

Authors:

Noel Deans
+44 (0)20 7360 8187
noel.deans@klgates.com

Paul Callegari
+44 (0)20 7360 8194
paul.callegari@klgates.com

Jackie Cuneen
+44 (0)20 7360 8184
jackie.cuneen@klgates.com

Lisa Goodyear
+44 (0)20 7360 8256
lisa.goodyear@klgates.com

Susannah Jarvis
+44 (0)20 7360 8271
susannah.jarvis@klgates.com

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Important Court of Appeal decision on the employment status of agency workers

In February the Court of Appeal gave its decision in *James v Greenwich LBC*. Ms James was an agency worker who had worked at Greenwich LBC for 3 years. She had a written “temporary worker agreement” with an employment agency. The agency had, in turn, a written contract with Greenwich. However, Ms James had no written contract with Greenwich.

When she was replaced, she brought a claim against Greenwich for unfair dismissal. For her claim to proceed, she had to show that she was an employee of Greenwich despite the fact that she had no written contract with them. Relying on previous cases, Ms James argued that she was an employee of Greenwich on the basis of an implied contract between them. The Court of Appeal decided that she was not Greenwich’s employee and so could not sue Greenwich for unfair dismissal.

The judgment suggests that there will be limited scope for agency workers to argue that they are employees of end users. The test is whether it is necessary to imply a contract between the worker and the end user in order to give “business reality” to the transaction. This is a high hurdle to overcome, especially where written contracts are already in place. Unless there is evidence that these agreements are a “sham”, it will be unusual for the courts to decide that it is necessary to imply a contract between the worker and the end user where the written agreements say otherwise.

For more information on this case, please contact Jackie Cuneen.

Whether a consultant is an employee for tax purposes

In *Datagate Services Ltd v Revenue & Customs Commissioners* (LTL, 18/1/2008) the Special Commissioner decided that a consultant who provided computer consultancy services was not an employee for tax purposes. The consultant (the sole shareholder and director of Datagate) provided computer consultancy services under a contract with another company and ultimately for a third company called MBDA.

The Commissioner considered the relevant issues such as the degree of control exercised over the consultant’s work, whether the consultant was required to provide services himself and the extent to which the consultant was allowed to work for companies other than MBDA. Most factors pointed towards the consultant being self-employed except that the consultant had to provide the services personally (and could not provide a substitute), which would usually suggest an employment relationship. However, the Commissioner decided that since this requirement existed for security purposes, this was not the sort of control that would make the consultant an employee.

This decision may be useful in the situation where consultants, or other self-employed workers, are required by their contract to provide services themselves rather than send a substitute. If this element of control is required for some objective reason – such as, in this case, a requirement that anyone providing the services has suitable security clearance – then this decision suggests that the consultant may not necessarily be an employee. A distinction was drawn between control of a worker in an employment sense, and control for another reason.

For more information on this case, please contact Noel Deans or Ian Fraser.

Introduction of civil penalties for illegal workers

On 29 February 2008 the Government brought into force legislation designed to prevent illegal migrants working in the UK. The new arrangements only apply to employees who start work on or after that date. The legislation provides that an employer who employs someone who is subject to immigration control but who is not entitled to undertake the work in question will be liable to pay a civil penalty of up to £10,000 per illegal worker.

However, an employer will not be liable if it checks and copies certain documents provided by the employee before the commencement of employment. The legislation provides 2 lists of documents – List A and List B. Copying and checking documents from List A excuses any liability for the duration of the employment. Documents from List B excuse any liability for the next 12 months at which point the checks should be repeated. Employers who acquire staff as a result of a TUPE transfer are provided with a 28-day grace period to undertake the appropriate document checks. Further guidance is available on the Border and Immigration Agency website: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/guidancefrom290208/>

For more information on this significant legislation please contact Lisa Goodyear.

Advocate General's opinion on discrimination by association

In February the Advocate General gave his opinion in the important case of *Coleman v Attridge Law and Steve Law*. In July 2006 the Employment Tribunal referred to the ECJ the question of whether the EC Equal Treatment Framework Directive protects not only disabled employees from direct discrimination and harassment, but also employees who are associated with them, for example their carers. The Advocate General has stated that the Directive does apply to employees who are not themselves disabled but who are the subject of discrimination “on the grounds of” disability, even if it is someone else’s disability. The Advocate General’s opinion is usually (but not always) followed by the ECJ and, if followed in this case, will represent a significant extension of the Disability Discrimination Act 1995 (which currently only applies to people with disabilities rather than those associated with them). The ECJ’s decision will be reported in a future edition of On Notice so watch this space.

For more information on this case please contact Jackie Cuneen.

Unfair dismissal – whether an expired final warning for misconduct can be taken into account

In *Airbus UK Ltd v Webb*, the Court of Appeal decided that previous misconduct by an employee which had been punished by a warning could be taken into account in determining whether a dismissal was fair, even though that warning had expired. Mr Webb was dismissed by Airbus having been found watching TV when he should have been working. Other workers found doing the same were not dismissed. Airbus would have dismissed all of the workers involved, but reduced the penalty for the other workers on the basis of their clean disciplinary records. Mr Webb had previously received a final warning for cleaning his car on when he should have been working. This warning expired about a month before the incident.

The Court decided that the previous misconduct could be relevant in determining whether dismissal was “within the range of reasonable responses” (the test applied by Tribunals in determining whether a dismissal was fair). There was no absolute rule that such misconduct could not be taken into account.

This case, although significant, does not give employers carte blanche to take into account expired warnings when considering whether to dismiss an employee for misconduct. This case was one where the employee’s misconduct was serious enough to warrant dismissal. However, if an employee commits an act of misconduct which is only serious enough to warrant a warning, then an employer will not be able to rely on an expired written (or final written) warning to justify dismissing the employee for that act of misconduct. The message is that employers should still proceed with caution before trying to rely on an expired warning.

For further information on this case, please contact Paul Callegari.

Employment seminar: date for your diary

On 1 May 2008 the Employment team will be hosting a working lunch at our offices to discuss recent legal and best practice developments on the subject of redundancies. Further details will follow.

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