Appeal No. UKEATS/0024/14/SM
UKEATS/0026/14/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HS

At the Tribunal
On 19 March 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

ADECCO GROUP UK & IRELAND — APPELLANT

(1) MRS NORMA GREGORY
(2) SCOTTISH WATER — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR I TRUSCOTT (One of Her Majesty's Counsel) Instructed by: Simpson & Marwick 144 West George Street Glasgow G2 2HG
For the First Respondent	MR D CAMERON (of Counsel) Instructed by: Balfour + Manson LLP 54-66 Frederick Street Edinburgh EH2 1LS
For the Second Respondent	Neither present nor represented

SUMMARY

UNFAIR DISMISSAL - Dismissal/ambiguous resignation

AGENCY WORKERS

PRACTICE AND PROCEDURE - Time for appealing

The Claimant was an agency worker, found to be employed by the agency. After an assignment to the Second Respondent ("R2") which had lasted several years came to an end, and a van and fuel card handed back by the Claimant to the First Respondent ("R1"), she did no further work for R1 or R2, though R2 (the agency) told her it would try to arrange some if she wanted it. She indicated that she was not interested, and R2 lost contact with her until a month later she complained she had been unfairly dismissed by R1 and by R2. R1 told her that it was not her employer but that R2 was. After a further month, R2 wrote to the Claimant, enclosing her P45 and saying that if she wished it would try to arrange further work for her, but if she did not or did not respond within two weeks, she would be treated as wishing to terminate her employment. The Judge held this letter amounted to a dismissal, but did not apply the objective reading of the letter, nor explain why in context this amounted to a dismissal.

In a further hearing, the Employment Tribunal held that it was just and equitable to extend time for a claim under the **Agency Workers Regulations**, but in exercising its discretion said it was relevant to consider when the Claimant first knew of the acts which she complained of as breaches of those Regulations. However, it did not answer that question at all, but in purported discussion of it addressed the wholly different question of why the Claimant had been late in submitting her claim. The approach to exercises of the discretion was thus flawed, and the decision needed to be taken afresh.

The questions whether the Claimant resigned or was dismissed and if so when, and whether her claim was within the normal time limit, as well as the question whether in all the circumstances it would be just and equitable to extend time for her claim in respect of the **Agency Workers Regulations** were remitted to a fresh Tribunal. It would be open to that Employment Tribunal to consider whether the Claimant (if she wished to do so) could advance a claim of constructive dismissal.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. This appeal concerns two Decisions which considered the jurisdiction of the Employment Tribunal, first in respect of the impact of the time limit appropriate to the claims and, secondly, as to whether there had been a dismissal by the employer.

2. In the first of those Decisions the Employment Judge (Employment Judge Bell in Edinburgh) held, for reasons delivered on 9 May 2014, that the Claimant had been subject to a contract of employment with an employment agency, Adecco, the Second Respondent. Working through an agency will only give rise to the implication in law of a contract of employment between the worker and the end user where it is necessary to do so. That proposition was reaffirmed only yesterday in the Court of Appeal in the case of **Smith v Carillion (JM) Ltd** [2015] EWCA Civ 209. But this legal position does not alter the way in which many agency workers, particularly those who are less well paid and realistically have no power to negotiate their own terms, may view the position. Where, as here, an employee works for an end user who when she applied to it for work directs her to an agency through which she then works exclusively for that end user for some eight years, it may be understandable that the employee sees herself as working for the end user and not for the agency, and that the agency is merely a conduit for her pay even if she has entered a formal written contract at some stage in which she is described as its employee. For that reason, although legally the position may not be difficult now for Tribunals to apply, insofar as the understanding of the parties is relevant to any issue, the position may become particularly complicated and call for sensitivity and understanding by an Employment Tribunal. It may give rise to particular difficulties of analysis in those Tribunals.

The Facts

3. With those introductory words of background, I turn to the underlying facts of the present case. The Claimant, who entered into a contract of employment so described with Adecco, and whom ultimately the Tribunal considered was employed by Adecco, a decision in respect of which there has been no sustained appeal, worked as a Water Sampler for Scottish Water. The work she did appears to have been regular, but it varied in duration (see paragraph 6.10 of the Judgment of May).

4. In March 2013 an issue arose as to overtime payment. Shortly after that, Scottish Water contacted Adecco seeking to terminate the Claimant's assignment. Mr Jack of Adecco spoke in April 2013 with the Claimant. She either could not recall or denied the conversation in evidence, but the Tribunal was sceptical as to her evidence generally and did not accept that it did not occur.

5. It recorded that Mr Jack told her that the assignment with Scottish Water was to come to an end and gave her the date. It found that she had told him that she was not surprised because the work had recently been "taken away from her". He reassured the Claimant that she was still employed with Adecco and that he would do his best to find her another assignment:

> **"… Mrs Gregory thanked him but told him that she would be moving to Aberdeen and so there was no need to find her another assignment. Mr Jack told the claimant that there was a branch of Adecco in Aberdeen and he was happy to introduce her to the branch manager there. Ultimately the Claimant did not get back in touch with Mr Jack. Mr Jack did attempt to make contact with her but was unable to reach her." (paragraph 6.27)**

The Tribunal found that the last assignment with Scottish Water occurred on 24 April 2013.

6. During the hearing the Claimant, who did no work for Adecco after the end of her relationship with Scottish Water and, it would appear from the evidence (which the Tribunal

accepted) given by Mr Jack, had made no contact with Adecco, asserted that she was an employee of Scottish Water. Her secondary position was that she was an agency worker, and what the Tribunal described as her tertiary position was that she was an employee of Adecco.

The Employment Tribunal Decisions

7. The Tribunal made the following material findings, amongst others. It concluded that at the end of May the Claimant had written both to the relevant manager at Scottish Water and on the next day to the relevant manager at Adecco, recording that she felt she had been unfairly dismissed. However she explained why she felt that to be the case:

> **"… I have requested that I be treated the same as a comparable worker.**
>
> **As an agency, Adecco are responsible with liaising with the hirer (Scottish Water). You have failed to ensure that I was paid in accordance with Scottish Water terms and conditions. You have failed to provide me with a copy of my terms and conditions with Scottish Water. You have failed to pay me at the correct hourly rate. You have failed to pay me at the correct rate of overtime after I worked thirty-seven hours in a week. …"**

8. It found that between the last assignment with Scottish Water and that letter, the letter to Scottish Water being in similar terms, two things of relevance had occurred. First, a fuel card, which had been issued by Scottish Water, had expired. That was at the end of April 2013. It was not then replaced. Secondly, on 1 May 2013, she was asked to arrange for the return of the van which had been supplied by Scottish Water. Thus, very shortly after the date which she was notified of by Mr Jack for the termination of her assignment, Scottish Water had taken action which was consistent with its view that the relationship had then ended.

9. In a second Decision, made in respect of a reserved part of the original issues for determination but not determined at the original hearing, Judge Bell decided for reasons given on 9 October 2014 that the Claimant was out of time to make claims under Regulation 5 of the **Agency Workers Regulations 2010** but that it was just and equitable to extend time. In doing

so, it gave further colour to the decisions made in the original hearing in May. Thus it recorded that on 14 June the Claimant had had a letter from Scottish Water making it clear that it considered that Adecco was her employer and not Scottish Water (see paragraphs 3.6 and 4.2). It found that she then appreciated that Scottish Water took that view.

10. Having in the first Decision spent a considerable time analysing the arguments as to whether a contract of employment should be implied between the Claimant and Scottish Water, the Tribunal concluded that it should not. It then went to the second issue which it had posed at the start of the hearing for its resolution, "Was the Claimant dismissed or did she resign?" Its reasoning was short and as follows:

> **"The claimant was an employee of Adecco. The undisputed evidence is that Adecco issued a P45 to the claimant with a letter dated 3 July 2013 stating that if the claimant did not make contact within 2 weeks then Adecco would assume that her employment has therefore terminated. We therefore find that the claimant was dismissed by Adecco on the date that she is taken to have received the letter."(paragraph 9.2.1)**

The Appeal against the First Decision

11. In his submissions in support of the appeal Mr Truscott QC, who appears with Ms Wilson of counsel, argued that the letter of 3 July, received by the Claimant on 5 July, could not sensibly be construed as the Tribunal construed it. The letter reads as follows, in its material parts:

> **"Dear Norma Gregory.**
>
> **Your P45 is enclosed. This has been produced because either:**
>
> **a. You have requested it, or;**
>
> **b. Our records show that you have not worked for Adecco for 4 weeks, and therefore in accordance with our standard policy we have produced your P45.**
>
> **If you do not want Adecco to look for other work for you, then in accordance with your contract please write or email to confirm that you are ending your employment with Adecco.**
>
> **If you do want us to continue looking for work for you, please return the P45 and get in touch to discuss your requirements.**
>
> **If you don't contact us within two weeks of the date of this letter we will assume that you are no longer seeking work and your employment has therefore terminated, but please do contact us to confirm your intention.**

We look forward to hearing from you."

12. He notes that that letter does not state that Adecco is dismissing Norma Gregory. It does not say that it is terminating the contract of employment. Rather, on a fair objective reading, it is to be read as offering her a choice. If she wished the relationship to continue, she was to say so. If she did not, it still wished to hear but would assume, if she did not, that she wished the relationship to end. He argues that the Tribunal could not properly take the approach which it appears to take in paragraph 9.2.1 of the May Judgment without setting out the full terms of the letter and analysing them in context. Although as Mr Cameron, who appears on behalf of the Claimant, notes, it referred at the start of paragraph 9, to the reasons in respect of each issue being "based on the tableau of evidence rather than simply those facts set out under the relevant heading within section 5", and therefore he argued it was to be assumed that the Tribunal had regard to all the facts, this does not in my view answer the point. Mr Truscott argues that the Tribunal have pointed to nothing which Adecco did which could properly be regarded as dismissing the Claimant. He acknowledges that in many contexts, despite the approach taken in **Newham London Borough v Ward** [1985] IRLR 509 CA at paragraph 5, in which the Court thought that the issue of a P45 on the facts of that case said nothing as to the date on which employment terminated, the handing of their cards to an employee may be regarded as a dismissal. But all, he submits, depends upon the context. Here the context was one in which the Claimant had done no work for Adecco since ceasing with Scottish Water on 24 April. That was a period of over two months. She had not during that period approached Adecco for work, though on Mr Jack's evidence he had left her in no doubt that, if she did so, Adecco would see what it could do to obtain that for her.

13. The conclusion is not faithful to the terms of the letter, objectively construed. Mr Cameron accepts that in general a notice of resignation or dismissal has effect accordingly to the ordinary interpretation of its terms. If it is an action by the employer, it should generally be unequivocal. Though I was not referred to the case, I doubt there is any significant dispute of principle as to the expression of those points in **Willoughby v CF Capital plc** [2011] IRLR 985 CA at paragraph 37. He argues that the conclusion is one of fact. He is right in that conclusion, that the Tribunal here indicated it was taking into account all the facts, that there was nothing else in context to which one could point to show why the relationship separated. He draws attention to the fact (see paragraph 6.32) that after the termination of the assignment by Scottish Water, Adecco had regarded the Claimant as continuing her employment with them and, in accordance with the terms of the contract between them, would have sought to place her on another assignment, most likely with another hirer. The letters in May did not point to any kind of acceptance that she had resigned. They were to be regarded as letters of complaint.

14. He emphasised the words in the concluding parts of the letter of 3 July, assuming from a lack of contact that the employment had therefore terminated. The question, as it seems to me, to be addressed by the Tribunal is: "who really ended the contract of employment?" That is always going to be difficult in a situation in which there is agency work, where an employee may, for instance, have the services of a number of agencies by which to secure work. There may be many situations in which it is plain from looking at the relationship between agency and worker that it has ceased. That will largely be because over a period of time the one provides no work for the other and the other does no work for the first. If the situation is that the agency has simply withdrawn work which it might otherwise have been expected to provide, a factual conclusion might follow that the agency has by its actions deprived the employee of work and

that could, in the relevant context, amount to a dismissal, though it may be very difficult to place a precise date upon it since no definite action will have been taken.

15. The converse is true too. If an employee simply drifts away, the agency will have them, as it were, on their books, but there will be no meaningful relationship between them. If the question arises for legal reasons when precisely the relationship ended, the difficulties of analysis are plain. If the question arises who ended it, again the difficulties may exist. Where it is the worker who simply drifts away, loses touch and makes no use of services which remain available, then she is in no position to prove, as prove she must if she is to make a claim in respect of her dismissal, that she has been dismissed because the circumstances are at least equally consistent with her having ceased to be an employee from her own wish. There is no formal resignation in such a case, but there can be no doubt to any objective observer that the relationship has ended.

16. These are all issues for a Tribunal, as it seems to me, to determine. Its determination of fact here was based fairly and squarely upon the letter of 3 July 2013. Accepting as correct the view, which Mr Cameron did not dispute, that the matter is to be objectively assessed, I turn to the letter of 3 July. In the situation in which I have described, in which an employee may have no continuing interest in work supplied through an agency, the letter is unremarkable.

17. The paragraph upon which both Mr Cameron and the Tribunal focussed could, if the context appropriately required it, indicate that in reality this was the agency terminating the contract of employment. But regard has to be had to the whole of a letter such as this. It is carefully drafted. It suggests a choice. It does not have about it the irrevocability of a formal notice. It leaves open the possibility of further employment. It suggests that the employer

would be happy for further employment to continue if only the employee indicated the wish for it. Though, as I have noted, all depends upon context, here it seems to me that it was an inadequate basis for the Tribunal to reach its conclusion of fact. It was either perverse to draw the conclusion which the Tribunal did or inadequately reasoned, if in truth there were aspects of the context to which it did not specifically refer which drove it to that conclusion. I accept there was nothing other than this letter indicated by the evidence upon which it could be said that Adecco had terminated the contract of employment which it had with the Claimant.

18. Since, as I have found, the reasoning is inadequate and the context strongly suggestive that another interpretation of the letter might be appropriate, as might appear from an objective reading of it, I have concluded that the Judgment in this regard cannot stand.

19. It nonetheless seems to me to be a question of fact, properly to be determined, why it was that the relationship terminated. There was much confusion about the case. It was not helped by the Claimant herself indicating in her claim form both that she was asking for a finding of unfair dismissal but also asserting that her employment continued. Her view was, despite what Mr Jack may have said, that she still was an employee of Scottish Water. I suspect the focus may not have been on the relationship that she had with Adecco, as it requires to be for this particular point. Accordingly, in my view this Appeal Tribunal cannot properly substitute a finding that there was no dismissal.

20. Moreover, on the facts, given the complaints made to which Mr Cameron drew attention, if the Claimant did choose simply to stop working for Adecco, that arguably may have been because of what she was complaining about in her letters of 30 and 31 May. She could, arguably, be saying that she was leaving Adecco in response to its unacceptable conduct toward

her. Legally, it is capable, if the appropriate facts be found, of amounting to a claim that she had been constructively dismissed. Mr Truscott submits that there is no claim for constructive dismissal. He is right: it is not made in those terms. But this is a case in which, if it is to be made, a Tribunal should have the task, it seems to me, first of deciding whether an amendment of the claim is needed to make the claim and deciding whether it should, in the circumstances, entertain it. It may come to the conclusion an amendment is not needed. That is a matter, it seems to me, for it. But it is not a matter which I can determine here and now. With those remarks, and on that basis, the appeal in respect of the first Decision must be allowed.

The Appeal against the Second Decision

21. The second Decision, that of October, adds to the corpus of fact touching upon the dismissal. However its central concern is whether a claim under the **Agency Workers Regulations** was out of time. Such a claim may be brought against either Scottish Water or Adecco. Scottish Water, the remaining party to the case, did not seek to be represented on this appeal. I therefore deal with the appeal only insofar as Adecco are concerned.

22. The Regulations provide, by Regulation 18(4), that an Employment Tribunal:

> **"… shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning -**
>
> > **(a) in the case of an alleged infringement of a right conferred by regulation 5 … with the date of the infringement, detriment or breach to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the infringement, detriment or breach, the last of them;**
> >
> > **…"**

23. The Tribunal found that the last day of work which the Claimant had with Scottish Water and therefore the last relevant date in respect of her claim against Adecco was 24 April 2013. The Tribunal decided that time started running in respect of some parts of the claim on 24 April

and on others on 3 May 2013. Since the claim was not issued until 19 August, it was out of time. It could only extend time if it was just and equitable to do so. It then considered the relevant factors, which it set out in paragraph 6.5, and are well known. It dealt extensively with the reasons for the delay. In respect of that, it accepted that it was only when the Claimant received the P45, with its accompanying letter, that she accepted that there was no prospect of further work from Scottish Water.

24. That deals with the Claimant's reasoning. It is open to the criticism that it looks at her state of mind and does not consider how objectively reasonable that state of mind might be. Mr Truscott draws attention to the conversation with Mr Jack, which in its terms told the Claimant that, as from the end of April, there was to be no more work from Scottish Water. The removal of fuel card and van were consistent with that. Whatever the level of work had been prior to 24 April, there was none thereafter from Scottish Water. Scottish Water had said to the Claimant in mid-June that it was not her employer but Adecco was.

25. Centrally, though, he relied upon the Tribunal's approach under paragraph 6.9. There, underneath the heading "The promptness with which the Claimant acted once she knew of the facts giving rise to the course of action" (should be "cause"), the Tribunal said as follows:

> **"The claimant's evidence is that when she received her P45 she realised that there would be no further work forthcoming from Scottish Water. The claimant received her P45 on or about 5th of July 2013. It is not clear how the claimant regarded the apparent juxtaposition between the P45 and what she had been told by People Connect, and we have not had the benefit of hearing from the claimant as to her view on that point. However we do accept that it was not until she received her P45 that the claimant reached the final conclusion that she would not receive further work on behalf of the first respondent. To put it another way, the claimant ought to have realised at that point that her employment (whether she still regarded it as being with Scottish Water or not) had effectively come to an end and that therefore time had started to run on the lodging of her claims. Her claims were lodged within in approximately 6 weeks of that period. Given that the advice the claimant was receiving at that time was that she had 3 months from the date upon which her employment terminated to lodge her claim, the lodging of that claim within a 6 week period is, in our view, relatively prompt." (paragraph 6.9)**

26. The difficulty which that gives rise to is this. The consideration which the Tribunal plainly thought of as important was when she knew the facts which could give rise to a claim. What it addressed was not anything to do with those facts. What it addressed instead was the date upon which she understood that she was being dismissed. It had asked one question but answered another. If it was to answer the other, it would be bound to have regard to its findings of fact which it had made in the Judgment of May which it incorporated in the Judgment in October. In paragraph 6.17 of the May Judgment the Tribunal recorded an e-mail she had written on 6 March to Scottish Water, complaining that it had not treated agency staff in the same way as employed staff. The Tribunal found that she regarded herself as agency staff. She went on to say:

> **"… If I were a sampler in Fort William, I would be entitled to a contract, sick pay, bonuses and the Cycle to Work Scheme. None of these perks have been made available to me."**

Mr Truscott says this was an assertion that she was being treated less favourably than comparable workers in the employment of Scottish Water.

27. The letters of May repeated the same theme. She had had access to legal advice in April, May or June, though the precise dates were indistinct to the Tribunal, though it may be thought that the letters of May showed some legal hand in their draftsmanship. Accordingly there was much to show that she knew and had the means to address the disparity of treatment which she had as an agency worker compared to those who were direct employees at the latest (assuming the matter to be a continuing act on the date that she left work for Scottish Water, namely 24 April 2013 or, if later, perhaps 26 April, the date referred to in the P45, the date when her assignment with Scottish Water formally ended).

28. To decide whether to extend time or not is a discretion. The exercise of a discretion must not be interfered with lightly on appeal. It must be shown either that the Tribunal took into account something it should not have done, or failed to take into account something which it should have taken into account, or came to a conclusion which no Tribunal, properly considering the matter, could come. Here I am satisfied that there was an error of approach.

29. It was in paragraph 6.9. The issue it set out for resolution was simply not properly addressed on the facts it set out. In his submissions Mr Cameron asks me to hold that it was open to the Tribunal nonetheless to reach a conclusion that it was just and equitable to extend time. He asked me to hold that it was not perverse to do so. I willingly accept that latter invitation because it seems to me to have been open to a Tribunal, properly approaching the circumstances, to reach such a conclusion as it did. This was not a case in which it could be said with certainty that, taking all the circumstances into account, the Tribunal was bound to hold that the cases were irretrievably out of time. However I have to look at the basis for the decision as reached. The Tribunal spent half a page dealing with paragraph 6.9. It did not address at any stage the actual time when the Claimant knew she had a claim and whether she might then have taken action about it and whether that might have led to a conclusion that she should have taken action earlier than she did and that in that context the delay was too long.

30. Though urged by Mr Cameron to regard the matter as not being sufficiently substantial to challenge the determination of the Tribunal, I am unable to accede to that invitation. There was here an error of approach. The exercise of discretion was flawed. The Decision cannot stand.

31. In conclusion, the Decision reached by the Tribunal in the May hearing is flawed. So too, though for different reasons, is the separate Decision reached in the October hearing. In

neither case does it seem to me that in this forum I am able to reach a determination of my own. I do not have all the facts. I am conscious that in this particular case there may have been significant confusion. It seems to me appropriate that both issues, first whether there was a dismissal and, if so, whether the claim was brought within time and, secondly, the question of whether it would be just and equitable to extend time in respect of the claim under the **Agency Workers Regulations** should be remitted.

Disposal

32. The next question is whether that should be to the same or to a different Tribunal. Here, understandably, the parties are at odds. In **Sinclair Roche Temperley v Heard** [2004] IRLR 763, Familiar Authorities 19, at paragraph 46 Burton J for the Appeal Tribunal set out the guiding principles. Here, Mr Truscott asks me to hold that the Decision was totally flawed and, for his part, Mr Cameron would suggest that the flaws are not so great as to deprive a remission to the same Judge.

33. I have come to the conclusion that there should be a remission but to a fresh Tribunal. My reason is this. Though I take into account Tribunal professionalism and although proportionality must always be a relevant consideration, this was not a case of any great length and, given the scope of the remission, will not take a significant amount of time to hear, but there is a real danger that having declared a view as to what is just and equitable in respect of time, on a number of considerations, only one of which was that in respect of which the Decision was flawed, there must be a significant temptation, or at least the parties may feel sufficiently that there was a great temptation, to reach the same conclusion. The second bite referred to by Burton J seems to me to be the reason here essentially why I do not think the matter should be remitted to the same Judge. I so find.