



Employment Law Round-Up Seminar

GLASGOW: 4 MAY 2010
EDINBURGH: 5 MAY 2010

macROBERTS

INDEX**PAGE NO.**

Redundancy Horror Stories – John Macmillan & Graham Mitchell	3 - 8
Found Out On Facebook – Karen McGill	9 - 29
Some Simple Steps To Avoid Losing Tribunal Claims – Stephen Miller & Frances Ross	30 - 33
Will “Agency” Get You Off The Hook Or Stab You In The Back? – Katy Wedderburn	34 - 41

Redundancy Horror Stories

By John Macmillan & Graham Mitchell

MacRoberts LLP

john.macmillan@macroberts.com

graham.mitchell@macroberts.com

Redundancy - A Cautionary Tale

The employer in this case has a business in the property sector and, like many other businesses it was suffering due to the challenging economic climate and the collapse of the market. The business decided to take the commercial decision to shut a department in the Glasgow office and to close its Edinburgh office entirely. The employer proposed that the secretaries in the Glasgow department and the Edinburgh office be made redundant.

It so happened that an employee went on maternity leave and, as a result, a temporary position was created. This position was offered to those secretaries who were facing redundancy in Edinburgh but neither of the individuals concerned were interested. The temporary position was then offered to a further two individuals in Glasgow.

The business decided to carry out an assessment of the two individuals and by all accounts this assessment was carried out well. The business considered that they had been very fair minded.

Both individuals performed well in the assessment. The employer decided that the critical factor for comparison should be time-keeping. One of the individuals maintained excellent time-keeping while the other had an extremely poor time-keeping record. As a result the individual with poor time-keeping was selected and ultimately made redundant. The business invited the unsuccessful individual to a meeting and explained this selection.

Why was this then ruled an unfair dismissal? It was wholly to do with the lack of process followed in the redundancy situation. The business failed to consult the individuals at any stage in the process, except to confirm who had been successful and who was being made redundant. Any meetings which were held were also extremely informal.

Although the employer had good intentions and felt that they were being fair, it had little option but to accept that there had been a procedurally unfair dismissal. Accordingly, the claim had to be defended

on remedy alone. This should serve as a warning to all employers. This was a cast-iron redundancy situation due to the downturn in the market and redundancies were entirely legitimate. However, if no process or an incorrect process is followed, there is no option but to rule that there is an unfair dismissal. Employers should ensure that they have correct procedures in place and that these are followed through on every occasion.

Redundancy

If you get the scope of the redundancy pool wrong, you could land up in hot water!

Due to the downturn in revenue for advertising, a publishing company suffered a downturn in its newspaper sales. One of its numerous proposals for cutting costs was to have the editing of one of its newspapers carried out by the Group Editor. The Group Editor already had the overall editorial responsibility for the Group as well as direct editorial responsibility for one of the several newspapers within the Group.

Given that the Respondent's proposal would mean that there would be a significantly diminished requirement for the editorial work at that publishing centre, there was a possible redundancy situation and the Company commenced consultation with the Editor. The Company consulted with the Editor over a period of around a month, during which time four consultation meetings were held.

During the consultation process, it was clear that the Editor, who had worked at the newspaper for around 30 years, was aggrieved about the redundancy position and took it personally.

There was, however, no doubt about the fact that the Company had to make efficiencies and that the Group Editor would be able to absorb the functions of the Editor of that newspaper. Indeed, in due course, it was proven that this efficiency was a success and did not impact on the quality of the Editor of the newspaper. To the contrary, the newspaper content improved and it was more popular.

The Editor decided to complain to the employment tribunal that he had been subject to unfair dismissal (and age discrimination). In respect of his claim for age discrimination claim, he did not succeed. In respect of his claim for unfair dismissal, the Tribunal spent much time considering whether the Company had acted reasonably in not giving consideration to bumping the Deputy Editor (who was younger and less experienced but very good at her job) to make room for the Claimant who was more experienced.

The majority of the Tribunal stated that selecting "one out of one" may not be unreasonable as a selection process is not a fundamental requirement of a fair redundancy dismissal. Equally, however, they stated that identifying one post only to be done away with, and therefore the incumbent of that post only for redundancy, with no thought for the other potential candidate, does not guarantee fairness. In summary, the majority of the Tribunal held that the Company's failure to put its mind to any selection pool (including specifically the possibility of bumping) was outside the band of reasonable responses of the reasonable employer.

Larry The Labourer

The Adams Family have now moved in to Construction in the UK.

Larry the labourer has been employed at the Adams Family business for a number of years as a general labourer. Up until the end of 2008, he was working in a team who were laying tar on roads on newly built housing schemes. He was a physically fit individual and generally inoffensive.

As a result of the downturn in construction and property there was less work in this area. The men were told in January 2009 that they were at risk of redundancy and a scoring process was carried out.

Larry and his colleagues doing the same work were scored and the main criteria that differentiated employees was headed "**Work Performance/Competence**". Larry scored 2/10 in this category. He was one of the lowest scored employees and this resulted in him eventually meeting with the MD of the company in late January 2009. The MD, Mr Adams stated that he was potentially at risk of redundancy but there were some vacancies in another division of the company for labourers but this was not laying roads but instead generally digging holes. Larry was not only happy about moving given that he had friends in the "tar squad" and the work there was seen to be hard but it often finished early in the afternoon once the roads were laid for the day. In February 2009 Larry moved to the hole digging department still as a general labourer with the same terms and conditions.

Right from the start, Larry did not like being in the hole digging department. He stated this to all colleagues and managers that came near to him. Nevertheless, whilst not happy he was physically fit and did do his day's work

In June 09, there was a further downturn which affected the requirement for hole-digging.

This is where it gets slightly interesting.

Larry's new Line Manager since February 2009 was a Mr F Stein. Mr Stein was infuriated by Larry's attitude and having to constantly push him to do his work. Also, Larry never asked for more work nor to be trained up on other tasks nor to help others. He simply dug holes and grunted.

The MD, Mr Adams, being a fair man, decided that in the scoring of hole-diggers that required to be done in June 2009, he would simply ask Mr Stein to score the other hole-diggers in the pool and not to apply his mind to scoring Larry the Labourer at all. Mr Stein was kept in the dark as to why this was the case and Mr Stein was not told the scores that Larry had gained in the scoring process previously carried out in January 2009 by the previous manager. The exact same criteria were used.

The MD, Mr Adams had done this because he knew that Mr Stein would have scored Larry poorly and he wanted to give Larry a fair chance based on his previous scores before Larry became disgruntled.

Once the scoring was carried out, Mr Stein met with Mr Adams and Mr Adams produced the scoring from January 2009. This placed Larry at the bottom of the pool of hole-diggers. Mr Stein commented that he would have scored Larry even less had he been given the chance!

As a result, Larry was dismissed by reason of redundancy in June 2009.

Issues

1. **USING OLD SCORES.** It is certainly not recommended that scores from a previous redundancy exercise in another department (even if recent) are used for a subsequent redundancy exercise. Even if well-intentioned this has obvious inherent dangers. The general principle is that an employee should be scored objectively by their line manager at the time of the redundancy situation and the same line manager with the same criteria should carry out the scoring in relation to all employees in the pool for selection.

2. **SCORING – WORK COMPETENCE.** It transpired at Tribunal that Larry was a very good labourer in the sense that he would work very hard and had all the skills required of a general labourer. He was effectively the sort that if told to dig a hole would keep digging to Australia unless told to stop!

It is important to know that as of 6 April 2009 the Statutory Dispute Resolution Procedures were repealed by the Employment Act 2008 but the ACAS Code of Practice on Disciplinary and Grievance Procedures which replaces the statutory procedures specifically excludes redundancy situations. ACAS has provided an advisory booklet entitled "Redundancy Handling" to provide guidance to employers making redundancies after 6 April 2009. The purpose of the booklet offers advice "on how best to handle redundancies" and it is intended "to act as an aid to improve employment relations". However, it is not entirely clear to what extent Tribunals will rely on the booklet. However, of importance to this case in relation to scoring it suggests that the following criteria should be used:

ACAS Booklet "Redundancy Handling" issued in 2009

In our example the crucial criteria used were "**Work Performance/Competence**", Disciplinary Record, and Attendance. There was no criteria used relating to attitude or aptitude for work.

A Tribunal is very likely to be concerned with the fact that the employee received 2/10 for work competence when he clearly was a competent worker in the sense that he could do and did do the work. Instead it appears that he has been marked down for his attitude and the fact that he did not want to up skill, etc. In this situation, a Tribunal is likely to say that the scoring is fundamentally flawed. If the Company truly wanted to mark the individuals on work competence and separately on flexibility and/or attitude then there should have been separate scoring columns for these.

3. **CONSULTATION** - The "nail in the coffin" for this case relates to consultation. There were less than 20 people at risk of redundancy at one establishment within a period of 90 days' or less and so individual consultation rules applied. Given that we no longer have the Statutory Dispute Resolution Regulations, the position as to consultation effectively goes back to the case law prior to the Dispute Resolutions coming into force in 2004.

In the present case, in June 2009, Larry the Labourer was simply told by Mr Stein on a Monday morning to come to his office. At that meeting Larry was told by Mr Stein that he was getting made redundant because he had scored the least in a redundancy scoring exercise. Larry was shocked.

There was no consultation with Larry the labourer prior to being told that he was being made redundant and his notice was served "there and then" on the Monday morning. He was not shown his scores.

Even as a minimum, in redundancy situations employers are under an obligation to consult with individuals and this is irrespective of the size of the company or length of service of the employee. The employer must inform the employee of the potential redundancy situation and conduct a consultation as soon as reasonably practicable and in any event when proposals are still at a formative stage. The ACAS Guidance on "Redundancy Handling" states that the consultation should take place at an early enough stage to allow further discussion as to whether the proposed redundancies are necessary. The consultation should be approached with the aim of avoiding redundancies where possible and the employee should be provided with adequate information on why he has been made potentially redundant in order that he can question the logic and if appropriate the scores. Whilst the leading case of redundancy dismissals prior to the 2004 changes (*Polkey -v- AE Dayton Services Ltd*) can be of assistance where there are minor procedural issues, this case also states that an employer will not normally act reasonably unless he warns and consults any employees affected and adopts a fair basis to select for redundancy and take such steps as are reasonable to avoid or minimise the redundancy by redeployment within his own organisation.

Accordingly, whilst there may be ways to mitigate the amount due, whatever way you look at it, having no consultation means that this is an unfair dismissal.

Found Out On Facebook



By Karen McGill

MacRoberts LLP

karen.mcgill@macroberts.com

Introduction

As the popularity of websites such as Facebook, MySpace and Twitter increases, the perils of employees' online social networking continue to be extensively reported on in the press with a distinctly negative context for all parties involved. Therefore, in order to address aspects as wide ranging as the appropriate level of social networking at work and how to regulate this usage through to how derogatory and damaging comments made by employees should be dealt with, employers are asked one major question: "***To what extent do you trust your employees?***"

1) The legal framework

Data Protection Act 1998 and The Employment Practices Data Protection Code

Although the same legal principles apply to the use of online social networking as apply to all employee use of the internet, employers should consider the Data Protection Act 1998 and also pay particular attention to the guidance issued by the Information Commissioner in Part 3 of The Employment Practices Data Protection Code in terms of monitoring internet usage at work. Under the Code, employees are entitled to a degree of privacy at work and employers should only monitor in a proportionate way after giving due consideration to the least intrusive method of monitoring to achieve the objective required.

The Regulation of Investigatory Powers Act 2000 and the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000

These statutory provisions permit employers to monitor or record communications *without* express employee consent in certain circumstances. Such circumstances include investigating or detecting unauthorised use of the employer's telecommunications system, establishing the existence of facts or ensuring quality the use of online control. In order to undertake such monitoring lawfully, the employer must have taken all reasonable steps to inform the employees concerned that monitoring may take place.

....**HOWEVER**, it is important that the above legislation is read and interpreted in conjunction with an individual company's policy in respect of using social networking websites, as certain employers may (and are permitted to) stipulate in their contractual agreements with employees that engaging in social networking is strictly prohibited and is in direct breach of the agreement.

Example:

Brelyn Hammernick, Quinn VanGorden, and Michael Hoolihan, all former employees with TEKsystems, moved to Horizon Integration, a company who is considered as TEKsystems' main competitors. Mr. Hammernick used social networking site LinkedIn to connect with at least sixteen of his former company's contract employees. However, this action was deemed to be in direct breach of TEKsystems' non-compete, non-disclosure, and non-solicit contractual agreements.

TEKsystem asked the court to require Messrs. Hammernick, VanGorden, and Hoolihan to uphold the terms of the agreements that the individuals made with TEKsystems and to prohibit all three from working at Horizontal Integration or any other TEKsystems competitor within a 50 mile radius of their office for eighteen months. TEKsystems also seeks financial compensation equal to the total gain that the three former employees have received as a result of the alleged contract breach.

II) The employee's productivity

A major concern for employers is their employees' potential excessive use of online social networking websites to the detriment of the amount of time spent on work. The addictive and time-consuming nature of social networking websites means that employers who do not have established guidelines on internet usage or have not restricted access to such websites run the risk of failing to make it clear to their employees what level of usage is considered acceptable and damaging employee productivity.

Example 1:



A sixteen year-old girl, Kimberley Swann (pictured), was an office administrator at Ivell Marketing & Logistics. Unimpressed with the limited range of administrative tasks that she was entrusted with, she felt compelled to write on her Facebook profile on her first day of employment:

"omg [oh my God]!! So dull!!"

A day later, in response to a question about her job, she wrote:

*"Its a load o s**t! i onli started monday...its in sum office but all I do is shred holepunch n scan paper!!!...omg!"*

A fortnight later, she clearly felt that her range of duties had not expanded:

"im so totally bord!!!"

The following Monday, after three weeks of employment, Ms. Swann was called into manager Stephen Ivell's office and was fired on the spot before being marched from the office premises in Clacton-on-Sea, Essex. Mr. Ivell informed her that he had seen her comments on Facebook; the negative nature of which were not good for the company. In that meeting, she was handed a letter, which stated:

"Following your comments made on Facebook about your job and the company, we feel it is better that, as you are not happy and do not enjoy your work, we end your employment with Ivell Marketing & Logistics with immediate effect."

Ms. Swann subsequently disputed the nature of the sacking, stating that she omitted to mention the company's name in her online postings and accused the company of being "nosy", "stupid" and "petty".

In response, Mr. Ivell stated that he had done everything by the book:

"We were looking for a long-term relationship with Miss Swann as we do with all our staff. Her display of disrespect and dissatisfaction undermined the relationship and made it untenable."

Once more, no issue of unfair dismissal rose in this particular case, although a statement from the TUC general secretary Brendan Barber warned employers that they must develop "thicker skins" with regard to what their employees write about them on social networking websites.

Example 2:



An unnamed Swiss insurance worker told her employer, Nationale Suisse, that she was unable to work in front of a computer and that she needed to rest in a darkened room instead of working. However, the employer soon discovered that their employee was surfing Facebook in bed on her iPhone after a series of status updates on her profile page.

The employee was subsequently sacked, with the explanation being that the employer felt the trust had

been destroyed:

"This abuse of trust, rather than the activity on Facebook, led to the ending of the work contract."

The employee subsequently accused Nationale Suisse of spying on her and other employees by creating a fictitious Facebook persona and sending a mysterious friend request which would have allowed access to the employee's personal online activity if accepted. Nationale Suisse rejected this claim by saying that this employee's Facebook activity was stumbled upon by a colleague.

III) The employee's personal conduct

The possibility of derogatory comments being made by employees in a public environment means that monitoring employees' usage of social networking websites is in the employer's best interests. For example, employers may have some valid concerns about the way their employees conduct their personal lives; such concerns are perfectly understandable in the context of the recent raft of examples whereby employees post such derogatory comments and the relationship of trust and confidence between the employer and employee is subsequently destroyed. Online social networking is making employees' private lives more public, with details now instantly searchable and potentially stored online forever.

Example 1:



A young woman, known only as "Lindsay", posted an expletive-laden rant on Facebook about her employer, known only as "Brian", accusing him of being lecherous towards her:

*"OMG (oh my God) I HATE MY JOB!! My boss is a total pervy w***** always making me do s*** stuff just to p*** me off!! W*****!"*

However, she had seemingly forgotten that she had made online friends with her employer Brian, meaning that he had access to all of her online postings!

A response to this rant was duly posted a mere three hours later:

*"Hi Lindsay, I guess you forgot about adding me on here? Firstly, don't flatter yourself. Secondly, you've worked here five months and didn't work out that I'm gay? I know I don't prance about the office like a queen, but it's not exactly a secret. Thirdly, that "s*** stuff" is called your "job", you know, what I pay you to do. **And lastly, you also seem to have forgotten that you have two weeks left on your six-month trial period. Don't bother coming in tomorrow. I'll pop your P45 in the post and you can come in whenever you like to pick up any stuff you've left here. And yes, I'm serious**".*

As Lindsay only had less than a year's service and had yet to complete her probationary period, the issue of ordinary unfair dismissal did not arise in this respect. However, this somewhat heated exchange spread across the internet and was eventually reported in the press, which serves as a reminder that employees who post unguarded and derogatory comments about their employers on Facebook are likely to be caught out.

Such a breach of professional responsibility has not only occurred in the private sector, as there have also been several notable high-profile examples within the public sector:

Example 2:

A Facebook group entitled "Look I've Had a Polcol [slang for 'Police Collision']" was set up by a member of the Metropolitan Police to invite fellow officers to upload pictures of road accidents involving police vehicles and write stories about such accidents.

The content on the group page included a picture of a uniformed officer smiling and giving a thumbs-up in front of a car trapped underneath a fallen tree (see above) and stories about collisions with pedestrians: one of which stated:

"Ran over a drunk. I believe he has a permanent limp and a hefty payout. I was given a three-month holiday from job driving. Ooh, bummer".

One other member of the group had stated that a fellow officer *"had booked a month in the Maldives with claim money after a crash with a bus"*.

The group had 200 members before it was discovered by senior officers in January 2008 and subsequently shut down. An investigation shortly afterwards led to more than twenty police officers being spoken to regarding their behaviour but had managed to keep their jobs. A spokesman stated the following:

"The inquiry has now closed. Eighteen officers were subject to formal disciplinary proceedings," a spokesman said.

"Fourteen officers were given written warnings and four were given words of advice. A further five officers have been advised about their conduct by local management."

However, a follow-up warning was issued to all Metropolitan Police officers in July 2008 that putting pictures or information on social networking sites could lead to their professionalism being doubted.

Example 3:



It had emerged earlier this month on the launch day of Labour's election campaign in Scotland that Stuart MacLennan (pictured), a Labour parliamentary candidate who was standing for the Moray constituency, had posted a series of foul mouthed and offensive comments on his Twitter page.

It was believed that a majority of these comments, which included Mr. MacLennan describing old people as "coffin dodgers" and launching personal attacks on fellow politicians and celebrities, were made by Mr. MacLennan while he was still a student and prior to becoming a Labour candidate, although some of these remarks were made as late as 31st March 2010.

There was further controversy when it was revealed that Cabinet ministers Ed Balls, Andy Burnham and Ben Bradshaw had been following Mr. MacLennan's Twitter page but had not protested to its content.

A spokesman for the Labour Party stated that Mr. MacLennan had been suspended from all of his party posts:

"On reading the comments in full, the Scottish Labour party was outraged by their content and Scottish Labour's general secretary took the decision to suspend his membership of the Labour Party. Stuart MacLennan is no longer a Labour party candidate nor eligible to hold office as a Labour party representative".

IV) The damage to an employer's brand and reputation

Derogatory comments made by employees in respect of their employer, client or customer may have the potential to damage an employer's reputation or brand. Such comments, until discovered by the employer, then become easy to find via an online search and may be available for an unlimited time.

Example 1:



Waitrose, British Airways and Virgin Atlantic have all recently come under fire after their employees formed groups on Facebook and subsequently posted a series of derogatory and malicious comments.

In the case of **Waitrose**, numerous members of staff contributed to a discussion forum within a group page entitled "Waitrose Isn't a Supermarket, It's a State of Mind", whereby members were asked to state what aspects of Waitrose annoyed them the most. Comments that were submitted included the following:

"Pikey skanks wait till the last minute, gathered around the reduced-stuff-bin, or the cake shelves etc, to get the cheapest possible stuff".

"We have this ridiculously dressed, fat, old woman come in. She's REALLY ugly and wears almost black eye shadow".

A spokesman for Waitrose stated that:

"The nature of the internet makes it difficult to get content removed once posted, however we do have teams that monitor website activity and will be conducting an immediate investigation".

British Airways were forced to apologise after a group page set up by BA staff entitled "London Gatwick Ground Staff" contained derogatory comments about the airlines customers, accusing some of them of *"putting boarding passes in their mouths and handing them back to you"* and having *"stupid American accents"*.

A spokesman for BA simply stated that they would be *"speaking to the individuals concerned about their disappointing and unwise comments"*.

In a similar incident, **Virgin Atlantic** were forced to investigate claims that a group page had been set up by employees to *"b*tch about the aircraft"*. One post claimed that stewards working for the airline had been bitten by cockroaches and that a jet engine was required to be replaced four times in the same year.

A spokesman for Virgin Atlantic stated that "the airline had started an immediate disciplinary investigation" into the matter.

Example 2:

Dan Leone (pictured), a part-time stadium operations worker for six years with American Football team "The Philadelphia Eagles", was unhappy that his employer decided to let their star player, Brian Dawkins, sign with rival team "The Denver Broncos" in 2009. He then decided to voice his dissatisfaction on his Facebook profile:

*"Dan is f***** devastated about Dawkins signing with Denver...Dam Eagles R Retarded!!"*

Someone within the team discovered this derogatory remark on his Facebook status, and less than two days after posting the Dawkins comment, Mr. Leone was contacted by Leonard Bonacci, the team's director of event operations. According to Mr. Leone, Mr. Bonacci said they needed to talk about Mr. Leone's Facebook page, to which Mr. Leone agreed. Mr. Leone subsequently deleted the comment from his Facebook page. However, Mr. Bonacci never got back to him after that; instead, Mr. Leone received a call from Rachel Vitagliano, the team's guest services manager. After a brief ten minute phone call, Mr. Leone was sacked from The Philadelphia Eagles. No further explanation was given by the team.

V) The 'confidentiality' argument

Would, or should, an employee be reasonably expected to explain comments made to his friend during a conversation outwith the office? This is the counter-argument to the principle that employees only have one identity, which applies for both their work life and personal life. Employees obviously cannot be expected to sacrifice their private lives in this respect. However, when comments regarding their workplace are posted online into a public environment for everyone to see, having a private life becomes harder to regulate.

Example 1:



TESCO

Tom Stones (pictured), a part-time shelf-stacker at Tesco, called in sick for a 6pm to 10pm shift and stated that he felt ill. However, later on that evening, he wrote on his Facebook page "*Tom had a good night xxx*" after having a night out on the town. An unidentified colleague spotted the web page, printed it out and handed it to managers, resulting in Mr. Stones being summoned to a disciplinary hearing. Mr Stones spoke out by saying:

"I think it's a bit much - a step too far. Why are they going on Facebook? There's your personal life and then there's your life at Tesco - the two should be kept separate."

Tesco subsequently denied using Facebook to spy on its staff, saying that "*someone pointed this out to the management.*"

Example 2:

An Australian call centre employee, Kyle Doyle, claimed for a day's leave of absence on Thursday 21st August 2008. A member of the HR department, Niresh Regmi, contacted Mr. Doyle on his return to the office to request a medical certificate for his day off:

From: Niresh Regmi

Sent: Wednesday, 27 August 2008 9:35 a.m.

To: Kyle Doyle

Subject: Absence on Thursday 21st 2008

Hi Kyle,

Please provide a medical certificate stating a valid reason for your sick leave on Thursday 21st 2008.

Thank You

NIRESH REGMI

Real Time Manager, Workforce Operations

Mr. Doyle replies by stating that his contract does not require him to provide a medical certificate if he is off sick for one day:

From: Kyle Doyle

Sent: Wednesday, 27 August 2008 9:38 a.m.

To: Niresh Regmi

Subject: RE: Absence on Thursday 21st 2008

Niresh,

1 day leave absences do not require a medical certificate as stated in my contract, provided I

have stated that I am on leave for medical reasons.

Thanks

Regards,

Kyle Doyle

Resolutions Expert – Technical

However, Mr. Regmi is insistent and informs Mr. Doyle that his line manager has decided that his absence was not related to medical reasons:

From: Niresh Regmi

Sent: Wednesday, 27 August 2008 9:39 a.m.

To: Kyle Doyle

Subject: RE: Absence on Thursday 21st 2008

Hi Kyle,

Usually that is the case, as per your contract. However please note that leave during these occasions is only granted for genuine medical reasons. Your line manager has determined that your leave was not due to medical reasons and as such we cannot grant leave on this occasion.

NIRESH REGMI

Mr. Doyle once again refuses and insists that a medical certificate is not required in these circumstances:

From: Kyle Doyle

Sent: Wednesday, 27 August 2008 9:43 a.m.

To: Niresh Regmi

Subject: RE: Absence on Thursday 21st 2008

Hi Niresh,

My leave was due to medical reasons, so you cannot deny leave based on a line manager's

discretion, with no proof, please process leave as requested.

Thanks

Regards,

Kyle Doyle

Mr. Regmi simply replies with the following attachment from Mr. Doyle's Facebook page:

From: Niresh Regmi

Sent: Wednesday, 27 August 2008 9:50 a.m.

To: Kyle Doyle

Subject: RE: Absence on Thursday 21st 2008

Hi Kyle,

I believe the proof that you are after is below



The status read "Kyle Doyle is not going to work, f*** it i'm still trashed. SICKIE WOO!"

Example 3:

Kevin Colvin, an intern at Anglo Irish Bank's North American arm, emailed his managers late in the day on 31 October 2007 telling them that that he'd miss work due to what colleagues took to be a "family emergency":

-----Original Message-----

From: Kevin Colvin [mailto:kevin.colvin@anglo-irish.com]
Sent: Wednesday, October 31, 2007 3:55 PM
To: Jill Thompson (North America)
Cc: Paul Davis (North America)
Subject:

Paul/Jill -

I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.

Kind regards,

Kevin

One of the recipients of the email, Paul Davis, checked Mr. Colvin's Facebook page the following day and discovered a newly posted photograph of Mr. Colvin from a Halloween party that he apparently missed work to attend:



After discovering the photograph, Mr. Davis responded to Mr. Colvin attaching the above incriminating evidence:

From: Paul Davis (North America)
Sent: Thursday, November 01, 2007 4:54 PM
To: Kevin Colvin; Jill Thompson (North America); Kevin Colvin (North America)
Subject: RE:

Kevin,

Thanks for letting us know--hope everything is ok in New York. (cool wand)

Cheers,
PCD

VI) Breach of security

Employers continue to raise concerns about the risk of potential loss of confidential information resulting from a malicious or insensitive comment being posted on a social networking site, which could invariably cause the company negative press, embarrassment and significant financial damage.

Example:



The proposed strike for twelve days by British Airways cabin crew over the Christmas holidays in 2009 is one such example, which attracted a lot of criticism and controversy – not least because of the internet backlash against the plans. Disgruntled staff members set up the "Support BA cabin crew!!!" group on Facebook to attract support for the strikers, only to have Facebook users turn against them by criticising the proposals.

Although that strike action failed, there were rejuvenated attempts through a strike ballot of British Airways' 13,000 cabin crew over imposed changes to working practices, which closed on 22nd February 2010. In the middle of that process, it emerged that there was a list of 40 pilots who were prepared to

break a strike by volunteering to work as cabin stewards. One cabin crew member posted a message on Facebook stating that he had that list and asked other Facebook users what he should do with the information.

The list itself was not published on Facebook; however, 14 individuals who were believed to have posted comments on the site alluding to the list and posted messages about the list on a thread on its discussion forum received calls from British Airway's management instructing them to attend meetings at the Crew Report Centre located at Heathrow's Terminal 5. The suspended individuals were given the following worded letter:

"You have been suspended because of allegations that, in relation to your activity on Facebook, you took part in conduct likely to harass a BA colleague and/or incited others to take part in such conduct".

The letter also alleges the staff members of having *"committed serious breaches under BA's data protection policy by accessing and using, or attempting to access and use, personal data of a BA colleague or colleagues for illegitimate and/or unauthorised purposes"*.

Some of the suspended staff refute the allegations, stating that they had not even read the Facebook message or replied to it – their only link to the content being that they were Facebook friends with the original poster.

The Unite Union's assistant general secretary, Len McCluskey, noted the following:

"BA has unleashed a cyberspace witch-hunt. Cabin crew have been suspended simply for being a Facebook friend. This is McCarthyism for the internet age".

VII) Social networking as a recruitment tool.....and a termination tool!

Social networking sites are being used more often by employees as a tool for vetting candidates for recruitment. This is controversial in itself; even though employers would not telephone a candidate's friend to ask for details of the candidate's stag-do, employers are known to consult social networking sites in order to pre-gauge the candidate's personality. Furthermore, since only a minority of candidates will have public profiles on social networks, employers who use such information from these sources can give an unfair advantage or disadvantage to certain candidates and may breach discrimination legislation.

Example 1:

Inspector Chris Dreyfus (pictured), head of royalty and government protection for British Transport Police, was offered a job as a chief inspector by Bedfordshire Police following an interview in February 2008.

However, during the background checks conducted by Bedfordshire Police, it emerged that British Transport Police had previously issued Inspector Dreyfus with a written warning in connection with the content of his Facebook page. The content in question concerned "graphic details" of his gay lifestyle on the page, which included photographs of him posing in his uniform at a London Underground station. He had also said that he was interested in men and looking for "whatever I can get". It was believed that Inspector Dreyfus had also posted "suggestive comments" to other Facebook users.

When British Transport Police initially became aware of the web page, Inspector Dreyfus had removed all references to his job but maintained his right to publish information about his private life online. His argument was that his page did not contain any "sexually explicit material" and that:

"As long as I do not do anything to disgrace the force then what I do privately is acceptable".

However, a spokesman for Bedfordshire Police stated that:

"After the interview we ran routine background checks and we were told he had a live sanction against him. Therefore we felt unable to proceed with the job offer".

Furthermore, the spokesman contradicted Inspector Dreyfus' claim that publishing details of his private life in a public setting is acceptable by stating that staff must not post any information on websites "that could bring the force into disrepute".

However, social networking sites aren't simply being used by employers to recruit staff:

Example 2:



Sixteen year old Chelsea Taylor (pictured), a part-time waitress at Cookies in Leigh, Greater Manchester, was given £10 and sent on an errand to get some biscuits for the staff. However, she ended up losing the £10 and had reported this to the manageress, Elaine Sutton.

However, later that day, she found a message from Elaine which was posted on to Ms. Taylor's Facebook page:

"hiya Chelsea its Elaine from work. Sorry to send u a message like this but bin tryin to ring u but gettin no joy.

I had to tell the owner bout u losin that tenner coz obviously the till was down at the end of day. she wasn't very pleased at all and despite me trying to persuade her otherwise she said I have to let u go. I'm really sorry".

The message, which was clearly littered with a series of grammatical errors, is believed to be the first time in Britain a worker has been sacked via Facebook.

VIII) Social Networking: Practical solutions for employers

It is widely thought that a total blanket ban on employees' personal usage of the internet is counter-productive and an overreaction to the problems that social networking presents to the employer. However, a comprehensive internet and email policy which is made up of the following elements could regulate potential problems:

- Details of how much, if any, personal internet use is permitted and when this can specifically take place (e.g. before or after work, during breaks, lunchtime etc.).
- Whether this usage includes or excludes social networking websites (if it does include such websites, the consequences associated with posting defamatory comments made in respect of the employer, comments that may damage the reputation of the employer or breaches the implicit confidentiality).
- The degree that such usage is monitored.

Training your staff in respect of the aforementioned dangers of social networking may also be beneficial, particularly in terms of security and confidentiality issues.

Some Simple Steps To Avoid Losing Tribunal Claims

By Stephen Miller & Frances Ross

MacRoberts LLP

stephen.miller@macroberts.com

frances.ross@macroberts.com

A tale of two shop assistants

The way that the Employment Tribunal broaches unfair dismissal is best summed up by the tale of two hapless shop assistants involved in episodes of dishonesty separated by 25 years.

In 1978 Miss Burchell, a shop assistant with British Home Stores, had been working late on Thursday night opening night. After the customers left the store it was an opportunity for the shop assistants to benefit from their permitted staff discount. One of Miss Burchell's colleagues bought a pair of sunglasses which had a retail price of £6.99. Miss Burchell put them through the till at a cost of £2.99.

25 years later Mr Hitt, shop assistant with Sainsburys, was implicated in a theft when a box of razor blades, which had been noted as missing, was discovered in his locked locker.

We can learn a lot from analysing the "approach to these incidents".

In both cases, the employees were held to have been fairly dismissed for their dishonesty, but in neither case was the employer in a position to prove guilt beyond reasonable doubt which is the standard in criminal cases.

In Miss Burchell's case it was held to be sufficient that there was a genuine and reasonable belief in Miss Burchell's guilt and that that belief had been established after an adequate investigation.

Although the three tests which emerge from that case appear in themselves straight forward, their application has caused difficulty as Mr Hitt's case demonstrates.

On the face of it, Mr Hitt had some explaining to do. He had been at work when the box of razor blades went missing and he had left the bakery floor (his place of work) several times during his shift.

When challenged about his involvement and the seemingly damning evidence of the discovery in his locker, Mr Hitt explained that several employees had keys which fitted his locker and so he claimed that he could have been framed.

Sainsburys investigated that and discovered that the only one of the employees who had such a fitting key was in the store working at the same time as the Claimant was a manager who had not been noticed to have left his place of work during his shift.

Weighing up all these features, Sainsburys decided to reject Mr Hitt's explanation. He was dismissed for misconduct.

The Tribunal was satisfied, taking us back to Miss Burchell's case, that Sainsburys had a genuine and reasonable belief in Mr Hitt's guilt; but they were not convinced that there had been an adequate investigation. In fact, they thought that the investigation was flawed because, in their view, Mr Hitt's claim that someone else had put the razor blades into his locker was not adequately investigated. The Tribunal ruled that Sainsburys should have investigated all the employees in the store who had a key capable of fitting Mr Hitt's locker. They were also unhappy about the level of investigation into the whereabouts of the manager who had been on the shift at the same time as Mr Hitt.

In an important restoration of the Burchell test, not to mention common sense, the Court of Appeal ultimately held that the Tribunal had made a mistake in their approach because they had substituted their own opinion as to what was a reasonable and adequate investigation instead of applying the objective standard of the reasonable employer as to what was an reasonable investigation, an approach which permits the application of the range of reasonable responses test. The Court of Appeal was satisfied that Sainsburys had investigated Mr Hitt's allegation that someone else had planted the missing razor blades in his locker. I would tend to conclude on the basis of that investigation that the explanation was improbable.

These decisions are helpful for employers who will from time to time be faced with employee misconduct. The standards are not demanding. In addition, standards are relaxed still further for smaller employers who would not have the resources to carry out a potential full scale investigation into what took place within Sainsburys store.

Often, we see evidence of allegations of misconduct which are not taken forward by employers on the mistaken belief that "we could not prove it". As these cases demonstrate, it is not difficult to establish proof and circumstantial evidence can be used.

In all types of employment litigation including discrimination, an employer can be faced with a claim which boils down to "one person's word against another".

It can be very frustrating as an employee can make a complaint about a fellow employee's misconduct and then to be told by the employer that "nothing can be done".

We do not believe that this is the case. Even in cases where it is one person's word against another there may be other pieces of evidence, circumstantial evidence, which can point in one direction or the other.

There have even been examples where an employer does not know which group of employees has been guilty of misconduct, despite investigation, and has been held entitled to sack all of them! (***Money v Corral Racing***).

The next feature covered in the handout is the way in which in which the Tribunal analyses evidence of the decision to dismiss.

In every case in every organisation no matter how big or small, it is usually the decision of one single person to dismiss the employee (whether for misconduct or redundancy, it doesn't matter).

It is tempting when facing a Tribunal claim to lead all the evidence from the initial complaint to the investigation to the Disciplinary Hearing and the Appeal.

As has been seen in Sainsburys, an Employment Tribunal naturally, and sometimes unfairly, starts to apply its own standards to the issue in question. One way of preventing that happening is to restrict the evidence which the Tribunal hears. If, for example, the only witness for the employer is the Manager who decided to dismiss then the Tribunal is denied the opportunity of forming its own views on the raw evidence. Not only is that an advantage in itself but it will usually restrict the time taken for presenting cases.

It is now a feature of most dismissals that there is an enormous volume of paperwork generated, often for the purposes of the Tribunal. For example, handwritten minutes can be typed up to create a near-verbatim record of the investigated matters in the Disciplinary Hearing. This can be counter productive.

All the Tribunal really needs to know is the gist of the evidence considered by the dismissing manager. If, instead, the Tribunal is presented with a blow by blow account of every single question and answer then the Tribunal can be drawn far too far into the detail of the case. A question and answer on paper can be misleading. Tribunals have been known to criticise Personnel Managers following a close textual analysis of a series of questions and answers. That is not a function the Tribunal is supposed to carry out. Tribunals were told recently by the Appeal Court that they are not to subject employers' processes to a "microscopic analysis" (E-ZEC Medical Transport Service Ltd v Gregory). Witnesses can be naturally guarded and sometimes embarrassed by their handwritten notes. These, though, can often be the best source of evidence serving to jog the memory of the note taker and not to prompt unnecessary questions on behalf of the Tribunal or the Claimant.

Another point which arises frequently with documents is that vacuums can be created. Some Claimants are serial correspondents and that creates a risk. An employer should not leave any unanswered correspondence. The Tribunal can be sceptical about any failure to challenge the points made by the employee at the time.

When appearing before the Tribunal it is a fact that you will be judged by a panel of three with equal voting rights in which the majority are lay not legal. That should bring comfort to employers. We have to say, however, that it is rare for any of the panel members to challenge the legal interpretation provided by the Judge. Although majority judgements are competent they are rarely seen in practice. In short, it would appear that in the main the panel are heavily influenced by the legally qualified Judge.

The treatment of correspondence leads us onto another area which really is the only point on which we regularly criticise employers and that is over-tolerance. It is perhaps a natural human reaction to put up with misbehaviour and not to challenge it because of the atmosphere created as a result. No-one wants to be portrayed as heavy handed. Unfortunately, uncorrected misbehaviour tends to repeat itself and eventually every employer snaps. In these circumstances, often the best point that can be made for the dismissed employee is that they had no idea their employment was at risk given the previous experiences.

Will "Agency" Get You Off The Hook Or Stab You In The Back?

By Katy Wedderburn

MacRoberts LLP

katy.wedderburn@macroberts.com

The question of whether a person supplied by an agency to another business ("the end-user") can ever become an employee of that end-user, has been considered by the courts on several occasions over the course of the last ten years. I will discuss the development of the case law on this subject and the vulnerability of agency-appointed individuals in the employment rights framework. I will also look at the increasingly prevalent issue of whether or not there exists a "sham" arrangement between parties in a working agreement.

Briefly to introduce the concept of an agent, one could generally be defined as a person with the express or implied authority to act on behalf of a principal. The extent of the agent's authority to act on a principal's behalf is largely determined by the principal, who will often grant the agent the authority to enter into contracts on behalf of that principal. In the context of employment agencies, when we speak of a principal, we are referring to an employer (or end-user), and the agent would of course be the agency providing workers. What emerges from this arrangement is a tripartite relationship, with the workers signing on with the agency, and the employer entering into an agreement with the agency for the supply of workers; there is no contract of employment between the worker and the employer. Consequently, in the current climate, employers are finding it useful to engage agency workers, mainly due to the reduced employment rights which are attached to them compared with employees. This approach minimises the risk of claims brought against an employer for, *inter alia*, unfair dismissal, and also outsources the recruitment process (thereby passing the burden and the risks associated with recruitment to the agency).

We will start by looking at a couple of the leading cases on agency-supplied workers and their attempts to argue that they are in fact employees.

The Early Cases

Earlier cases indicated that the appeal courts were open to the possibility of implying a contract between the agency worker and an end user where an examination of the practical operation of the relationship revealed a number of features that were typical of an employee/employer relationship, for example, several years of service, payment of a salary/wage, control/supervision by the end user and

the application of employment policies (*Motorola Limited v Davidson and Melville Craig Group Limited* [2001] IRLR 4, *Franks v Reuters Limited* [2003] EWCA Civ 417, *Brook Street Bureau (UK) Limited v Dacas* [2004] EWCA 217 and *Cable & Wireless plc v Muscat* [2006] IRLR 557).

James v London Borough of Greenwich [2008] IRLR 302

The case of ***James v London Borough of Greenwich (2008)*** set out the legal position to the effect that only on grounds of *necessity* can an employment tribunal imply a contract of employment between an agency worker and the end-user of her services. By way of background, in that case, Ms James was supplied by an agency to carry out work for Greenwich Council. She had no express contract with the Council but argued that there was an implied contract on the basis that she had worked for the Council for a period of some five years and had throughout that time been treated in all respects like other permanent employees.

The Court made clear that it is not for courts or tribunals to extend employment protection rights to agency workers, and that further developments will need to come from Parliament. In particular, the employment appeal tribunal gave the following guidance:

- Unless an end user can insist on an agency supplying a particular worker, a contract between the worker and the end user cannot be implied:
- *“Where the arrangements are genuine and when implemented accurately represented the actual relationship between the parties- as is likely to be the case where there was no pre-existing contract between worker and end user- then we suspect that it will be a rare case where there will be evidence entitling the tribunal to imply a contract between the worker and the end user. If any such a contract is to be inferred, there must be subsequent to the relationship commencing be some words or conduct which entitle the Tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed, and that the reality of the relationship is only consistent with the implication of the contract. It will be necessary to show that the worker is working not pursuant to the agency arrangements but because of mutual obligations binding worker and end user which are incompatible with those arrangements.”*
- A contract cannot be implied between parties merely because of the passage of time.

This guidance was approved by the Court of Appeal, which noted that the only express contractual relationships were between the employment business and Ms James and between the employment business and the Council. Moreover, there were no grounds for treating these express contracts –

which fully explained the parties' relationships – as other than genuine. As such, it was not necessary to imply another contract in order to give business reality to the situation.

In ***Muschett v HM Prison Service [2010] EWCA Civ 25***, Mr Muschett (M) entered into a contract with an agency. The agency then sent him to work at HM Prison Feltham (HMPS) in a temporary position as a cleaner. During this time M was paid by the agency and had no written contract with HMPS, however M had to undergo a Criminal Records Bureau check in accordance with the HMPS' staff handbook.

M brought various claims in the tribunal against HMPS for sex, race and religious discrimination and unfair and wrongful dismissal. The claims for unfair and wrongful dismissal relied on him showing that he had been an 'employee' of HMPS under a contract of employment.

At a Pre Hearing Review (PHR) the tribunal held that M was not an employee of HMPS or the agency (as defined in s.230 of the Employment Rights Act 1996) nor was M in "employment" in the wider sense of the definitions for discrimination purposes as contained in s.78 of the Race Relations Act 1976, s.82 of the Sex Discrimination Act 1975, and Reg. 2 of the Employment Equality (Religion or Belief) Regulations 2003. In respect of HMPS specifically there was no mutuality of obligation and no contract should be implied.

In light of this decision the tribunal found they had no jurisdiction to hear the claims and so dismissed them. M was given permission to appeal as there was concern as to whether the Tribunal had adequately considered the wider definition of 'employment' in the discrimination legislation. M appealed and the EAT upheld the decision of the Tribunal. M appealed to the Court of Appeal (CA).

The CA agreed with the EAT and held that on that facts found by the tribunal the conclusion that M was not an employee of HMPS was correct. M had alleged that the findings of fact made by the Tribunal were deficient. However the CA made it clear that although an employment judge has a duty to assist a litigant there are limits to what the judge should do, they stated "*It is not his function to step into the arena on the litigant's side and to help him to make his case*". The CA confirmed in the case that "*that meagre collection of facts does not begin to justify a finding that Mr Muschett became an employee of HMPS*".

Further, there was no contract for services (a contract personally to execute any work or labour) with HMPS and M was under no obligation to work for HMPS and could terminate his engagement with them at any time by giving notice to the agency.

Vulnerability of Agency-appointed Individuals

What is clear from the cases outlined above is that agency workers fall into a gap when it comes to the protection offered by the employment legislation. Agency workers will not typically be employed by an agency and, therefore, will only have the protection of the employment legislation if they can convince the Employment Tribunal that it is necessary to imply a contractual relationship between the individual and the end user. As the *James* and *Muschett* cases demonstrate, this will now be a difficult test to satisfy.

The Court of Appeal in *James* made it clear that it is not for the Courts or Tribunals to extend employment protection rights to agency workers. Any change in the law to this effect needs to come from Parliament. The European Directive in Temporary Agency Work (2008/104EL) was adopted by the UK on 5th December 2008. It must be implemented by 5th December 2011. The Agency Workers Regulations 2010 ("the Regulations") provide that an agency worker (as defined by the Regulations) is entitled to the same basic working and employment conditions as he would be entitled to for doing the same job, if recruited by the end-user. The relevant terms and conditions are defined; they relate to pay, working time, night work, rest periods and annual leave. The protection only applies where the agency worker completes a qualifying period, working in the same role and for the same end-user for 12 continuous calendar weeks, during one or more assignments. Primary liability will be with the Agency which will have a defence where it has taken reasonable steps to obtain accurate and relevant information from the hirer regarding the basic working and employment conditions of the hirer. This will come into force on 1st October 2011. Although the Regulations will no doubt be welcomed by agency workers and trade unions, they do not address the gap highlighted in the *James* and *Muschett* cases in their current format, nor does the Equality Act 2010.

Sham Arrangements

It has been fairly common in recent years for individuals to claim that the contract detailing a person's working arrangements was a "sham". It is one of the few circumstances in which a tribunal will look behind the written terms of a contract to identify the true nature of the relationship between the end-user and the worker. Essentially, a "sham" exists where parties to a contract have created an agreement (or part of an agreement) which neither party intended to have any binding effect, and which deceives third parties, such as a court or the HMRC, as to the reality of the agreement. A sham may exist whether there is an agreement to create such a deception or otherwise. The following cases outline recent developments where claims of sham agreements have been made.

Consistent Group v Kalwak 2008 EWCA 430

Polish workers were contracted by an agency to work for Welsh Country Foods Ltd. The contracts with the agency stated that they were self-employed and that the contract was the "entire agreement".

The contractors were stated not to be employees and that there was no mutuality of obligation. There was a right of substitution. Accommodation and transport was provided by the agency. The workers brought an Employment Tribunal contending that they were dismissed for trade union membership or activities when they sought to join a trade union; seeking notice pay and unlawful deductions from wages. The Employment Tribunal decision which was upheld by the EAT found that the Claimants were employees of the agency and that the rights which were stated in the contract were a sham as they did not reflect reality.

On appeal from the EAT, the Court of Appeal said that the EAT had erred –

- "It is not the function of the Court or an Employment Tribunal to recast the parties bargain.
- A term agreed in writing can only be rejected in favour of another one by a clear finding that the real agreement was to that different effect, and that the term in the contract was included so as to mislead:
- To find that a contract is in part a sham requires a finding that both the parties intended it to paint in that respect a false picture of their respective obligations.
- It is not possible to imply into a contract a term that contradicts an expressed term. The test for implication of a term is one of strict necessity."

The Court of Appeal sent the case back to a differently constituted Employment Tribunal to decide.

Protectacoat Firthglow Ltd v Szilagyi [2009] IRLR 365

In this case, Mr Szilagyi (S) brought an action against Protectacoat (P) after the company dismissed him. P defended the unfair dismissal claim by arguing that S was not an employee and therefore had no right to bring such a claim. This was because of a complex working arrangement detailed in two contracts which were not explained to S but which he signed nonetheless. The contracts purported to create a "partnership" between S and his assistant, and this partnership would provide services to P.

The tribunal judge held that the partnership/service agreement documents were a sham which did not represent the true nature of the parties' relationship. The Court of Appeal agreed that the arrangements amounted to a sham, and went on to elaborate on the correct test for establishing a sham contract. The

court held that it is not necessary to establish that there was an intention to deceive third parties when deciding whether an agency arrangement was a sham. While it was a necessary step to consider the terms of the written contract when evaluating the relationship, if the evidence shows that the written contract was intended to be different in effect from the situation in reality, then the court must look at the relationship itself and not just the contract. Smith LJ's test is laid out below (para 55):

"The question is always what the true legal relationship is between the parties. If there is a contractual document, that is ordinarily where the answer is to be found. But, if it is asserted by either party, or in some cases by a third party, that the document does not represent or describe the true relationship, the court or tribunal has to decide what the true relationship is."

LJ Sedley also considered this point, and wished to keep open the question of whether there was any need to consider such a case in terms of whether there was a sham or not, and instead look simply at "what the true legal relationship is" (para 73).

Autoclenz v Belcher and Ors [2009] EWCA1046

Autoclenz v Belcher and Ors concerned a group of 20 car valets, who had been recruited by Autoclenz Ltd via advertisements asking for 'self-employed' valets. Their contracts of employment described them as 'subcontractors'. The contracts contained substitution clauses, providing that the subcontractors would be able to supply substitutes to carry out valeting on their behalf and there was no obligation on Autoclenz Ltd to supply them with work, nor on the valets to accept it. They submitted weekly invoices for payment and were responsible for their own tax and national insurance payments and the Inland Revenue had accepted that they were self-employed. The valets brought tribunal claims asserting that they should be paid holiday pay and unpaid wages as employees of Autoclenz.

In this case the tribunal had taken the stance that they required to look behind the written contract on the basis that it did not reflect the true nature of the parties' relationship, and found that the reality of what happened in practice did not reflect the terms of the contract. The valets were, it ruled, fully integrated into Autoclenz Ltd's business and subject to its control. As such, they were employees. The EAT overruled the ET however, on the basis that the ET had no entitlement to go behind the terms of the employment contract which described the valets as self-employed. According to the case of *Snook v London and West Riding Investments Ltd*, the EAT held, the tribunal is entitled to look behind the written contract at the underlying facts only where both parties intend to create a false picture. As such, they disapproved the tribunals' decision to follow *Consistent Group v Kalwak and Ors*, as the incorrect approach, stating that this decision had been subsequently overturned.

The Court of Appeal considered the differing approaches taken by the ET and EAT to their interpretation of the case of *Consistent Group v Kalwak*, but instead applied *Protectacoat*. The Court of Appeal held that the court/tribunal, in considering any dispute as to the genuineness of a contract term, should focus the enquiry on discovering the actual legal obligations of the parties. In order to do so, they ruled, it is necessary to examine all relevant evidence, which will certainly include examination of the contract itself, as well as how the parties conducted themselves in practice. Nonetheless, notably it stated that "*the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by...where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties...[e]vidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations.*"

As to the presence of a substitution clause, the Court of Appeal held that this of itself did not give rise to the inference of self-employed status, since no real substitution had taken place. In reality, it was expected that the valets turn up and do the work required every day, and would not send substitutes.

Accordingly, the Court of Appeal overturned the decision of the EAT, holding that there was the necessary mutuality of obligation for the individuals to be deemed workers, and further that the necessary level of control was retained over them by Autoclenz in order for them to be deemed employees.

The Autoclenz decision is now being appealed to the Supreme Court, and the case is expected to be heard in the last quarter of 2010.

Launahurst Ltd v Larner [2010] EWCA Civ 334

In *Launahurst Ltd v Larner*, the EAT upheld a Tribunal's decision that Mr Larner was an employee of Launahurst, despite the fact he had signed a contract supply agreement holding him out to be an independent contractor. Although there was an 'entire agreement' clause to the effect that the written agreement amounted to the entire contract between the parties, this did not reflect the reality of the relationship between Mr Larner and the company, so the clause was a sham.

The EAT referred to the Court of Appeal's decision in the case of *Protectacoat Firthglow Ltd v Szylagyi* and said that if evidence shows that the parties' true relationship was different from that described in a

written agreement, it is the relationship rather than the agreement alone that determines the contract.

In this case, the written agreement had been entered into to address HM Revenue & Custom's stance in relation to tax and self-employment status. However, it did not accurately reflect the parties' conduct (which was more akin to an employment relationship). Therefore, the 'entire agreement' clause was not definitive of the relationship.

The EAT's ruling, however, has been overturned in the Court of Appeal. From a procedural point of view, it was found that the issue of the entire agreement clause being a sham was never raised by the claimant at the tribunal stage and therefore the tribunal should not have made its ruling on this point. Launahurst had no notice of this argument and therefore had no opportunity to gather evidence in its defence. Mummery LJ further noted that it would then be unfair for the EAT to rule on the sham point, either in terms of the facts or of the law. In addition, it was held that, in the interests of justice, the court ought not to remit the case to the ET for re-hearing. The claimant did not attend any of the hearings or make written representations against Launahurst's appeals. He could therefore not reasonably object to the court's decision to decide the case on the basis of facts found from the evidence in the original hearing.

Considering the evidence gathered in the original hearing, the court found that the relationship was on the whole closer to that of a self-employed individual. Indeed, Richards LJ added that he would take into account the terms of the contract as "strongly supporting the conclusion" that Mr Larner was self-employed and not an employee.

As we can see, whilst there is a general reluctance on the part of courts to assert the existence of employment contracts where agencies have supplied the workers, the courts are much happier to interfere in cases where the written agreement between the parties does not reflect the actual working practice and the legal obligations which the parties ought to be subject to. Employers must therefore be wary of saying one thing, and doing another.

Disclaimer

The material contained in this handout is of the nature of general comment only and does not give advice on any particular matter. Readers should not act on the basis of the information in this handout without taking appropriate professional advice upon their own particular circumstances.

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152 Bath Street
Glasgow G2 4TB
Tel: 0141 303 1100
Fax: 0141 332 8886

www.macroberts.com

Excel House, 30 Sempole Street
Edinburgh EH3 8BL
Tel: 0131 229 5046
Fax: 0131 229 0849