

It gives me great pleasure to introduce the second issue of the Tanfield Chambers Employment Bulletin, produced by barristers in the Tanfield Employment Group. The aim of this quarterly publication is to provide solicitors practising in employment law with a succinct and practical analysis of a selection of recent developments. In this issue, Lucy Reed considers the effect of four recent EAT cases on the status of agency workers; Stephen Heath examines a key Court of Appeal decision which re-defines the meaning of “reasonable belief” in the context of whistleblowing; Peter Linstead looks at a possible change of direction by the EAT in relation to ‘Polkey reductions’; and, Martina Murphy considers an EAT decision on equal pay which also found that an uplift did not apply despite a failure to follow the statutory grievance procedure, owing to exceptional circumstances. Details of forthcoming Tanfield Chambers Employment Group events can be found on the back page.

David Berkley QC

AGENCY WORKERS: UNPICKING DACAS

In *Brooke Street Bureau v Dacas* [2004] IRLR 358 and *Cable & Wireless PLC and Muscat* [2006] IRLR 354 the Court of Appeal grappled with the question of the employment status and associated rights of agency workers. In the wake of *Dacas*, many thought that there would be the potential for routinely finding an implied contract between worker and end-user. However, recent EAT cases have limited the scope for finding such an implied contract.

Dacas was authority for the propositions that:

- in ‘triangular’ relationships involving worker, employment agency and end-user it was possible for there to be an implied contract of employment between the end-user and worker, notwithstanding the absence of express words, and that
- it was necessary for a tribunal dealing with the status of that worker specifically to consider whether or not there was an implied contract of that kind, and whether that contract was a contract of service.

Whilst these points are not controversial, it has not been clear how *Dacas* should be applied in practice. Some aspects of *Dacas*, and particularly the judgment of Sedley LJ, were more controversial. He said that: ‘the conclusion...that Mrs Dacas was employed by nobody is simply not

credible. There has to be something wrong with it.’ (para 71). He also considered that once arrangements had remained in place ‘for a year or more’ there would be an ‘inexorable inference’ of an implied contract of service. Understandably, *Dacas* has been criticised for being a policy driven attempt to stretch the common law to resolve problems more suited to reform by Parliament.

In *Muscat*, a differently constituted Court of Appeal held (in very different factual circumstances) that the Claimant was an employee of the end-user. Mr Muscat had originally been an employee of the end-user. The question was whether he had remained so after the implementation of various contractual changes and the introduction of an agency into the equation. Held: the reality of the relationship remained unchanged and he remained an employee notwithstanding the express terms of the various other contracts.

The Court in *Muscat* considered the guidance in *Dacas* to be ‘unimpeachable’ (albeit obiter), stating that ‘[Dacas] was not an attempt to resolve a social problem by judicial creativity but an attempt to ensure that Employment Tribunals considered (and made relevant findings of fact) according to the existing law’. That is to say, tribunals must consider whether there might be an implied contract, but *Dacas* does not compel them to find such a contract did in fact

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claims for new
comparators

exist. The Court of Appeal said it was not even sufficient, in order to establish an implied contract, to say the circumstances were identical to those in **Dacas**. This point was reiterated in **Craigie v Haringey** (12.1.07) UKEAT0556/06/JOJ by Bean J, who also called for legislation to change the law regarding the status of long term agency workers, which he said was “far from satisfactory”.

In **James v Greenwich Council** [2007] IRLR 168 Elias P gave some helpful (obiter) guidance (paras 53-61). In particular, he said that where arrangements are genuine and accurately represent the relationship between the parties the tribunal will rarely be properly able to imply a contract, and in any event there must be some words or conduct which demonstrate that the express arrangements no longer reflect the reality. Elias P also expressed the clear view that the passage of time does not justify the implication of a contract, despite Sedley LJ’s conflicting judgment in **Dacas**.

In **Heatherwood & Wexham Park NHS Trust v Kulubowila** (29.3.07) UKEAT/0619/06/DA, HHJ Peter Clarke said ‘It is not enough to form the view that because the Claimant looked like an employee,... acted like an employee and was treated like an employee, the business reality is that he was an employee and the ET must therefore imply a contract of employment’ (para 29). The question is whether or not the facts are *only* consistent with an implied contract being in existence.

In **David Astbury v Gist Ltd** (28.3.2007), UK/EAT/0619/06/DA, HHJ Peter Clarke effectively dismantles Sedley LJ’s proposition that the notion of the worker being employed by no-one was ‘incredible’. In a careful analysis of the statutory framework (which can only be sketchily summarised here) he concludes that the fact that Parliament has specifically chosen in some contexts to give separate but

different protection for contract workers as opposed to employees (for example the mutually exclusive remedies for whistleblowers of different statuses) is a demonstration of a deliberate parliamentary intention *not* to give contract workers protection equivalent to employees, rather than an inadvertent injustice.

The present position can perhaps be summarised thus: **Dacas** remains binding authority, but will not routinely assist agency workers. Whilst tribunals should still consider whether an implied contract of service exists, cases of implied contracts will be few and far between – unless it is the *only* answer, the device of the implied contract is no answer at all. Whilst Judicial sentiment is generally sympathetic to and anxious about the lack of protection afforded to the expanding class of agency worker, it is now clear that this is an issue that is apt for resolution by Parliament rather than through case law.

Lucy Reed

WHISTLEBLOWING: REASONABLE BELIEF WHERE NO CRIMINAL OFFENCE

Section 43B Employment Rights Act 1996 sets out how disclosures of information qualify for protection under what is colloquially termed the ‘whistleblowing’ legislation. It requires the worker to hold a ‘reasonable belief’ that one of the relevant statutory ‘failures’ has occurred or is likely to occur. This includes the belief that a criminal offence has been or is likely to be committed (section 43B(1)(a)), and that a legal obligation has been or is likely to be breached (section 43B(1)(b)). In **Babula v Waltham Forest College** [2007] EWCA Civ 174 the Court of Appeal considered what happens if the worker is in fact incorrect in his belief that an offence had been committed, and in doing so it overruled the contentious decision of the EAT in **Kraus v Penna Plc** [2004] IRLR 260.

In **Babula** the Claimant, an American citizen and a lecturer at the Respondent college, informed the college head that the previous class teacher had segregated his class into Muslims and “Jews and white Europeans”, and had expressed approval of the attacks of 11 September 2001 and a wish that similar incidents would occur in London. Nothing was done by the college and so the Claimant took his concerns to the CIA, the FBI, and (somewhat more prosaically) Walthamstow Police Station. He claimed that as a consequence of these disclosures the college began a series of actions which

left him no alternative but to resign claiming constructive dismissal, such dismissal being automatically unfair as the reason for it was his protected disclosure.

At a Pre-Hearing Review the Claimant’s case was that the criminal offence he was relying on under section 43B(1)(a) was a public order offence (using threatening words or behaviour with the intention of stirring up racial hatred), and the breach of the legal obligation under section 43B(1)(b) was the college head’s failure to implement its equal opportunities and race equalities policies.

The chairman regarded himself as bound by **Kraus v Penna** which had held, in the context of section 43B(1)(b), that a disclosure cannot qualify for protection if the employer was not in fact subject to the legal obligation identified by the Claimant. In Mr Babula’s case the most that could be said of his actions in dividing the class along Islamic/ non-Islamic lines was that he was potentially inciting *religious* hatred, which was not a criminal offence, and there was no breach of the college’s equality and race policies as these did not cover religious discrimination. The facts asserted by the Claimant could not in law support his contention that an actual criminal offence or breach of a legal obligation had or were likely to occur, and so the case was struck out.

The EAT dismissed the Claimant’s appeal, but the Court of Appeal allowed his further appeal. Wall LJ observed that section 43B

required the worker’s “reasonable belief” and, as had been pointed out in **Darnton v University of Surrey** [2003] IRLR 133, it was possible to have reasonable and yet mistaken belief. Further, the statutory wording was illustrative, in that the disclosure “tends to show” rather than “shows” amongst other things that certain incidents were “likely” to happen.

The Court also looked at public policy arguments and took the view that the purpose of the legislation was to encourage responsible whistleblowing. To expect employees to have sufficiently detailed knowledge of criminal law to determine whether facts they reasonably believe to be true amount in law to an offence was unrealistic and worked counter to the policy behind the legislation.

In short, there is nothing in the legislation that requires the whistleblower to be correct, so long as his/her belief is reasonable, and this must be the case in respect of all the failures within section 43B. It may be that the factual inaccuracy of the disclosure is useful in determining whether a worker’s belief was reasonable, but it is not fatal to a claim.

Stephen Heath

CLEAR GUIDANCE ON POLKEY IN 'SOFTWARE 2000' CASE

It is now well established that where an employee is dismissed following a failure to follow a fair procedure, if the employer satisfies the tribunal that there is more than a 50% chance dismissal would have occurred in any event, the dismissal is then fair by virtue of s.98A(2) ERA 1996 (see **Kelly Madden v Manor Surgery** [2007] IRLR 17). It is also clear that if there was a chance of dismissal but that chance is less than 50%, compensation should be reduced accordingly. However, it is often far from clear how a tribunal should assess what might have happened if a different procedure had been followed and what evidence an employer needs to produce in these circumstances.

In **Software 2000 Ltd v Andrews & Ors** UKEAT/0533/06/DM, the EAT has provided welcome guidance in this area. This case discourages tribunals from being too ready to reject evidence about what might have happened if a different procedure had been followed, on the basis that it is impossible to predict precisely. The EAT points out that the failure to consider what might have happened could lead to over-compensating the employee. This might be seen as a reaction against **King v Eaton (no. 2)** [1998] IRLR 681 in which the tribunal (with the EAT's approval) refused to allow the employer to adduce evidence on whether dismissal would have occurred under a different procedure. The EAT said this would involve embarking "on a sea of speculation" in circumstances where the employer's failing went "to the heart of the matter".

Software 2000 Ltd concerned a redundancy exercise involving almost all the Respondent's workforce where four employees were selected from their

respective pools.

The assessments in the redundancy exercise were found by the tribunal to be inadequate and subjective. In particular, the criteria included the ability to relate to customers and colleagues and an assessment of commitment and reliability. Some but not all of the managers were given guidance in how to apply the criteria. The tribunal found it was impossible to find that the employees would have been dismissed had the process been applied fairly, and made no reduction in compensation.

Nevertheless, the selection was by a matrix based on scoring by several different managers on several specific criteria and the individuals selected had still scored the lowest in their respective pools, by a significant margin. The EAT found that the tribunal did not address whether or not there was reliable evidence relevant to the *Polkey* issue and further, that there was evidence the tribunal could have taken into account. The case was remitted for reconsideration.

The EAT considered the effect of the relevant cases and in particular the Court Appeal decision in **Scope v Carol Thornett** [2006] EWCA Civ 1600 which emphasised that the assessment of loss inevitably involves speculation. In summary:

(1) The tribunal's task is to assess the loss flowing from the dismissal using its common sense, experience and sense of justice. The question is not whether it can predict with confidence what would have occurred.

(2) It is for the employer to adduce evidence on this issue, but the tribunal must have regard to all the evidence, including that of the employee.

(3) There may be circumstances where the speculation is so riddled with uncertainty that no sensible prediction can be made.

(4) The tribunal must appreciate that a degree of uncertainty is an inevitable feature of the exercise and the mere fact speculation is involved is not a reason for refusing to have regard to the evidence.

(5) Whilst the appellate court should be wary of interfering, it must do so if the tribunal has not directed itself properly or taken too narrow a view of its role.

(6) S.98A(2) and *Polkey* exercises run in parallel. However, if evidence is too speculative to decide whether dismissal would have occurred on a balance of probabilities, it could potentially be relied on to show that employment may have come to an end.

(7) A finding that employment would have continued indefinitely should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.

This case emphasises that employers must produce evidence to support a *Polkey* reduction. However, it appears to encourage tribunals to make some kind of reduction, except in the clearest case. This approach is likely to ensure a fair result in circumstances where there is a genuine redundancy situation, and will reduce the danger of tribunals overcompensating the employee.

Peter Linstead

EQUAL PAY: LIMITS ON ARREARS OF PAY AND FRESH CLAIMS FOR NEW COMPARATORS

A new EAT decision in the continuing North-East equal pay litigation on the one hand renews hope of success for failed litigants if a new comparator is identified and on the other, limits arrears of pay for the 'work rated as equivalent' claims to the date of the job evaluation study ('J.E.S'): **Bainbridge v Redcar & Cleveland Borough Council (no.3)** (Elias P) (UKEAT/0424/06/LA and UKEAT/0031/07/LA).

New comparator – fresh claim

The Employment Tribunal decided that the fact that an employee has failed in an equal pay claim does not automatically prevent a new claim using a different comparator relating to the same period.

The EAT agreed by a majority, rejecting the argument that such a claim would be precluded on the basis that the matter

was res judicata, or, on the basis that the claimant had elected the remedy sought.

The EAT recognised the potential for abuse by a multitude of claims being advanced by a host of complainants, each making comparison with a wide range of comparators.

The EAT suggested that it will have to be dealt with by a "robust application" of the Tribunal Rules and that tribunals "must bear in mind that they do have rules which will enable them to ensure that cases are pursued properly and in a sensible order". Respondents facing such claims may understandably find little comfort in this advice.

No compensation beyond date of J.E.S

The Employment Tribunal held that employees whose jobs are rated as equivalent

following a JES do not have the right to seek compensation going back up to six years.

The EAT unanimously agreed with the Tribunal. The reasoning behind this is that the claim arises on the date of the J.E.S. This contrasts with successful claims brought on the different basis of 'like work' or 'equal value', where compensation may be backdated for up to six years. This of course depends upon the jobs of both the claimants and their comparators remaining materially the same throughout the period of claim.

Statutory Grievance Procedure: meeting was futile due to CFA agreement

This decision also considered what

cont

amounts to “exceptional circumstances” disapplying the duty to increase or reduce an award for breach of the Statutory Dispute Resolution Procedure. The *duty* to make a reduction or increase of 10 per cent under s.31(2)(reduction) or (3)(increase) of the Employment Act 2002 does not apply where there are “exceptional circumstances” which would make the reduction or increase inequitable (s.31)(4).

The EAT held that the Tribunal had erred in finding that there was no breach of the regulations by the employer failing to hold meetings to consider grievances. However, this was only a technical breach as it was “plainly an exceptional case” falling within the terms of s.31(4). The “exceptional circumstances” were that the Claimants’

conditional fee agreements (‘CFAs’) prevented them from settling claims without their solicitors. The EAT, agreed that a meeting under the Statutory Grievance procedure in the circumstances was futile, justifying no uplift in compensation.

This case may lend support for an “exceptional circumstances” defence against an uplift in compensation under s.31, where under different circumstances an employer takes a view that a grievance meeting would be futile. It will be no surprise if this EAT judgment, in what Elias P described as the “horrendously complex litigation involving equal pay” against the Redcar & Cleveland Borough Council, is further appealed.

Martina Murphy

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To book places email dhaigh@tanfieldchambers.co.uk.
Registration 15 mins before start time given below.

Monday 25 June 6.15pm Inner Temple Parliament Chamber
The R.J. Harvey Memorial Lecture
“Can Employment Law Cater for Conscience?”
Given by Mr. Justice Elias, President of the EAT.

Thursday 6 September 6pm Tanfield Chambers
“Restrictive Covenants and Confidential Information”
The latest in effective drafting and enforcement.

Thursday 20 September 6pm Tanfield Chambers
“Senior Executives: Termination Issues and Bonuses”
Topics include the importance of *Keen v Commerzbank* on discretionary bonuses, garden leave and without prejudice dismissals.

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