

ARTICLE: Agency worker denied protection of discrimination laws

April 2010

Introduction

A laundry worker for Her Majesty's Prison Service (HMPS) who worked under an agency agreement was considered not to be an employee and more importantly was also held to be outside of the scope of protection under the discrimination legislation. This case could identify a potentially serious loophole in the current law.

The facts

Mr Muschett joined the books of Brook Street (UK) Limited agency (Brook Street) on 15 January 2007. On 22 January Mr Muschett started work as a cleaner in the laundry at HMPS Feltham Young Offenders Unit. He was informed in advance by Brook Street of his hours, rate of pay and the fact that the assignment could be terminated by HMPS, Brook Street or him at any time without any notice.

When he began working for HMPS, he was supplied with the tools for the job and underwent both induction and manual handling courses. These were mandatory for both permanent and temporary workers. As time went on, he was given some additional duties and responsibilities, such as supervision of those inmates working in the laundry. While Mr Muschett was told at the start that this would only be a temporary role, he became aware that a permanent role was becoming available. He applied for this, but ultimately was not considered for it since he was dismissed before the closing date for applications had passed.

In a witness statement for the pre-hearing review, Mr Muschett described the circumstances leading to his dismissal. The nature of the work often meant that there could be altercations with the inmates and that the staff would generally "look out for and support one another". However, for reasons which were not made clear, Mr Muschett began to feel that this "mutual duty of care" was being eroded by the staff around him and matters began to escalate.

His work was terminated on 10 May 2007 by HMPS who escorted him off the premises after reports from staff members of him being involved in two incidents with prisoners. Mr Muschett brought a claim for unfair dismissal, arguing that he was an employee of either HMPS or Brook Street. Although he had only held his role for four months, it might still have been possible for him to bring a claim for unfair dismissal. Generally, to claim unfair dismissal an individual must have been working for their employer for more than one year, but there some reasons for dismissal are automatically unfair and do not require the one year qualifying period. Mr Muschett claimed unfair dismissal for an automatic reason. He also brought complaints of race, sex and religious discrimination due to "an unnecessary dressing down for mentioning the bible" and because "I do not believe that a white person would have been treated in the way that I was. Particularly a white female".

Mr Muschett asserted three arguments to prove that he was an employee of either HMPS or Brook Street. Firstly, he advanced the traditional argument that he came within the definition of "employee" under section 203 of the Employment Rights Act 1996 (ERA) by working under a contract of employment or service. Secondly, that he came within the broader definition of "employment" under section 78(1) of the Race Relations Act 1976 (RRA) where it can mean "employment under a contract of service or... a contract personally

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to execute any work or labour". Finally, section 7 of the RRA covers "contract workers" who are "employed not by the principal himself but by another person, who supplies them under a contract made with the principal". Previously, agency workers have been considered as "contract workers" in situations where the agency itself has discriminated against them.

The Tribunal's decision

In November 2007, the matter came up for a pre-hearing review and Mr Muschett's claim was dismissed. He was not an "employee" of either HMPS or Brook Street under the meaning of section 203 of the ERA and so could not bring a claim for unfair dismissal.

It did not help Mr Muschett that, representing himself, his ET1 actually "torpedoed" his own case by stating: "Although not a fully fledged employee at the time, the intention was that I should take up a full time, permanent post". He described himself as "a worker providing services to" HMPS. Claiming he did not consider himself to be an employee at the relevant time meant he faced an uphill struggle trying to convince the judges of the opposite.

Mr Smith, the former line manager of Mr Muschett, gave further evidence on the working relationship. There was no written contract between Mr Muschett and HMPS. In the case of Mr Muschett being off sick, he would inform Brook Street who would contact HMPS and Brook Street would ask HMPS if a replacement worker was required. Due to the need to train and CRB check workers, if the absence was likely to be short then HMPS would not, request a replacement out of practicality. Brook Street paid Mr Muschett's wages and he received no payment from HMPS directly.

The judge accepted this evidence and restated the ingredients necessary for a contract of employment: control, personal performance and mutuality of obligation. The judge found that Mr Muschett was controlled by HMPS and he had to carry out the work personally, but he also found that there was no obligation on Mr Muschett to work and no obligation on HMPS to provide him with work. In short, there was no mutuality of obligation and so no contract of employment. The judge added that there was no need to imply a contract of employment between Mr Muschett and HMPS since the existing contractual terms (between Mr Muschett and Brook Street) were clear.

Having made this ruling, the judge went on to consider whether Mr Muschett could qualify for protection from discrimination under the wider definition of "employment" under the RRA and decided not. Since the definition of "contract worker" required the individual to be employed by the agency, this claim also failed due to the finding that there was no employment relationship between Mr Muschett and Brook Street.

The EAT's decision

Mr Muschett appealed to the EAT on the findings in relation to HMPS and whether the judge had adequately considered the wider definition of employment under the discrimination legislation.

The EAT judge considered the argument that a contract ought to have been implied between Mr Muschett and HMPS. He referred to the case of *James v London Borough of Greenwich*, which is the leading case in this area. The EAT judge considered whether it was "necessary... in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist". It was made clear that, for a contract to be implied, words or conduct must exist which entitle the tribunal to conclude that the agency arrangements no longer accurately reflect the reality of the relationship. Although Mr Muschett pointed to the length of time he had worked for

HMPS as a reason for implying a contract, the EAT noted that the mere fact that particular arrangements carry on for a long time does not of itself mean that a contract should be implied. It may simply be a matter of convenience, for example an agency sending the same worker to an end user since that worker has proven himself able and knowledgeable and has experience of the end user's business.

. Based on the consideration above, the EAT judge rejected this argument. Mr Muschett also argued that the intention to make him permanent should mean that a contract should be implied, but the EAT judge responded that the question was "not whether a contract might have materialised in the future, but whether he worked under such a contract at the material time".

The EAT judge held that there was nothing incompatible with an agency relationship in Mr Muschett's case and so he dismissed the appeal. He also held that the tribunal judge had been correct in holding that Mr Muschett was not "employed" in the wider sense for the purpose of discrimination legislation and so dismissed that appeal as well. Mr Muschett was refused leave to further appeal his argument of being a "contract worker" due to the EAT upholding the finding that he was not an employee of Brook Street.

The Court of Appeal's decision

An appeal was allowed to the Court of Appeal on two grounds. The first was that the EAT judge had not applied his mind properly to whether a contract could be implied. The second and more important point was on the wider definition of "employment" under the RRA and it was acknowledged that, depending on the outcome of the appeal, other agency workers in Mr Muschett's position might not have a remedy if the end user discriminated against them.

The first 25 paragraphs of the judgment dealt with the background of the case and it took only 15 paragraphs for the Court to dispose of Mr Muschett's appeals. With the assistance of pro-bono Counsel, Mr Muschett pointed again to the extra duties he had taken on and argued that they were so far removed from his agency role that he had become a true employee. He stated that he had undertaken such duties only because he had the expectation of being made a permanent employee.

He also argued that the tribunal judge was in error by considering mutuality too early. He should have focussed first on the arrangements in place between Mr Muschett and HMPS to see whether any contract was in place, and then gone on to test whether the contract was one of employment or something else.

Mr Muschett sought to argue that the judge had a duty to him as a litigant in person to offer him all proper assistance in unearthing the facts. The Court was swift to dismiss this argument, stating that it is not the function of a tribunal judge "to step into the factual and evidential arena". The litigant himself should decide what case to make and how to make it.

Reviewing the written evidence before them, the Court held that the "meagre collection of facts" presented by Mr Muschett "does not begin to justify a finding that Mr Muschett became an employee of HMPS". His expectation of being made into a permanent member of staff was irrelevant. The Court emphasised that "an employment contract cannot be created by the mere, and unilateral wish, of the putative employee". With regards to the discrimination law issue, the Court stated that it regarded this case "as without substance".

Conclusion

Despite acknowledging that the second point of appeal might have the consequence of depriving agency workers of a remedy under discrimination law, the Court still ruled against

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Mr Muschett and did not seem to address this wider implication at all. It is therefore left to future case law to determine whether agency workers would have a remedy for discrimination.

In the meantime, this case goes to show that where an agency relationship is conducted correctly, an employment relationship will not be implied.

If you would like further information on this case, please contact David Hill at dhill@davidsonlarge.com or Lucy Bond at lbond@davidsonlarge.com.

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