Employment law brief

At last! Ian Smith brings clarity & some common sense to working hours, terms & divisions

IN BRIEF

- Statutory rights for agency workers.
- Employer knowledge and opinion.
- Division, practice & procedure.

Clarification is the name of the game in the three cases covered in this update: (i) that an agency worker's statutory rights to (certain) equal terms cannot be bought out by paying a higher hourly rate (but also that the phrase 'duration of working time' does not mean that the agency worker must be hired to work the same *number* of hours as a permanent worker); (ii) that an employer in a disability case may reasonably rely on advice from an occupational health or other similar department, as long as it does not just rubber stamp it; and (iii) that a contract action brought before a tribunal under the Extension of Jurisdiction Order must be against the employer itself, not some other party. In a sense, all of these seem fairly obvious but, although the decisions all come down on that common sense side, the arguments in them show that (as is so often the case) getting there was not quite so simple.

An agency worker's statutory rights may not be bought out

Although the Agency Workers Regulations 2010 (SI 2010/93) have been in force since October 2011, *Kocur v Angard Staffing Solutions Ltd* UKEAT/0181/17 is the first case at appellate level to consider the interpretation of the central provision in reg 5 requiring an agency worker to be given the same basic working and employment conditions as they would have been if an ordinary direct worker. In fact, these terms are then restricted to six categories by reg 6(1). This case, coming before the Employment Appeal Tribunal (EAT) under Choudhury J, concerned primarily two of these—holidays and rest breaks—but it also raised an important point on a third, 'the duration of working time'.

The claimant worked for agency A, which supplied him as a temporary worker to organisation B. He alleged that A and B had failed to ensure that he had the same terms as direct workers—he was entitled to 28 days' annual holiday but they had 30.5 days; he was only paid for half of his one-hour rest break but they were paid for the whole hour. Prima facie this looked a straightforward breach of reg 5 *but* before the employment tribunal (ET) his claim failed. This was because, as is not uncommon, as an agency worker he received a higher hourly pay rate and the tribunal held that this compensated for the lesser entitlements to these two rights, so that he was no worse off overall.

On appeal, the EAT held that this was the wrong interpretation of reg 5 and that it does *not* permit a 'package' approach. The judgment makes the following points:

- Although the wording of reg 5 (the same basic terms) and Art 5 of the Temporary Agency Work Directive 2008/104/EC (at least the terms that would apply) differ, they are to be read together, so that 'same terms' ' means '*at least*' those of employees. That construction provides for a minimum level of entitlement, and sets the floor, but does not impose a 'ceiling on entitlements'. Any other construction might mean, for example, that an agency worker could not have a higher pay rate.
- The wording of reg 5 (and particularly the limitations in reg 6) means that a term-by-term approach is to be adopted, not a package approach, and so there had been breaches here in relation to both holidays and rest breaks.
- With regard particularly to the holiday point, there is, of course, an overlap with working time law, which allows the 'rolling up' of holiday pay. In the light of that, once the overall entitlement to holidays is equal, it may be possible to *pay* the agency worker in a different way from ordinary employees (eg at the end of a short engagement) but that in itself does not validate a package approach to unequal entitlement. Moreover, it would be subject to the method of calculation being transparent and comprehensible (which had not been the case here).

To these points, it might be added that a package approach is *specifically* allowed in the Fixed-term Employees Regulations 2002 (SI 2002/2034), reg 4 but an equivalent provision does *not* appear in the legislation relating to part-time workers or (as here) agency workers —*expressio unius*...?

Having dealt with the two major issues of holidays and rest breaks, the EAT went on to consider a third point that only arose relatively late in the proceedings—what is meant by 'duration of working time' in reg 6(1)? On a literal interpretation, this could mean that the agency worker had to be taken on to work *the same hours* as a direct employee (eg on the same 39-hour week). This, however, was considered by the ET and the EAT to be the argument too far. Taking into account the recitals in the Directive that stress not just the protection of the temporary worker but also the possible advantages of temporary work in providing *flexibility* for both parties, it was held that this term has to be given a more restrictive interpretation: 'In our view, bearing in mind that the Directive seeks to achieve a balance between flexibility and security, the better interpretation of the phrase, "*duration of working time*", is, in this context, that the agency worker's working time should not exceed that which would ordinarily apply to employees. Thus, by way of example, if there is a maximum of a six-hour shift for some shifts (eg a night shift), an agency worker should not be required to work eight hours. The requirement

cannot be that there be precise equivalence between the agency worker's hours and those of the employees of the hirer. Any such requirement would entirely remove the flexibility inherent in the agency/hirer relationship.' (para [44])

Employer knowledge & reliance on professional advice

The decision of the Court of Appeal in *Donelien v Liberata UK Ltd* [2018] EWCA Civ 129 dismissing the claimant's appeal from the decision of the ET and EAT (considered in *Harvey* at L [406.02]) contains an important clarification of the meaning of that court's previous decision in *Gallop v Newport City Council* [2013] EWCA Civ 1583, [2014] IRLR 211 where it was held that an employer did not show that it had had no reason to know that the employee was disabled simply by relying on the say-so of its occupational health (OH) department. Giving the decision of the court here, Underhill LJ emphasised that *Gallop* is to be understood in the light of its own facts, in particular the employer's unquestioning acceptance of the OH opinion, which itself was unsupported by reasoning; at [32] he said that the correct position is as follows: 'It seems that there was some concern following the decision in *Gallop* that it raised a serious question about whether employers in a case of this kind were entitled to attach weight to advice from occupational health consultants about whether an employee was suffering from a disability within the meaning of the 1995 Act.

'It was explicitly for that reason that Judge Richardson, when permitting the appeal in the EAT to proceed, directed that it be heard by a tribunal that included lay members. In my view it is plain that Rimer LJ did not intend generally to discount the value of such advice. The basis on which the employee's appeal was allowed was that the ET had found that the employer was entitled to rely, and rely exclusively, on the opinion of the occupational health advisers in circumstances where that opinion was worthless because it was unreasoned. That is perhaps most clear from para. 42 of Rimer LJ's judgment ("relying *simply* on its *unquestioning* adoption of OH's *unreasoned* opinion") but equally from paras. 40 and 43 ("he cannot simply rubber-stamp the adviser's opinion").

'That is very far from saying that an employer may not attach great weight to the informed and reasoned opinion of an occupational health consultant. That was the view of the EAT, and in particular of the lay members, in the present case. Having expressed at para [30] of his judgment essentially the same view as me about the ratio of *Gallop*, Langstaff J went on to say, at para. 31, that while an ET will "look for evidence that the employer has taken its own decision … the lay members sitting with me in this case would wish to emphasise that in general great respect must be shown to the views of an Occupational Health doctor", though such views should not be followed uncritically.'

> *"Moreover, it knew that significant amounts of her absences were unrelated to what she claimed was the disability"*

The facts of the instant case showed that it was far from a rubber stamping exercise. The employer had used its OH opinion and what information it had managed to obtain from the claimant's GP (she had for some of the time refused access). Moreover, it knew that significant amounts of her absences were unrelated to what she claimed was the disability, it had attempted a phased return to work and had had difficulty dealing with her health and work-related problems because of her uncooperative and confrontational attitude. Taking this all together, the tribunal had reached a permissible decision that the employer did not reasonably know of the disability (under the Disability Discrimination Act 1995, s 4A(3), now the Equality Act 2010, Sch 8 para 20.

Two further points are worth noting:

- at [36] the judge repeats the well established position of an appellate body on the question of reasonable knowledge, ie that this is essentially a matter of fact for the ET and the EAT/the Court of Appeal must be slow to impose any contrary opinion of its own;
- the text states that at EAT stage Langstaff P said that he preferred to use the language of the section/paragraph, rather than the term 'constructive knowledge', but in the Court of Appeal Underhill LJ specifically adopted the use of that phrase.

Division, practice & procedure

Every now and then a case comes along raising a surprising argument that you immediately think 'must be wrong' but then you have to think exactly why. *Oni v UNISON Trade Union* UKEAT/0092/17 (5 February 2018, unreported) is such a case. It is the latest stage in litigation going back to 2009, firstly against the claimant's ex-employer Trust for race discrimination and unfair dismissal and then, having lost that, against her ex-union. Again, this failed, leading to a costs order. The present proceedings were later instituted against the union for race discrimination and detriment. They were largely framed in terms of an action for breach of her previous contract of membership with the union; crucially, she claimed to bring this action before a tribunal under the Employment Tribunals (Extension of Jurisdiction) Order 1994 (SI 1994/1623). This was struck out by the employment judge on the basis that this Order only applies to breach of contract actions *against the employee's employer*. So far, so obvious, but was it? On appeal two unusual arguments were raised to try to establish a wider reach for the Order than conventionally assumed.

- The first went back to the wording of the Order's vires power. Initially this was the Employment Protection (Consolidation) Act 1978 s 131 and it is now contained in the Employment Tribunals Act 1996 (ETA 1996), s 3. It refers to the power to extend jurisdiction in relation to breach of an employment contract or another contract 'connected with employment'. It was argued that this was wide enough to cover her contract with her union.
- The second related to a rather odd provision in the 1994 Order, in Art 8(c) on the time limit for an employer's counterclaim, which sets it at six weeks from when a copy of the original claim is received by the employer 'or other person who is the respondent party to the employee's contract claim'. It was argued that this envisaged a separate non-employer party such as the respondent union here.

Both arguments were rejected by the EAT. It was held that s 3 of ETA 1996 is restricted to other forms of contract *with her employer*. As for the Order itself, the judge said that had it not been for Art 8(c) he would have held that it was *all* consistent with an action having to be against the employer only. It had to be accepted that Art 8(c) is problematic *but* the decision had to be that the Order *overall* supports the employer-only interpretation. The judge said that he inclined towards the opinion of counsel for the union that the odd wording was in Art 8(c) to cover a case where a claimant had wrongly included a non-employer party and had served proceedings on that one, but it was not necessary to decide the point. **NLJ**

Ian Smith, barrister, emeritus professor of employment law at the Norwich Law School, UEA & general editor of *Harvey on Industrial Relations and Employment Law*.