Appeal No. UKEAT/0633/06/LA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 20 February 2007
Judgment handed down on 29 March 2007

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

HEATHERWOOD AND WEXHAM PARK HOSPITALS NHS TRUST — APPELLANT

1) MR D S KULUBOWILA
2) MR R ANDREWS
3) MR P HILL
4) SHORT TERM ENGINERRING LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Miss L Chudleigh (of Counsel) Instructed by: Messrs RadcliffesLeBrasseur Solicitors 5 Great College Street Westminster London SW1P 3SJ
For the 1st Respondent	Ms H Grewal (of Counsel) Instructed by: 20 Eastleigh Avenue South Harrow Middx HA2 0UF
For the 4th Respondent	Mr J Gregg (Representative) Instructed by: Short Term Engineering Ltd Station House High Street West Drayton Middx UB7 7DJ
	2nd and 3rd Respondents not represented

SUMMARY

Contract of Employment – Definition of employee

Triangular relationship – whether implied contract of employment between worker and end-user – strict application of **Aramis** principle – ET finding of implied contract reversed.

HIS HONOUR JUDGE PETER CLARK

1. This case raises, yet again, consideration of a triangular relationship between worker, agency and end-user and the question as to whether there is to be implied a contract of employment between the worker and end-user.

2. That possibility was raised by the Court of Appeal in **Dacas v Brook Street Bureau (UK) Ltd** [2004] IRLR 358, as explained by the Court in **Cable & Wireless Plc v Muscat** [2006] IRLR 354. Guidance as to the approach to be taken by Employment Tribunals in deciding the implied contract question has been provided by Elias P in **James v Greenwich Council** [2007] IRLR 168. I have also been referred to my judgment in **Cairns v Visteon UK Ltd** [2007] IRLR 175, where, in distinction to the other cases mentioned, there was a contract of service between worker and agency, as opposed to a contract for services. Finally, since hearing oral argument in this appeal but before writing this reserved judgment, I have seen a transcript of the judgment of Bean J in **Craigie v LB of Haringey** (UKEAT/0556/06/JOJ) 12 January 2007. I invited the parties to submit any written representations on that decision and have taken those submissions into account in reaching my conclusions.

3. The parties to these proceedings before the Reading ET, so far as is presently material, were Mr Kulubowila (Claimant) and (1) Heatherwood and Wexham Park Hospitals NHS Trust (the Trust) and (4) Short Term Engineering Ltd (Short Term). The appeal is brought by the Trust, the end-user, against the judgment of a Chairman, Mrs Jessica Hill, sitting alone on 7 September 2006 at a PHR, in which she held that the Claimant was employed by the Trust under a contract of service so that the ET had jurisdiction to entertain his complaint of unfair dismissal against the Trust. In so ruling the Chairman also found that the Claimant had

sufficient continuous service to found that jurisdiction, for the purposes of s108(1) ERA. That judgment, with reasons, was sent to the parties on 28 September 2006.

The facts

4. The factual background, as found by the Chairman, was neither controversial nor is it atypical. The Claimant describes himself as a medical electronic equipment maintenance technician/engineer. He learned from a friend, employed by the Trust, that if he wished, as he did, to work at Wexham Park Hospital he should go through an agency, Short Term, to whom he submitted his CV. Without meeting anyone at Short Term he was directed by telephone to report for work at the hospital, which is maintained by the Trust. He did so, reporting to a Mr Hill who is a named Respondent to his separate claim of racial discrimination. He commenced work on 10 October 2003.

5. In November 2003 he signed a written contract with Short Term headed Terms of Engagement of Temporary Workers. It is common ground that that was a contract for services. He was not employed by Short Term within the meaning of s230(1) **Employment Rights Act**. Although, under that agreement, Short Term was not obliged to provide the Claimant with assignments offered, where an assignment was offered and accepted he agreed (clause 8(a)):-

> **"to co-operate with the client's (Trust's) staff and accept the direction, supervision and instruction of any responsible person in the client's organisation,"**

6. Short Term agreed to pay to the Claimant remuneration based on an hourly rate. Tax and NIC was to be deducted by Short Term. He was entitled to leave based on the WTR 1998 although holiday pay was 'rolled up' into the hourly rate. The contract provided (clause 5.4) that he should notify Short Term when he wished to take leave and give at least 2 weeks notice. In practice, the Chairman found, he notified his 'line manager' at the hospital.

7. In the contract for supply of services made between Short Term and the Trust details for the placement of the Claimant were set out. The pay rate was set at £13.30. His hours of work were 37½ hours per week.

8. At the hospital the Claimant worked with 3 others, 2 permanent employees and 1 agency worker, under the direction of Mr Hill. He received some training from the Trust in his specific job. He was not a member of the Trust's pension scheme.

9. In mid 2005 he applied for a permanent position at the hospital but was unsuccessful. This event formed part of his complaint of racial discrimination.

10. In early 2006 the Trust ran short of money in its annual budget. It did not pay Short Term for the Claimant's services. Accordingly Short Term withdrew his services and the assignment ended on 2 February 2006.

11. During the period between October 2003 and February 2006 the Claimant was absent, either on holiday or for medical treatment (he underwent heart surgery). It was argued that these absences interrupted continuity of employment, if he was indeed an employee of the Trust. The Chairman rejected that submission. I shall return to it later in this judgment.

Implied contract of service

12. The observations of the members of the CA in **Dacas** as to the possibility of an implied contract of service between a worker and end-user caused something of a stir in the world of employment. Unfortunately (a) the question did not strictly arise for determination by the Court in that case and (b) each of the judges, Mummery and Sedley LJJ and Munby J gave

differing views on whether and in what circumstances such a contract of employment was to be implied; there being express contracts between worker and agency and agency and end-user, but not between the worker and the end-user.

13. On the other hand the point did arise directly for determination in **Muscat**. The Court upheld an ET finding, itself upheld by the EAT, that on the facts of that case there was an implied contract of employment between the worker and end-user. The facts were somewhat unusual. Mr Muscat was employed by a company called Exodus. Exodus then told him that he would have to become a contractor, operating through a limited company. He therefore set up a limited company, E-Nuff, into which remuneration and allowances were paid. Cable & Wireless (C & W) then took over Exodus. Mr Muscat continued working as before. He was given an employee number and described as an employee within the departmental structure but was paid through E-Nuff. C & W then placed a further layer between themselves and Mr Muscat. His services were to be provided via a contract between an agency, Abraxas and E-Nuff, which agreed to provide his services. That agency then paid for Mr Muscat to E-Nuff. Eventually his services were dispensed with by C & W. He brought a claim against them for unfair dismissal.

14. The Courts reasoning, contained in the judgment of the Court delivered by Smith LJ, contains the following material principles:-

(1) The ET was correct to follow the guidance of the majority (Mummery and Sedley LJJ) in **Dacas**

(2) That guidance was not an attempt to shape social policy but to ensure that ETs applied the law correctly

(3) The ordinary common law principles, exemplified in the judgment of Bingham LJ in the **Aramis** [1989] 1LR 213, applied, (Muscat para 43), for a contract to be implied it must be reasonably understood from the conduct which is equally consistent with an intention to contract as not to contract. It must be necessary to identify conduct inconsistent with there being no contract between the relevant parties. Smith LJ (para 45) opined that in Dacas Mummery LJ (para 16) had that principle in mind when he spoke of a contract of service being implied as a necessary inference from the conduct of the parties.

(4) Contrary to the disserting opinion of Munby J in **Dacas**, the fact that payment to the worker was arranged by the end-user through an agency did not negative a contract of service, applying the well-known formula stated by McKenna J in the RMC case [1968] 2QB497, and cited by Smith LJ in Muscat (para 31).

I recognise, of course, that the principles, as I understand them, to be derived from **Muscat** are binding on ETs and this EAT. As to **Dacas**, it is therefore clear that the majority view that there may be an implied contract of employment between worker and end-user is to be followed and not the disserting opinion of Munby J that such an implied contract can never arise.

15. However, one aspect of the judgments in **Dacas** are not, it seems to me, directly addressed in **Muscat**. Sedley LJ observed (**Dacas**; para 71) that:-

> **"The conclusion of the ET that Mrs Dacas was employed by nobody is simply not credible."**

Taken literally, that may be taken to mean that if the worker is not employed by the agency he or she must be employed by the end-user.

16. He added, para 77, that once arrangements like these (those in Mrs Dacas' case were very similar to those in the present case) have been in place for a year or where there was an 'inexorable inference' that she was an employee of the end-user.

17. In **James** (para 59) the President respectfully disagreed with the analysis of Sedley LJ or the significance of the passage of time with the same arrangements in place, for the reasons which he there sets out.

18. For myself, I do not find it necessary or desirable to agree or disagree with the observations of Sedley LJ. I prefer to hold to the reasoning of the Court in **Muscat**, which did not espouse the inevitable result indicated by Sedley LJ. The **Aramis** test must be applied to the facts of each individual case. That test presents a high hurdle to the litigant who asserts that a contract is to be implied.

19. As to whether it is incredible that an agency worker such as Mrs **Dacas** and indeed Mr Kulubowila is employed by nobody, it is perhaps instructive to return to the statutory framework.

20. It is frequently the case that a worker claiming to be an employee is found not to be so; he is engaged under a contract for services. That was the determination of the Court in **Dacas**. She was not employed by the agency. That is consistent with the distinction which Parliament has chosen to make between employees and 'workers' (ERA s230(3)). The former have unfair dismissal protection; the latter do not.

21. Interestingly, Parliament has, in a separate context, recognised the right of agency workers to statutory protection against unlawful discrimination. Take the present case. Mr Kulubowila's claim of racial discrimination is brought against the Trust, 2 of its managers and Short Term. Plainly he was engaged by Short Term under a contract for services, falling within the wider definition of 'employment' contained in s78(1) **Race Relations Act 1976**. He was thus 'employed' by Short Term and as such a contract worker vis-à-vis the Trust by virtue of s7 RRA. The individual Respondents, employees of the Trust, are thus potentially liable under s33(2); the Trust being potentially liable for acts of discrimination perpetrated by them under s32(2).

22. In saying that I am not in any way prejudging the merits of the Claimants claim of racial discrimination which has yet to be determined on the merits. The point is this. If Parliament wishes to render the end-user (Principal) liable to an agency worker for the unfair termination of his services there is already a statutory mechanism to bring about that result. It has chosen, thus far, not to do so. I am therefore comforted by the clear ruling of Smith LJ in **Muscat** that in **Dacas** the Court was not attempting to lay down social policy; something which must be left to Parliament. I note that the D.T.I has recently commenced a consultation process proposing new measures to protect vulnerable agency workers.

Mutuality of obligation

23. In **Stephenson v Delphi Diesel Systems Ltd** [2003] ICR 471, para 11, Elias J said:

> **"The significance of mutuality (of obligations) is that it determines whether there is a contract in existence at all."**

He went on to deal with the issue of control, the 2 being irreducible minima of a contract of service (see **Carmichael v National Power Plc** [2000] IRLR 43 HL).

24. It seems to me that, in order to imply a contract of service it must necessarily be inferred that the parties intended to undertake mutual obligations, the employer to provide work for the employee and the employee to do the work for remuneration (whether paid directly or indirectly, here through an agency). The element of control is plainly present on the facts of this case.

The present case

25. The Chairman was referred to **Dacas** and **Muscat**. This case was decided before the President's judgment in **James**.

26. Miss Chudleigh, on behalf of the Trust, challenges the Chairman's analysis of the test to be derived from **Dacas** and **Muscat**. At para 14 of her reasons she said:-

> **"The Tribunal was directed to the two leading cases of recent times in this matter Dacas as referred to above and Cable and Wireless v Muscat [2006] IRLR 354. From those cases the Tribunal distils the following principles of law. In order for there to be a contract of employment there must be mutuality of obligation between the employee and employer and there must be control by the employer of the employee. It is for the Tribunal to consider from its findings of fact whether those elements are present such that an implied contract might exist between the worker and the end user. Further in order to give business reality to what was happening it is necessary that the existence of the implied contract must be inferred."**

27. Miss Chudleigh submits that the real test is whether the reality of the relationship was only consistent with the implication of a contract and whether, therefore, it is necessary to imply a contract between the Claimant and the Trust. In so submitting she draws on the formulation by the President in **James** (para 58) and my own in the earlier case of **Cairns** (para 23).

28. I see no reason to depart form that formulation. It accords, it seems to me, with the approach of Bingham LJ in the **Aremis**, applied by the CA in **Muscat**. I do not accept Ms Grewal's submission that the President's reasoning, with which, like Bean J in **Craigie** I respectfully agree on this point, is inconsistent with the decision in **Muscat**.

29. It follows also that I accept Miss Chudleigh's submission that the Chairman, in understating the hurdle which the Claimant must pass in showing an implied contract, then failed to answer the correct question. In my judgment it is not enough (Reasons para 22) to form the view that because the Claimant looked like an employee of the Trust, 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.

30. When the correct question is asked the answer, in my view, is quite different. On the primary facts found the position was at least as consistent with there being no contract between the Trust and the Claimant; the affairs of the parties were as consistent with the express arrangements, that is the contract for services made between the Claimant and Short Term and the contract made between Short Term and the Trust for the supply of the Claimant's services. It cannot be said that it is necessary to infer a contract of service between the Trust and the Claimant, developing at some unspecified time during the triangular relationship, in circumstances where the Claimant applied for a permanent post and was rejected by the Trust. That, it seems to me, is wholly inconsistent with an inferred intention by the Trust to contract with the Claimant.

31. As to the necessary mutuality of obligation what is it that, impliedly, the Trust agreed to do? Ms Grewal relies on the Chairman's findings at para 17 of her reasons where she said:

> **"Did the first respondent treat the claimant as an employee? He was not recorded on their database as such. He did not receive induction training as an employee and he was not in the NHS Pension Plan. On the other hand they clearly expected him to attend work on a regular basis. As Mr Gregg [of short term] put it so succinctly no one asked him if he would come into work, he simply continued to do so because he expected and was expected to go into work. To that extent that demonstrates there was mutuality of obligation."**

That analysis, in my view, overlooks the express arrangements between the parties. The Claimant agreed to provide his services to Short Term and Short Term agreed with the Trust to provide those services to the Trust. Such an arrangement does not, on a proper application of the **Aremis** test, give rise to the necessary implication of a contract between the Claimant and the Trust. The parties would have acted exactly as they did in the absence of a contract between Claimant and Trust.

32. Looked at another way, what were the terms of the implied contract? Ms Grewal submits that they are the terms to be found in a contract of employment ordinarily made between the Trust and its employees. That would include, I assume membership of the Trust's pension scheme, to which he had not hitherto been admitted. When did the contract of employment come into force? That question is not answered on the Chairman's findings. It is plainly relevant to the question of continuity for the purposes of s108(1) ERA. I am not here dealing with the short breaks, as to which I agree with the Chairman's analysis, but the start and end date of employment.

33. As to the facts of **Muscat**, I find them easily distinguishable. Mr Muscat began as an employee of C & W's predecessor and the ET was entitled to conclude, so the EAT and CA found, that the arrangements made for contracting out his services did not obscure that continuing state of affairs. Here, there never was an express contract of employment at any stage between the Trust and the Claimant. For the reasons I have endeavoured to give, nor was there any implied contract.

Conclusion

34. It follows that I shall allow this appeal, reverse the finding of the Chairman and hold that the ET has no jurisdiction to entertain the Claimant's complaint of unfair dismissal against the Trust on the basis that he was never their employee.