps should be given a statutory right to time off
- that black and Asian women should have greater access to training opportunities at work and help with finding affordable, good quality childcare
- that the Government should make more use of positive public procurement policies.

Go to: *www.tuc.org.uk/extras/bwae.pdf* to download a copy of the report.

PHONE SOLIDARITY

The TUC is asking unions and their members to give their used mobile phones to the Iraqi trade union movement as an act of "second-hand solidarity".

Useful for any union organiser, they are particularly crucial in Iraq where it is dangerous to travel and landlines are not sufficiently reliable or widespread. Mobile phones are expensive to buy in Iraq (and UK phone systems do not work there yet), so buying new ones eats up scarce union resources.

The Iraqi trade union movement has worked out how to convert old European mobile phones for use there, and the TUC Iraq Solidarity Committee has opened an appeal for used mobile phones.

Old mobile phones (along with their chargers) should be sent to the TUC Aid for Iraq appeal at Congress House, Great Russell Street, London WC1B 3LS.

FEWER TRADE UNION DEALS

According to the annual TUC "Focus on Recognition" survey, unions signed 61 deals in the year to October 2005, covering 12,000 employees. Nearly 180 deals were signed the year before, covering over 20,000 employees.

This is despite the fact that unions are running almost three times as many campaigns for recognition. The TUC says this is because lots of unions are now tackling non-traditional sectors, where membership has historically been low.

Over 90 per cent of the deals covered collective bargaining on pay, hours and holidays. Two thirds allowed for negotiation and consultation over employee training and learning, and the number of agreements providing for training and learning reps almost doubled.

There was also an increase in deals that covered collective representation on grievance and disciplinary issues - up to 84 per cent from 73 per cent the previous year.

Thirty-five unions took part in the survey representing 5.2 million members – 81 per cent of the TUC's total affiliated membership.

To download the survey, go to: *www.tuc.org.uk*

ACAS PUBLISHES GUIDANCE ON AGE

Following publication of the Employment Equality (Age) Regulations 2006, Acas has published two guides called Age and the Workplace to help employers and individuals get to grips with what they entail.

The first summarises the regulations and highlights good practice for recruiting and retaining staff, as well as dealing with staff of retirement age. It features the importance of having a comprehensive equality policy and action plan and answers a number of frequently asked questions.

It has also produced an advice leaflet for employees, workers and individuals looking at what the regulations will mean for them and providing a brief overview. It also explains what to do if individuals think they have suffered discrimination or harassment.

Go to: *www.acas.org.uk/index.aspx?articleid=1044%20* to download copies of the guidance.

Paying for leave

The European Court of Justice (ECJ) has ruled that the working time directive does not allow EU states to pay workers instead of letting them take their annual leave, even if the holiday was just being carried over from the previous year.

In Federatie Nederlandse Vakbeweging -v- Staat der Nederlanden, the Dutch equivalent of the TUC challenged the Netherlands civil code which said that workers who had not taken all their holiday could "cash it in" in the subsequent holiday year, as long as they were allowed to take their full entitlement in that year.

It argued that this was a violation of the directive, which states that workers cannot accept payment in lieu of taking annual leave, except when the employment relationship has ended.

And the ECJ agreed. It said that although it was not contrary to the directive to allow workers to carry over their leave, offering financial compensation for leave that had not been taken was at odds with the directive's health and safety objectives. The relevant provision of Dutch law was therefore contrary to the directive.

Workplace disputes

As part of its series of discussion papers, Acas has just published a paper looking at the impact that the dispute resolution regulations (introduced in 2004) are having on employment tribunal claims. It also addresses wider issues such as the increasing complexity of the process.

New rules, new challenges suggests that the best way of reducing tribunal cases is by focusing on improving employment relations solutions in the workplace. To do that, the paper argues that more resources should be targeted on dispute prevention in the workplace, including mediation services.

To download a copy of the discussion paper, go to: *www.acas.org.uk/media/pdf/j/s/discusapril06_1.pdf*

DDA guidance

Under section three of the Disability Discrimination Act, the Secretary of State for Work and Pensions can issue guidance concerning the definition of disability in the Act, in particular, guidance about matters that have to be taken into account in deciding whether someone is disabled or not.

The Disability Rights Commission has now, on behalf of the Minister, revised its previous guidance to reflect the various changes that came into force in December 2005.

The guidance does not carry any legal weight as such, but tribunals have to take it into account when considering whether someone is disabled or not.

Go to: *www.drc-gb.org/documents/guidance.pdf* to download a copy.

Vanishing dismissals

Following their dismissal by GSL just before a TUPE transfer to G4S, the employment appeal tribunal has said in G4S Justice Services -v- Ansley & Simpson **that the employees had transferred over once they were reinstated.**

The two claimants were dismissed in April 2005 and lodged internal appeals before the end of April. G4S then took over the contract on 1 May. The men's contracts stated that if an appeal against dismissal was successful, their continuity of employment would be deemed to be unbroken.

The men's appeals were successful, but G4S did not have jobs for them under the new set-up. They then refused to reinstate the men on the basis that they were not employed by GSL immediately before the transfer and consequently, their employment had not transferred to G4S under TUPE.

The EAT has now said that, when employees are dismissed before a TUPE transfer, but reinstated following the transfer, the dismissal "vanishes" and the employees are deemed to have transferred over.

Ageing claims

Just as the age regulations are about to kick in, the House of Lords has decided in the long-running saga of Rutherford -v- DTI that Mr Rutherford could not claim unfair dismissal because he was over 65.

He argued that the upper qualifying limit affected more men than women and so was indirectly discriminatory. This limit disappears under the new regulations, due to come into force in October 2006.

We will look at this case in more detail in the next issue of LELR.

MINIMUM RATES

The complexity of the minimum wage regulations have been highlighted in the case of HM Revenue & Customs -v- Leisure Employment Services Ltd**, in which the employment appeal tribunal (EAT) decided that payments for gas and electricity were, in effect, accommodation costs and therefore could not be included in gross pay.**

WHAT WERE THE BASIC FACTS?

Every year, the company hired seasonal workers for a number of holiday camps. As part of the agreement between the two parties, workers had to pay £6 a fortnight for gas and electricity if they opted to stay in company accommodation.

This was normally taken as a deduction from salary through the payroll, although one payment was made in cash.

HM Customs issued three enforcement notices against the company in April and May 2005 on the basis that the utilities payments should not have been included in gross pay. Once those were deducted, the workers received less than the minimum wage.

Picture: RexClusive/www.rexclusive.co.uk

The company appealed to the tribunal, arguing that the payments could be included in the calculation of gross pay.

WHAT DOES THE LAW STATE?

The minimum wage regulations state that employers have to calculate a worker's salary by dividing their total gross pay by the total hours worked for that period. The question is: what is gross pay?

The regulations list a large number of items that cannot be included in gross pay, such as costs for "accommodation" and "deductions or payments for the employer's own use or benefit".

WHAT DID THE TRIBUNAL DECIDE?

The tribunal said the Revenue was wrong to label costs for gas and electricity as costs for "accommodation". The latter referred only to the physical structure of the building and not to the provision of utilities. The £6 payment was not, therefore, in respect of living accommodation and should be included in gross pay.

Nor did the tribunal think that the deductions (or payment) had been made for the employer's "own use and benefit", as the company did not gain financially from this arrangement.

WHAT DID THE PARTIES ARGUE ON APPEAL?

The Revenue said that it was artificial to distinguish the utilities payment from payment for the accommodation itself, as workers could not opt for one without the other. It should only be considered separately if the workers paid for gas and electricity directly to the utilities companies themselves.

It also argued that the money could be used by the company in any way it thought fit. In other words, it was for the company's "own use and benefit" and should not therefore be included.

The company, however, said that it did not make sense for employers to be caught by payments that they made directly to the utility companies, but to be exempt when workers made the payments themselves.

And it argued that because the payments also benefited the workers (as they were very low), they could not be said to be for the sole "use and benefit" of the company and could be included in the definition of gross pay.

WHAT DID THE EAT DECIDE?

The EAT was sympathetic to the employer's arguments but found in favour of the Revenue. It said that, if a worker has to pay a certain sum of money to make use of the accommodation on offer, then that should be considered as being "in respect of the provision of living accommodation".

But were the deductions (or payments) for the employer's "own use and benefit"?

The EAT said that the payments for gas and electricity could only count as gross pay *"if the money is deducted by the employer with an obligation to account to a third party on behalf of the worker"*. In this case, however, the worker had no liability to the utility companies and so could not be included.

It was irrelevant, the EAT said, whether the money was taken by way of deduction or payment.

I DON'T LIKE MONDAYS

The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 state that employers cannot treat part-time workers less favourably than full timers, unless the different treatment can be objectively justified.

In McMenemy -v- Capita Business Services Ltd, the employment appeal tribunal (EAT) said that, although Mr McMenemy had been disadvantaged in comparison to full-time workers, this was not because he was a part timer.

Mr McMenemy's union, Bectu, instructed Thompsons to act on his behalf.

WHAT WERE THE BASIC FACTS?

Mr McMenemy worked full time from 1998 as a researcher for a company that operated a series of call centres, seven days a week. In April 1999 the company agreed that he could work part time – Wednesday-Friday – because he had child care responsibilities.

He was not, however, allowed time off in lieu when public holidays fell on Mondays. The company relied on clause nine of his contract, which said that employees were only entitled to those days when they fell on a "normal working day."

Mr McMenemy claimed he was entitled to public holidays on a pro rata basis and had been treated less favourably under the regulations.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal agreed that Mr McMenemy had been treated less favourably, but not because he was a part-time worker. He was not therefore protected by the regulations.

Instead, it was because clause nine of his contract provided that employees were entitled to public holidays only " ...where these fall on your normal working day.....".

This applied to both full-time and part-time employees. For instance, Mr McMenemy's manager, Mr Keeman, had worked full time for a while about a year before, from Tuesday to Saturday, and did not get the benefit of Monday public holidays.

WHAT DID THE PARTIES ARGUE ON APPEAL?

Mr McMenemy argued that the regulations required the tribunal to compare his situation with that of a current, comparable full-time employee, not a hypothetical one. He also said that the pro rata principle was built into the regulations and that the company was therefore obliged to apply it.

The company, however, said that Mr McMenemy had conflated the two questions that the tribunal had to answer, which were:

- had he been treated less favourably?
- if so, was this because he was a part timer?

There was a clear policy in place that did not allow employees the benefit of a Monday bank holiday if they did not work that day. This applied whether or not the employee worked part time or full time, as the case of Mr Keenan, a member of Mr McMenemy's team, showed.

WHAT DID THE EAT DECIDE?

The EAT said the tribunal had been right to decide that Mr McMenemy had been treated less favourably, but this was not because he was a part-time worker. The difference in treatment was because he did not work on Mondays.

It said that, at this point, the tribunal was entitled to consider whether a hypothetical full-time employee, who did not work Mondays, would have been treated any differently. It had considered all the evidence and decided that the terms of a full timer's contract would have been the same as that of a part timer, as the example of Mr Keenan showed.

Finally, the EAT rejected the argument that the regulations gave Mr McMenemy a "stand-alone" right to pro rata treatment as regards holidays. This was not something that a tribunal had to consider when deciding whether or not the less favourable treatment was because the employee was a part timer.

The union is seeking leave to appeal the decision.

a brief overview of

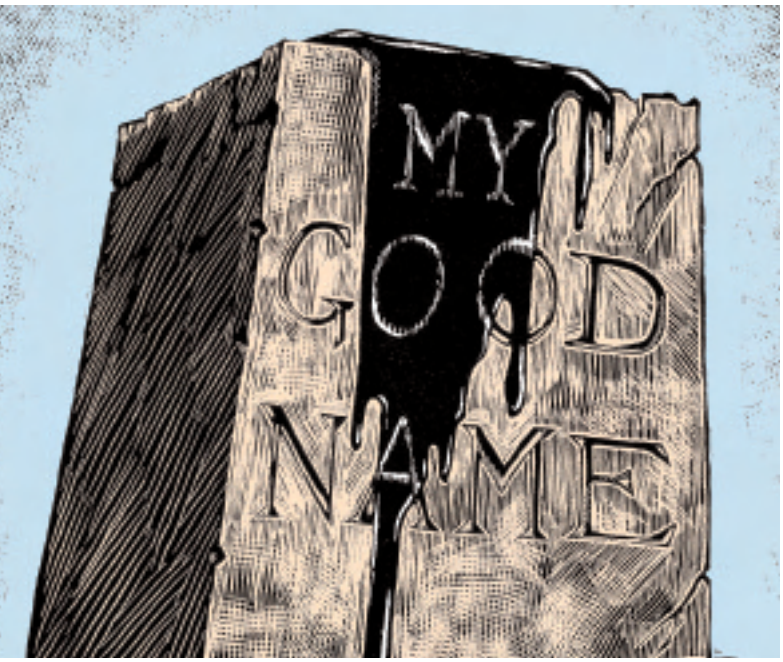
THE LIBEL

England is the libel capital of the world. Where once only the rich could sue to protect their reputations, now anyone can. And trade unions are not immune.

In a way they are obvious defendants because of their political nature and rights-based culture. But they should be wary of stumbling into defamation actions without fully understanding the financial consequences, especially since the advent of defamation no-win no-fee cases in 1998.

Thompsons has handled several such cases on behalf of unions and continues to do so with alarming regularity. We cannot publish the details of these because any repetition of a defamatory statement creates a new "cause-of-action" for the claimant.

To help unions in assessing potential actions, ***Victoria Phillips***, Head of the Employment Rights Units, looks at this complex area of law and answers some frequently asked questions.



WHAT IS DEFAMATION LAW?

Defamation law protects a person's reputation from an unjustified attack.

How is a defamatory attack carried out?

Attacks are usually conveyed by words, either written or spoken, but they can also include photographs, cartoons, statues, cinema, television, signs, gestures, and even hissing.

Who can make a claim?

"Individuals" can sue, but this is broadly defined and includes people, companies, firms, and charities. Government bodies cannot sue, but individuals within them can.

Who can be sued?

Anyone involved in the publication of the defamatory attack can be sued. Trade unions can be defendants directly, but because there are restrictions in the level of damages that can be claimed from them, claimants usually issue proceedings against their officers, along with authors, editors and publishers of defamatory allegations.

LIBEL OR SLANDER?

Libel is a defamatory allegation made in a permanent form, such as in a union newsletter. Slander is an allegation in a transitory form, usually the spoken word.

What must the claimant prove?

In a libel claim the claimant only needs to prove that the offending allegation:

- defames them
- would be understood to refer to them by at least one other person, and
- has been published to a third party.

In most slander claims, the claimant must also prove that they have suffered a loss arising from the defamation that can be quantifiable in monetary terms.

WHAT IS DEFAMATORY?

An allegation is defamatory if it does any of the following:

- lowers the claimant in the estimation of right-thinking members of society generally
- disparages the claimant in their business, trade, office or profession
- exposes the claimant to hatred, ridicule or contempt, or
- causes the claimant to be shunned or avoided.

The courts decide whether something is defamatory on the basis of what an average reasonable person would view the allegation to mean.

It is not usually too difficult to decide whether offending

BIBLE

allegations are defamatory and courts will apply ordinary meanings to words. They will also read between the lines to look at what is being hinted at, and they will apply meanings that only a few readers could attribute to words.

It does not matter if there was no intention to defame someone.

How can claimants establish an allegation referred to them?
Even if a claimant is not named, and only one person can identify them from the allegation, that is enough to establish identification. It is irrelevant whether there was intention to identify someone. There have even been cases where the existence of the claimant was not known to the defendant before publication.

What is sufficient publication of the defamatory allegation?
The claimant need only prove that the allegation was published to one third party to have a claim.

What about defences?
There are three main defences of justification/truth; fair comment; and privilege. These are far harder to prove than the claim itself.

What is justification/truth?
Justification/truth is where the defendant can prove that the "sting" of the allegation is true. The "sting" is the substance of the allegation, not every fact alleged. It is a complete defence, and the most ideal due to its simplicity. But it is important to realise that the courts presume that an allegation is false until proven otherwise by the defendant.

What is fair comment?
Fair comment is the expression of an opinion based upon true facts made in good faith without malice on a matter of public interest. The facts upon which the opinion is based must be proved to be true. Comment is still protected even if extreme, as long as it is honest. "Malice" is awareness of or recklessness as to the untruth of the statement.

What is privilege?
Privilege applies to specific circumstances where it is in the public interest to permit greater freedom of speech. Two types of privilege exist – absolute and qualified.

Proof of malice defeats the defence of qualified privilege, but it has no impact upon absolute privilege. Malice in the context of qualified privilege is the same as fair comment (above), but unlike fair comment its definition also includes an improper motive in making a statement that is believed to be true. Examples of improper motives include spite, revenge or personal gain.

Absolute privilege relates to circumstances such as fair, accurate and contemporaneous reports of court proceedings and is unlikely to be relevant to trade unions.

Qualified privilege applies to a host of situations, but the most relevant is when a trade union is informing its members of something where it has a duty (legal, moral or social) or interest in doing so and their members have a duty or interest in receiving that information.

For instance, there may be a duty-interest defence for information about how union funds and therefore members' contributions were spent by a union, even if this involved publishing a defamatory statement. Whether a duty-interest situation exists is difficult to prove and not all information published to members is protected in this way.

Overall, trade unions must be cautious about trying to rely upon qualified privilege as the courts do not apply simple mechanical rules but instead attempt to strike a balance between the protection of reputations and freedom of speech based upon unsystematic and often unconnected case law. The outcome of such an approach is not always predictable.

How does the cost of a defamation action compare to the damages award?
Most damages awards are around £10,000 or less. It is rare for an award to exceed £100,000 and judges cap the awards that a jury can give.

In contrast, legal costs are nearly always for at least £100,000 and some are now for more than £1,000,000, particularly if the winner is using a no-win, no-fee agreement.

Chilling statistics for unions and their members, who ultimately fund actions brought against their unions.

BONUS POINTS

The law says that during paid maternity leave, a woman is entitled to all the same terms and conditions had she not been away from work, with the exception of pay (defined as "wages or salary").

But do bonuses fall under this heading? The Court of Session has now said – in Hoyland -v- Asda Stores – that they do. As a result, employers are entitled to reduce them during the period that the woman is on paid leave.

WHAT WERE THE FACTS IN THIS CASE?

Ms Hoyland had been working part time for Asda as a customer services assistant when she went on six months maternity leave in June 2002, returning on 3 December 2002.

On her return, she expected to receive her normal bonus for the year to 21 February 2003. The rules state that bonuses will be paid to any employee who:

- had been working for Asda for 12 months by 31 December 2002; and
- was still working for them on 21 February 2003

However, the scheme also set out a number of rules for pro rating bonuses, including an absence from the business of eight consecutive weeks or more.

Ms Hoyland had been on maternity leave for 183 days during the 2002 bonus year, so her bonus was pro rated accordingly, giving her about half the amount she had expected.

She claimed that this was unlawful under the Sex Discrimination Act as it took her maternity absence into account.

WHAT DID THE TRIBUNALS DECIDE?

The tribunal said that the store had not discriminated against Ms Hoyland when it paid her a pro rata amount of bonus. It said that, although the bonus was described as discretionary in the scheme, it was part of her "wages or salary" and was therefore a contractual payment.

That meant it was outside the scope of the Sex Discrimination Act 1975 which relates to non-contractual payments only. If a worker is discriminated against in relation to a contractual term, then the Equal Pay Act applies.

And the employment appeal tribunal agreed that the scheme was a contractual entitlement (see LELR 101 for details). It had not been withheld from anyone who satisfied the qualifying requirements. Her claim for sex discrimination could not, therefore, succeed.

SECTION 6, SEX DISCRIMINATION ACT 1975

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her –
(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or
(b) by dismissing her, or subjecting her to any other detriment.

(6) Subsection (2) does not apply to benefits consisting of the payment of money when the provision of those benefits is regulated by the woman's contract of employment.

WHAT DID THE PARTIES ARGUE ON APPEAL?

Ms Hoyland argued that the bonus was completely separate from any term in her contract and as such did not therefore fall within the exclusion created by section 6(6) of the Act.

The company pointed out, however, that section 6(6) did not require entitlement to a bonus to be a term of the contract. It just had to be "regulated" by it.

WHAT DID THE COURT OF SESSION DECIDE?

The Court of Session emphasised the importance of the word "regulated" in section 6(6). It pointed to the fact that, although the employer used the word "discretionary" in relation to the scheme, in reality every employee received a bonus.

It had no doubt therefore her entitlement *"arose out of the contract of employment and is regulated by it in the sense that but for the existence of the contract of employment the bonus would not be paid and it is therefore being paid as a consequence of its very existence."*

The bonus payment therefore fell within the terms of section 6(6) and excluded her claim for sex discrimination under the Act.

TRANSFER TIME

The Acquired Rights Directive protects the terms and conditions of employees when their jobs are transferred to another employer.

In Werhof -v- Freeway Traffic Systems GmbH & Co KG (2006, IRLR 400; IDS 803), the European Court of Justice (ECJ) said that transferees, who are not members of an employer's association, do not have to apply new collective agreements entered into by the association after the transfer, even if they are incorporated into the contracts of transferred employees.

WHAT WERE THE BASIC FACTS?

When Mr Werhof started work for DUEWAG AG in 1985, his terms and conditions were governed by a collective agreement between the metal industry trade union and an employers' federation.

His job subsequently transferred to Freeway Traffic Systems GmbH & Co KG in 1999, which was not a member of the employers' federation.

In August 2001, the works council at Freeway agreed a new grading system with the company and in return for a one-off payment, Mr Werhof waived his right to any wage increases that applied before the grading system came into force.

Then in June 2003, the metal industry union and the employers' federation negotiated a wage increase. Mr Werhof claimed he was entitled to the difference between the amount he had received and the sum negotiated under the new agreement.

The local labour court dismissed his claim, but an appeal court referred two questions to the ECJ:

- When a contract of employment refers to a collective agreement (in force at the time of the transfer) to which only the transferor has signed up, is the transferee bound by subsequent collective agreements to that one?
- If the answer is no, is a transferee (who is not party to a collective agreement) bound by agreements which come into force after the transfer for as long as the transferor is bound?

WHAT DID THE PARTIES ARGUE?

Mr Werhof argued that because his individual contract included a clause relating to a collective agreement in a particular industrial sector, that clause must be "dynamic" and apply to subsequent collective agreements negotiated after the transfer.

The company said that the only agreement that could bind the transferee was the one that was in force at the time of the transfer.

WHAT DID THE ECJ DECIDE?

The ECJ said that, under the normal rule of contract, obligations negotiated between two parties cannot be imposed on a third party. However, as this rule could undermine the rights of employees in the event of a transfer, employees had special protection to safeguard the terms of their contracts.

That included the terms and conditions of any collective agreements in their contracts. As a result, the ECJ said *"the rights and obligations arising from a collective agreement to which the contract of employment refers are automatically transferred to the new owner, even if ... the latter is not a party to any collective agreement."*

But what happens after the transfer? The ECJ said that the collective agreement only has to be observed until it ends or another one comes into force. The directive could not bind a transferee to collective agreements other than the one in force at the time of the transfer.

The court said that binding transferees to observe future collective agreements would undermine their fundamental right not to join an employers' association.

COMMENT

This radical decision goes against other UK decisions that say that, if a worker's contract incorporates a collective agreement, the transferee must observe changes to it after the transfer.

To help limit the damage, union officers should negotiate collective agreements (especially those with employers' federations or associations) that run for extended periods of time that allow for clauses to be varied.

The agreements should also provide for variations to be treated as part of the original agreement.

Much obliged

Although it may seem like a pretty basic question, the courts are still agonising over the difference between an employee and a worker.

In Cotswold Developments Construction Ltd -v- Williams (2006, IRLR 181), the employment appeal tribunal (EAT) said that the key question was whether the individual was required to do at least a minimum amount of work personally.

WHAT WERE THE MAIN FACTS?

Mr Williams was taken on as a carpenter for Cotswold Developments, who were sub-contractors to the main contractor providing maintenance services to the London Underground.

He had no written contract, nor any oral agreement that established his main terms and conditions. He worked night shifts and was frequently telephoned by the company at short notice to work the next day. He did sometimes refuse work, in which case he was not usually paid.

When he accepted work he was paid a fixed sum, less an 18 per cent standard tax deduction. He had the use of a company van, had to attend courses to satisfy the requirements of London Underground and was under their general supervision.

He worked for the company exclusively from October 2002 to June 2004 when he was dismissed. Mr Williams then complained of unfair dismissal, wrongful dismissal, non payment of holiday pay and unlawful deductions from wages.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal decided that, as Mr Williams was required to perform the work personally, he was a worker and was therefore entitled to holiday pay. He could also claim unlawful deductions from wages as the company had not paid him any.

However, it did not think he was an employee because there was no "mutuality of obligation" between the parties. In other words, the employer did not have to offer work and Mr Williams did not have to accept it. He could not therefore bring claims of unfair and wrongful dismissal.

> *'The real question for the tribunal was whether or not there was some minimum amount of work which the facts demonstrated that the claimant had obliged himself to do'*

The tribunal went on to say that, had it found mutuality of obligation, it would have concluded that he was an employee because he worked under the company's control.

In particular, his shift pattern was decided by the company, they told him what work to do, they supplied him with the necessary tools and equipment, he had the use of a company van and was subject to their supervision.

WHAT DID THE EAT DECIDE?

The EAT said there had to be "mutual obligations" to have any sort of contract. The real question for the tribunal was *"whether or not there was some minimum amount of work which the facts demonstrated that the claimant had obliged himself to do"*.

In order to decide whether someone like Mr Williams was an "employee" or a "worker", the EAT said that tribunals must ask:

- was there one contract or a succession of shorter assignments?
- if one contract, can it be inferred from the facts that the claimant agreed to undertake a minimum amount of work for the company in return for being given that work, or pay?
- if so, did the employer exercise sufficient control over the individual to make it a contract of employment, giving rise to rights of unfair dismissal, as well as a right to holiday pay?
- if there was insufficient control, or any factor negating employment, was the claimant nevertheless obliged to do some minimum (or reasonable) amount of work personally?

In this case, it said that the tribunal did not seem to have addressed the question of whether or not there was some minimum amount of work that the claimant had to do personally. The EAT therefore allowed his appeal and remitted it to the employment tribunal to look at again.

COMMENT

This is a very helpful decision for employees. *Cotswold* makes clear that the focus should be on whether workers have some obligation to work and employers have some obligation to provide or pay for it, as opposed to having an absolute obligation to do so.

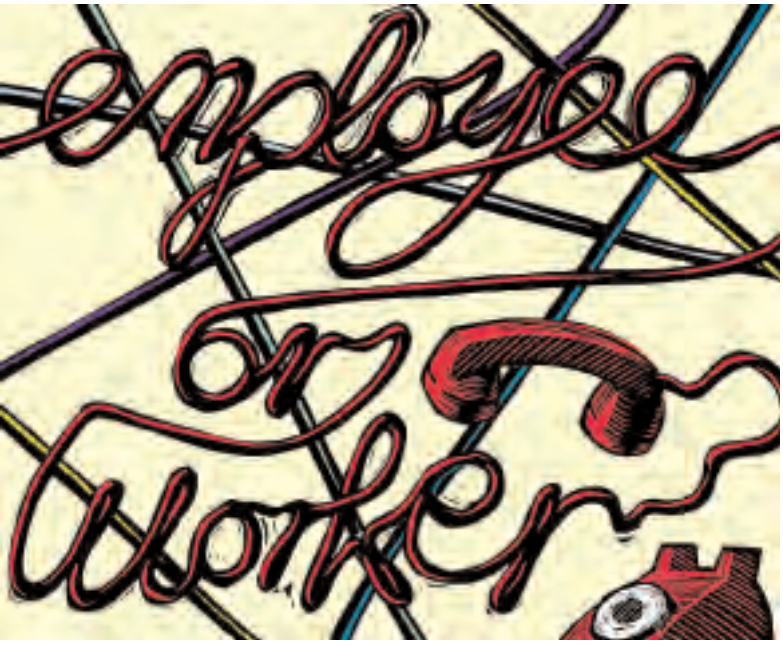
All wired up

The law distinguishes between workers and employees and accords them different employment rights, so it is important to know what status someone has.

In Cable and Wireless plc -v- Muscat, the Court of Appeal said that an agency worker was an employee as he had an implied contract of employment with the client.

WHAT WERE THE FACTS?

Mr Muscat agreed in October 2001, at the request of his employer, Exodus Internet Ltd, to become an independent contractor with his own limited company E-Nuff.



In February 2002, Exodus was taken over by Cable & Wireless who told Mr Muscat that he had to work through an agency. On 13 August 2002, E-Nuff agreed a contract for services with Abraxas, expressly stating that it constituted "the entire agreement" between them, and that no verbal or other written contract would be valid. It also said he was not an employee.

Cable & Wireless brought the agreement to an end in December 2002 and Mr Muscat claimed unfair dismissal.

WHAT DID THE TRIBUNALS DECIDE?

Following the decision of the Court of Appeal in *Dacas -v- Brook Street Bureau(UK) Ltd* (see LELR 88 for details), the tribunal said Mr Muscat had been employed by Exodus and had an implied contract of employment with Cable & Wireless

The company appealed on the basis that *Dacas* had been wrongly decided, but the employment appeal tribunal disagreed. It appealed again on the same grounds.

WAS DACAS CORRECTLY DECIDED?

The company argued at the Court of Appeal that the decision in *Dacas* could not be relied on because it had not taken all the relevant cases into account, and that the guidance was not binding because it had not been directly relevant.

The Court of Appeal first looked at the relevant authorities. First up was *Ready Mixed Concrete (South East) Ltd -v- Ministry of Pensions and National Insurance*, in which the judge said that, if the rights and duties in the contract implied that it was a contract of employment, then it was irrelevant what the parties had actually called it.

In *Carmichael -v- National Power PLC*, the House of Lords said that, unless the parties specifically stated that the documentation setting out the rights and duties "constituted an exclusive record", it was open to the courts to consider what the parties had said and how they had behaved as well as what they had written down.

On that basis, the court said that *Dacas* had been correctly decided. It also decided that, although the guidance was not strictly binding, tribunals should certainly take note of it.

WAS THE CONTRACT THE "ENTIRE AGREEMENT"?

Cable & Wireless then argued that there could not be an implied contract of employment between them and Mr Muscat because of the terms of the contract that he had agreed with Abraxas.

But the Court of Appeal disagreed. Given that Cable & Wireless was not a party to the Abraxas agreement, the court could see no reason why Mr Muscat could not have an implied contract of employment with them.

WAS IT NECESSARY TO IMPLY A CONTRACT OF EMPLOYMENT?

The company then argued that in *Dacas*, the court had not mentioned the need for tribunals to consider whether it was necessary to imply a contract of employment between worker and end-user *"to give business reality to what was happening between the parties."*

The Court of Appeal disagreed. It said that this issue had been addressed in *Dacas*, and by implication, by the tribunal.

The Court concluded that *"it was necessary to infer the continuing existence of the employment contract in order to give business reality to the relationship and arrangements between Mr Muscat and C&W ... and in order to establish the enforceable obligations that one would expect to see in these circumstances."*

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