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Employment Alerter

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CAN AGENCY WORKERS BECOME EMPLOYEES OF AN END-USER?

Until recently there has been some uncertainty as to when an agency worker can argue that they are an employee of an end user and when they cannot. This issue was considered in the case of *James v London Borough of Greenwich*. The Court of Appeal ruled that the correct approach is for a Tribunal to decide - as a question of fact - whether it is necessary to imply a contractual relationship between an agency worker and the end-user. The CA confirmed the factors (outlined in the EAT's judgment in this case) that should be taken into account in deciding the nature of the relationship. As an example, the EAT stated that it is likely a contract will be implied between a worker and the end user where (i) there is no agency relationship regulating the position of the parties, (ii) where the end user is paying wages to the employee and can insist on the agency providing a particular worker, and/or (iii) where there is a separate agreement between the agency worker and end user regulating the terms of work. The fact that a worker has been working for the end user for a long period of time will not necessarily imply the existence of a contract. The CA's judgment has therefore confirmed that there is a clear need for careful legal analysis of the evidence presented in every case and that it will be for the Tribunal to decide on the facts of a particular case.

CARERS FOR DISABLED PERSONS

In 2006, the question of whether the EC Equal Treatment Framework Directive protects not only disabled employees from direct discrimination and/or harassment, but also employees who are associated with disabled people, such as carers, was referred to the European Court of Justice in the case of *Coleman v Attridge Law & Steve Law*. The Advocate General has recently given his opinion on this issue. First, he confirmed that direct discrimination and/or harassment by association is prohibited by the Directive, and that the Directive prohibits an employer from relying on religion or belief, disability, age or sexual orientation to treat employees less favourably than others (to do so would amount to unjust treatment and a failure to respect their dignity and autonomy). He went on to clarify that this fact does not change when the employee who is the object of discrimination is not disabled as the Directive protects against discrimination "on the grounds of" disability, provided the "ground" which serves as the basis of the discrimination is a disability. Although the reference to the ECJ is limited to persons who are disabled, the AG indicated that the same principle will apply in relation to religion or belief, disability, age or sexual orientation. This means that the Directive would, for example, protect a person from direct discrimination because he or she is married to a person belonging to a particular religious group. However note that the AG raised doubts as to whether the same could be said for indirect discrimination. The ECJ's decision is expected later this year and is likely to follow the AG's opinion.

HOLIDAY PAY AND EMPLOYEES ON LONG-TERM SICK LEAVE

The matter of whether an employee's statutory holiday entitlement under the Working Time Regulations 1998 continues to accrue whilst an employee is off on long-term sick leave was referred to the ECJ in the case of *Stringer v HRMC*. The AG has recently given his opinion, stating that:

- entitlement to paid holiday does accrue whilst an employee is absent on sick leave and this can be carried forward to the next holiday year;
- however workers may not take their holiday while they are on sick leave; and

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- after employment has been terminated, workers are entitled to a compensatory payment to reflect accrued but untaken holiday leave in that holiday year (however not in respect of holiday carried forward from the previous holiday year), even where the worker was on sick leave for the full holiday year.

We now await the ECJ's final decision. This is expected to follow the AG's opinion.

CAN 'OLD' PARTNERS BE FORCED TO RETIRE?

In *Seldon v Clarkson Wright & Jakes (CJW)* Leslie Seldon, a former senior partner at CJW, a ten partner law firm, brought an age discrimination claim after he was forced to retire at 65. The Tribunal considered whether it was proportionate to force partners to retire from the firm in order to achieve legitimate business aims. The Tribunal held that the compulsory retirement of a partner at 65 in accordance with the Partnership Deed was justified and did not amount to unlawful age discrimination. It found that the following amounted to legitimate aims:

- ensuring associates are given the opportunity of Partnership after a reasonable period as an associate (thereby ensuring they do not leave the firm);
- facilitating the planning of the Partnership and workforce across individual departments by having a realistic long-term expectation as to when vacancies will arise; and
- limiting the need to expel Partners through performance management thereby contributing to the congenial and supportive culture of the firm.

In the particular circumstances of this case, the Tribunal agreed that compulsory retirement was a proportionate means of achieving these legitimate aims, and that there were no alternatives to a compulsory retirement age in achieving the aims.

If you have any queries on this, please call Richard Woolmer 0207 614 3577 or email richard.woolmer@parkerandcosolicitors.com

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