Appeal No. UKEAT/0081/13/MC

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
On 10 & 11 October 2013
Judgment handed down on 17 January 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MR T M HAYWOOD

MR P M SMITH

MR D SMITH — APPELLANT

(1) CARILLION (JM) LTD
(2) SCHAL INTERNATIONAL MANAGEMENT LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOHN HENDY (One of Her Majesty's Counsel) And MR DAVID RENTON (of Counsel) Instructed by: Free Representation Unit Ground Floor 60 Gray's Inn Road London WC1X 8LU
For the Respondents	MR DAMIAN BROWN (One of Her Majesty's Counsel) Instructed by: Clarkslegal LLP 2 Caspian Point Caspian Way Cardiff Bay Cardiff CF10 4DQ

SUMMARY

CONTRACT OF EMPLOYMENT – Whether established

VICTIMISATION DISCRIMINATION

Health and safety

Other forms of victimisation

It is a prerequisite of the right under the **Trade Union and Labour Relations (Consolidation) Act 1992** section 146 or under the **Employment Rights Act 1996** of an employee not to have action short of dismissal taken against him by his employer respectively by reason of his trade union or health and safety activities that there is a contract between him and his employer. The requirement also applied when the protection under TULR(C)A section 146 was extended by amendment with effect from 1 October 2004 to "workers" after the material dates in this appeal. The common law principles applicable to ascertaining whether a contract was to be implied between the employee or worker and the end-user of his services in an agency agreement were those generally applied to all contracts **Tilson v Alstrom Transport** [2011] IRLR 169 para 8 applied. **The Human Rights Act 1998** and Convention rights do not require or permit the implication of a contract between an agency worker and the end-user of his services in circumstances in which domestic law would not. In deciding whether such a contract is to be inferred in a tripartite agency agreement the test of whether it is necessary before implying such a contract continues to be applicable where the facts would be equally explicable without the implication of such a contract. **James v London Borough of Greenwich** [2008] ICR 302 and **Tilson** applied.

The Employment Tribunal did not err in holding on the facts before them that no contract between the Claimant and the Respondent end-user had been established.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. Mr David Smith ('the Claimant') appeals from the judgment of an Employment Tribunal, Employment Judge Snelson and members ('the ET') sent to the parties on 23 January 2012 ('the judgment') which held that he was not employed by the Second Respondent, Carillion (JM) Ltd, or the Third Respondent, Schal International Management Ltd ('Schal'), whether as a "worker" or otherwise. Accordingly the ET dismissed his claims against them which were brought under section 146 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ('TULR(C)A') and under section 44 of the **Employment Rights Act 1996** ('ERA'). The claims were of detrimental treatment on grounds of trade union activities and activities as a health and safety representative. In the course of the hearing before the ET the Claimant withdrew a similar claim against the then First Respondent, Carillion plc. In his skeleton argument for the appeal before us, counsel for the Claimant, Mr John Hendy QC made it clear that the appeal is now against the dismissal of the claim against First Respondent only. The appeal in respect of the Second Respondent, Schal, is dismissed on its withdrawal. The Carillion Group acquired the First Respondent which was then called John Mowlem Construction plc ('John Mowlem') in February 2006. The Claimant worked for John Mowlem before the acquisition.

2. The services of the Claimant were provided to John Mowlem through an employment agency, Chanton. The claim against the Third Respondent, Schal, had been in respect of the provision of his services to them through the Heffo Engineering employment agency ('Heffo'). Schal was a wholly owned subsidiary of the former First Respondent, Carillion plc.

3. The First Respondent cross-appeals from the finding of the ET that the Claimant performed services for John Mowlem for a very brief period of a couple of days after the

commencement of the **Human Rights Act 1998** ('HRA'), 2 October 2000, on the grounds that there was no factual basis for such a finding.

Outline facts

4. When working in the construction industry the Claimant was an active member of the Union of Construction Allied Trades and Technicians ('UCATT'). At a number of building sites he took on the role of UCATT Shop Steward and/or Safety Representative. The Claimant's case was that he had to change career because he had difficulties in securing work in construction as he was blacklisted because of his trade union and safety representative activities. The ET summarised the Claimant's case against each of the Respondents as follows:

> **"5. The gist of the Claimant's pleaded case against each of the Respondents** [John Mowlem and Schal] **was that it supplied information to an organisation called the Consulting Association which compiled and maintained a 'blacklisting database' and that, as members of the Consulting Association, the Respondents used the database to cause him detriment by denying him work and/or removing him from employment where he was already in a post."**

5. The Claimant did not know about the blacklisting system until the results of a raid by the Information Commissioner's Office on the premises of the Consulting Association in April 2009. Because of the passage of time and the fact that the events complained of against the Second Respondent occurred before their acquisition of John Mowlem it was said that they were not in a position to contest many of the Claimant's assertions.

6. The ET recorded that counsel for the Claimant abandoned the assertion that he was an employee of either John Mowlem or Schal but contended that he was bound to them "by a looser bond", namely a "worker/employer contract".

7. The statement of agreed facts prepared by the parties for the hearing before the ET included the following:

> **"John Mowlem Construction plc ('John Mowlem')**
>
> **1. The matters that are the subject of the Claimant's claims against this company took place in relation to work undertaken by the Claimant in October 1997 to May 1998 and September 2000 for a supplier to the company. At that time, the company was part of the John Mowlem Group and had no relation with Carillion plc, which at that time did not exist.**
>
> **…**
>
> **3. Based on the records obtained by the Information Commissioner in February 2009, it has transpired that John Mowlem used the services of the Consulting Association between 1994 and 2006. John Mowlem ceased to use the services of the Consulting Association shortly after its acquisition by Carillion.**
>
> **…**
>
> **Employment Status**
>
> **7. In respect of work undertaken by the Claimant on the Docklands Light Railway project from the Isle of Dogs to Lewisham in October 1997 to May 1998 and at the former Co-op Store in Stratford in September 2000, there was no employment contract, express or implied, between the relevant John Mowlem Group company and the Claimant. There was a contract between the Claimant and Chanton employment agency for the Claimant to provide his services to that company. This was not a written contract.**
>
> **…**
>
> **9. The Claimant was paid net of tax by Chanton. He was not paid holiday pay.**
>
> **10. The Claimant was dismissed from the DLR site in May 1998."**

8. The ET held that in respect of the Claimant's first period of work for John Mowlem from October 1997 until May 1998 he worked on the John Mowlem DLR project in the capacity of Section Engineer. They found:

> **"27. He was so engaged through the above-mentioned employment agency ('Chanton'). He dealt with Chanton exclusively by telephone. Under Chanton's procedures he was required to submit timesheets and invoices. He was paid at an hourly rate, in accordance with timesheets presented. The Tribunal assumes that, in the usual way Chanton were paid a slightly larger sum, representing their profit."**

9. The ET made findings of fact regarding the way in which the Claimant performed work for John Mowlem in the first period of work for them, on the DLR project. These findings included that the Claimant:

> **"…was fully integrated into the John Mowlem site management team (para 30);**
>
> **…represented John Mowlem in dealings with third parties… He signed documents as 'Dave Smith, Mowlem' and had authority to do so. The ET accepted his evidence generally that to all outward appearances he seemed to be an employee of John Mowlem (para 32);**
>
> **…had power to exercise some disciplinary control over John Mowlem staff (para 33);**

> **…in respect of his work on the DLR project was seen on all sides as engaged on a long-term appointment (i.e. it was anticipated to run for many months at least) (para 35);"**

The Claimant's engagement on the DLR project was terminated by John Mowlem in May 1998 when the project had more than a year to run (para 37).

10. The Claimant was engaged again by John Mowlem from September to October 2000 in the capacity of Sub-Agent on a project at Stratford. The ET held at paragraph 39:

> **"He worked through Chanton as before and his relationship with John Mowlem was not materially different from that which had existed between them during his time on the DLR project."**

The Claimant contended that this engagement was ended because of his raising health and safety concerns about asbestos.

11. An entry on the Consulting Association file reads:

> **"2000 Oct: Further information on the above entry is that the above named was not employed on 3280's** [John Mowlem's] **site in Stratford, East End of London, but was able to walk onto site and video, as stated. H&S aspects of this site BBC2 Programme on site safety of 5th Oct 2000, included some footage taken by the above."**

12. It was recorded in the agreed statement of facts that between August 1998 and May 1999 the Claimant worked on a BT project at Brentwood. Schal were the construction management company acting for BT. At paragraph 42 the ET held that:

> **"The Claimant's services were supplied exclusively through Heffo Engineering ('Heffo') to Cinnamond Contracts Ltd ('Cinnamond'), one of BT's contractors."**

13. Unlike the DLR project, some documentation was produced to the ET relating to the Claimant's work on the BT project. The ET held that a letter dated 31 July 1998 from Cinnamond Contracts Ltd ('Cinnamond') was premised on the basis that Heffo would supply a

site engineer, the Claimant, as an employee of Heffo. Cinnamond would have the right to "require the removal of the Engineer" ideally with notice but if necessary without.

14. The ET held of the Claimant when he was working on the BT project that "As in the case of the DLR project, he was fully integrated into the operation." The ET accepted that Schal exercised close supervisory control over the contracting companies including Cinnamond. On the Claimant's case he worked for Schal via Cinnamond. The ET held that the arrangements for the Claimant's pay were similar to those applicable to his work for John Mowlem. As with the John Mowlem project, the Claimant's appointment for the Brentwood work was envisaged as long-term. On 27 May 1999 Mr McArdle of Cinnamond terminated the Claimant's engagement. It was the Claimant's evidence that Mr McArdle told him that:

> **"…he was entirely happy with his professionalism but had been pressured by Schal, because of his health and safety activities, to have him removed."**

Whilst Mr Blake of Schal said that the decision whether the Claimant was to stay or go was not for Schal to take, he accepted that Schal were involved in discussions of the decision whether the Claimant should stay or leave. The ET held at paragraph 50:

> **"In the entry in the Consulting Association file for 6th May 1999 (1/C/12) this entry appears:**
>
> > **Cinnamonds to tell Heffo agency, supplying above to site, that D Smith is no longer required on site i.e. do not propose to pay him an engineer's rate to go around site as safety rep.**
>
> **The source of this entry is Schal and the individual concerned is identified as Mr John Bull, their Human Resources Manager."**

The relevant statutory provisions

15. **Employment Relations Act 1999**:

> **"3. Blacklists.**
> **(1) The Secretary of State may make regulations prohibiting the compilation of lists which—**
> **(a) contain details of members of trade unions or persons who have taken part in the activities of trade unions, and**

(b) are compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers.

(2) The Secretary of State may make regulations prohibiting—
(a) the use of lists to which subsection (1) applies;
(b) the sale or supply of lists to which subsection (1) applies.

…

(5) In this section—
"list" includes any index or other set of items whether recorded electronically or by any other means, and
"worker" has the meaning given by section 13.

…

13. <u>Interpretation.</u>
(1) In sections 10 to 12 and this section "worker" means an individual who is—
(a) a worker within the meaning of section 230(3) of the Employment Rights Act 1996,
(b) an agency worker…"

16. **Trade Union and Labour Relations (Consolidation) Act 1992**:

"Section 146
(1) An employee has the right not to have action short of dismissal taken against him as an individual by his employer for the purpose of –
(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so…

Section 295
(1)In this Act—
…
''contract of employment' means a contract of service or apprenticeship,
employee' means an individual who has entered into or works under…a contract of employment, and
'employer' in relation to an employee, means the person by whom the employee is (or where the employment has ceased, was) employed

Section 296
(1) In this Act 'worker' means an individual who works, or normally works or seeks to work –
(a) under a contract of employment or
(b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his…

(2) In this Act 'employer', in relation to a worker, means a person for whom one or more workers work, or have worked or normally work or seek to work."

Section 146 was amended by the **Employment Relations Act 2004** to substitute "worker" for "employee" in relation to acts or failure to act on or after 1 October 2004.

17. **Employment Rights Act 1996**:

"Section 44
(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee…

…

Section 230
(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker"…means an individual who has entered into or works…—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual…"

18. **Human Rights Act 1998**:

"Section 3 – Interpretation of legislation.
(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; …

…

Section 6 – Acts of public authorities.
(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, …

…
SCHEDULE 1 – The Articles
PART I – The Convention Rights and Freedoms

…

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

…

Article 11 – Freedom of assembly and association
1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

The judgment of the Employment Tribunal

19. The basis for the decision of the ET that the claims brought by the Claimant alleging detrimental treatment by the Second Respondents by reason of his trade union or health and safety activities was that they found that no contract could be implied between the Claimant and the end-users, John Mowlem and Schal (or Cinnamond). The ET directed themselves in paragraph 61:

> **"First it is for the Claimant to establish that a contract should be implied between him and the end-user. Secondly, a contract can be implied only if it is necessary. This means that if the facts would be equally explicable without the implication of a contract, it is not permissible to imply one. These principles and the high authority on which they are founded are collected and analysed in *James v Greenwich LBC* [2007] ICR 577 EAT and [208] IRLR 302 CA and *Tilson v Alstom Transport* [2011] IRLR 169 CA."**

20. The ET considered the five factors upon which counsel for the Claimant relied to contend that the implication of a contract between the Claimant and the Respondents was warranted. These were:

> **"62. …first, the Claimant was (in one case at least) interviewed before his appointment to the relevant assignment was approved; secondly, all three appointments were intended as long-term engagements on long-term projects; thirdly, the Claimant was fully integrated into the managerial set-up in each case and subject to a significant degree of control in the performance of his work; fourthly, the 'dismissals' were decided upon by the Respondents (or, at least directed or influenced by them); fifthly, written terms were never concluded between the Claimant and either of the two agencies."**

21. The ET considered whether any of these factors supported the implication of a contract between the Claimant and the end-user and concluded they did not. Included in their reasons were the following:

> **"63. It seems to us that the fact of being interviewed by the end-user is not in any way inconsistent with the conventional analysis that the Claimant was simply supplied to the end-user pursuant to his agreement with the agency and the agency's agreement with the end-user. In work of the kind under consideration here, it is entirely understandable that the end-user would wish to know something of the appointee and to be satisfied that he was a suitable choice to fulfil the task for which he was being recruited."**

In paragraph 64 the ET rejected the contention on behalf of the Claimant that the fact that the project which was the subject of each period of work would run over an extended period supported an implied contract with the end-user. The ET held:

> **"Mr Renton [counsel for the Claimant] fairly accepted in his closing submissions that the fact that the projects were long-term and ran for a significant period was not by itself legally significant. The fact that the parties contemplate an extended assignment does not undermine the validity of the relationships which, on the face of it, all three parties have entered into."**

Integration into the business and control over the Claimant's work were held not to be assistance to the Claimant. The ET held:

> **"65. It was in the nature of his work that he would need to be integrated into the organisation to which he was assigned and be subject to control by senior figures within it. Of course the consequence is that, as we have found, to outward appearances he was indistinguishable from members of the Respondents' employed staff. But, as the authorities such as *James* point out, the fact that someone appears to be an employee cannot be regarded as lending support to the contention that, as a matter of law, he has become an employee."**

The ET held:

> **"66. The contention that the Respondents 'dismissed' the Claimant does not advance his case. In any triangular arrangement it is open to the end-user (risk-free unless any question of discrimination arises) to terminate the assignment and call upon the agency to provide a substitute.**
>
> **67. As to the absence of written terms between the Claimant and the agencies, this also, as it seems to us, does not avail Mr Renton [counsel for the Claimant]. The fact that the Claimant's services were in each case supplied through an agency is not, and could not be, challenged. He fully accepts that he entered into the two assignments under agency terms. He told us that it is always preferable to be 'on the cards' but that he had to take what was offered. There was no suggestion that the agency arrangement was a 'sham' (cf *Autoclenz Ltd v Belcher and others* [2011] ICR 1157 SC). The absence of written terms in the instant case does not cause any doubt as to the Claimant's relationship with each of the two agencies. As the *Tilson* case shows, the absence of a written agreement between the individual and the agency does not support or justify a finding of a contract between him and the end-user."**

22. In addition to considering the factors relied upon by counsel for the Claimant as supporting the implication of a contract between the Claimant and the Respondents the ET

considered the "totality of the material" put before them. That material included evidence relating to his work for Cinnamond (alleged to be for Schal) on the BT project. Having done so the ET reached the conclusion:

> **"68. …that the Claimant is unable to make out a valid ground for the Tribunal implying a contract of any sort between him and either end-user."**

The ET held:

> **"69. We should add that we are mindful that the dispute in the instant case does not correspond perfectly with the line of authority culminating in *James*. Mr Renton reminded us more than once that he was not asking us to imply an employment contract with the end-user, only a 'worker'/employer contract. In our view, this is, for present purposes, an immaterial distinction. The first problem for Mr Renton was precisely that which faced the claimants in the authorities just mentioned, namely how to justify the implication of *any* contract between them and the end-users. Despite his attractive submissions, that problem has not been overcome."**

In light of their conclusion that there was no contract between the Claimant and the end-users the ET did not consider it appropriate for them to decide the issues of statutory interpretation of the word "employee" in TULR(C)A Section 146 and ERA section 44.

23. The ET summarised their views on the role of the Consulting Association and the evidence that John Mowlem paid for their services as follows:

> **"52. As we have mentioned, the Claimant obtained a copy of his personal blacklist file in April 2009. It runs to 36 pages and covers trade union and health and safety activities undertaken by him over the period from 1992 to 2004. It was and is his case that many such entries were wildly inaccurate and some amounted to attempts to smear his character and reputation. The Consulting Association received substantial remuneration for its work. The Claimant's unchallenged evidence was that between 1996 and 2006 John Mowlem alone paid over £20,000 plus VAT to the Association. A direct consequence of the raid was the bringing of criminal proceedings against Mr Ian Kerr, the Chief Executive of the Association, which resulted in a conviction and a fine. The organisation, as we understand it, is now defunct. We have selected four sample entries from the Claimant's file, which should suffice to explain his strong sense of grievance."**

24. After their conclusions, the ET added a section headed 'Outcome and Postscript' which included the following:

> **"71. For the reasons we have stated, we are satisfied that the Claimant's complaints are legally untenable. In dismissing them, we wish to pay tribute to the careful and frank evidence which he gave. We have reached our conclusions with considerable reluctance. It seems to us that he has suffered a genuine injustice and we greatly regret that the law provides him with no remedy. We hope that he can take some comfort from the fact that the wrongdoing of which he complains has been exposed and punished and legislation passed designed to protect others from the misfortunes which he has experienced."**

The submissions of the parties

25. Mr Hendy QC for the Claimant submitted that the ET erred in conflating the tests of "employee" and "worker". He contended that whilst there was no employment contract between the Claimant and John Mowlem there was a worker's contract. Although it had been accepted on behalf of the Claimant that he was not an employee, the ET should have considered whether he was engaged under a worker's contract. The **Human Rights Act 1998** ('HRA') came into effect on 2 October 2000. An adverse detrimental entry about the Claimant's presence on the John Mowlem site where he had been working in September was made in October 2000 on the Claimant's record with the Consulting Association. At the latest domestic legislation had to be construed compatibly with the Human Rights Convention after 2 October 2000. From 2 October 2000 those who were not employees but were workers were entitled to protection in the same way as employees.

26. Mr Hendy QC submitted that the ET erred in law in directing themselves that a contract can only be implied if it is necessary to do so in deciding that no contract could be implied between the Claimant and John Mowlem. Further, the HRA required the ET to apply the common law as to the existence of a contract compatibly with Convention rights. This would lead to the implication of a contract between agency worker and end-user in these circumstances.

27. Mr Hendy QC submitted that the ET erred in concluding that there was no contract between the Claimant and John Mowlem when they made no findings as to the nature of the

contract between John Mowlem and Chanton or between the agency and the Claimant. Although the ET stated that in addition to the factors which counsel for the Claimant relied upon to indicate the existence of a contract between the Claimant and John Mowlem they considered the "totality of the material" they did not specify which material they relied upon. For example the Claimant explained at paragraph 198 of his statement that he had always considered that John Mowlem employed him and that the employment agency was simply fulfilling the function of an out-sourced wages department but the ET did not refer to this evidence. Other features relied upon by the Claimant indicated that it was John Mowlem and not Chanton who controlled his work and dismissed him.

28. It was submitted on behalf of the Claimant that the task of considering whether it is necessary to imply a contract between the end-user and the worker only arises where the contract with the agency expressly precludes him from having the status of employee of the end-user. **James v London Borough of Greenwich** [2008] IRLR 302 and **Tilson v Alstom Transport** [2011] IRLR 169 upon which the ET relied were cases in which the contracts precluded the agency worker from having the status of employee of the end-user. In this case there was no finding of an agreement showing that the mutual intention of the worker and the agency was to exclude the former from having employee status with the end-user.

29. Mr Hendy QC submitted that since the judgment of the Supreme Court in **Autoclenz Ltd v Belcher** [2011] ICR 1157 the difference between "ordinary commercial disputes" and employment cases requires, by reason of the difference in relative bargaining power of the parties, a different, purposive approach to the existence of a contract between them and its classification. It was said that the test of necessity is no longer good law. Lord Clarke set out at paragraph 29 the approach to be adopted:

"The question in every case is…what was the true agreement between the parties."

30. Reliance was also placed on **Ajar-Tec Limited v Stack** [2012] EWCA Civ 543. In a case in which the issue was whether a director was an employee and where there was no written contract regarding his status Elias LJ expressed doubt at paragraphs 20 and 23 as to whether the necessity test "is appropriate for determining whether a contract exists in a case of this kind." It was contended on behalf of the Claimant that in any event the test of necessity is not appropriate to considering whether a contract is to be implied between a "worker" and an end-user.

31. Mr Hendy QC referred to a passage in Clayton and Tomlinson on *The Law of Human Rights 2009* at paragraph 5-89 to contend that the common law of contract in this area should be modified to override the requirement, if there were such, that a contract between worker and end-user in an agency relationship would only be implied if it were necessary to do so. It was contended that the Convention on Human Rights ('the Convention') must be applied to the common law so as to imply a contract between the Claimant and John Mowlem.

32. It was contended that the finding of the ET that there was no contract between the Claimant and John Mowlem is unsustainable in any event. There must have been some arrangement between the parties under which he was on their premises working for them with all the indicia of at least a worker contract. Mr Hendy QC submitted that whilst the ET stated that they had regard to all the evidence placed before them they failed to refer to the Claimant's evidence. In paragraph 92 of his statement he gave his view of the role of Chanton, the agency. He regarded them as John Mowlem's outsourced payroll department. It was said that insufficient regard was paid to the fact that no written agreement was produced showing the parties' relationship with Chanton. It is insufficient to say that because the Claimant was provided through an agency therefore there was no contract between him and John Mowlem.

33. Mr Hendy QC referred to a decision of an ET sitting at Stratford entered in the Register on 24 November 1998 which decided that the Claimant was employed by Costain Building and Civil Engineering between 15 June 1998 and 24 July 1998. The Claimant in that case was provided with work through Chanton. Counsel contended that the facts of that case were comparable to those in the current appeal. The ET held that the Claimant was an employee of Costain. Mr Hendy QC contended that the ET should have reached the same conclusion in respect of the relationship between John Mowlem and the Claimant.

34. Mr Hendy QC accepted that at the material time TULR(C)A section 146 only applied to employees. With effect from 1 October 2004 section 146 was amended to include within its protection "a worker". Accordingly by amendment the protection from detriment on grounds of trade union activities was extended to workers as well as to employees. The protection for employees from detriment on grounds of health and safety activities given by ERA section 44 has not been extended to workers.

35. It was submitted on behalf of the Claimant that in accordance with normal principles and the HRA, a broad construction should be given to TULR(C)A section 146 and ERA section 44 in relation to blacklisting for trade union and health and safety activities to extend protection to "workers" as well as "employees". Mr Hendy QC contended that although the HRA only came into effect on 2 October 2000 John Mowlem carried out detrimental acts after that date. Further, applying the principles in **R v Lambert** [2001] UKHL 37 and **R v Kansal (No.2)** [2001] UKHL 62, the ET and the EAT are under a duty imposed by HRA section 3 so far as it is possible to do so to read and give effect to legislation in a way which is compatible with Convention rights.

36. Mr Hendy QC sought to distinguish this case from **Wilson v First County Trust Ltd** [2003] 4 AER 97 in which Lord Nicholls held at paragraph 22 of HRA section 3 that:

> **"…Parliament cannot have intended that application of s3(1) should have the effect of altering parties' existing rights and obligations under the 1974 Act [the Consumer Credit Act 1974]."**

It was submitted that Articles 8 and 11 were engaged on the facts found by the ET in this case. The nature of the alleged infringements of Articles 8 and 11 was illegitimate: the collecting and use of private date to enable detrimental treatment of individuals for their trade union activities. Mr Hendy QC contended that the interpretative obligations of the HRA applied to the ET and the EAT. **First County** was to be distinguished as the parties had no accrued rights which would be lost if the HRA applied to existing legislation. The fact that section 146 of the TULR(C)A was to be interpreted to extend the protection from detriment for trade union activities to workers as well as employees was said to be illustrated by the amendment in 2004 to that effect to give effect to the judgment of the European Court of Human Rights ('ECHR') in **Wilson and Palmer v United Kingdom** [2002] IRLR 568 on Article 11. The judgment of the EAT in **Onu v Akwiwu** [2013] ICR 1039 provided an example of the interpretative obligations of courts and tribunals where European provisions are engaged. Accordingly in accordance with those obligations, the ET and the EAT should read the unamended section 146 as applying to "workers" as well as "employees".

37. Mr Hendy QC relied on the power conferred upon the Secretary of State by section 3 of the **Employment Relations Act 1999** to make regulations prohibiting the compilation of blacklists with a view to being used by employers or employment agencies for the purposes of discrimination in relation to the recruitment or treatment of workers. By section 3(5) "workers" has the meaning given by section 13 of the Act which in turn refers to the definition of that term in ERA section 230(3). In reliance on the power to make Regulations, albeit not exercised until

2010, Mr Hendy QC contended that ERA section 44 should be construed compatibly with Articles 8 and 11 to include "worker" as well as "employee".

38. Mr Hendy QC contended that the cross-appeal is academic as the protection against detriments in employment extends post-employment. The Claimant stated that the source of the entry made on his file on or after 2 October 2000 was John Mowlem. It was contended that the substance of the entry shows that it must have been on or after 2 October 2000, the coming into force of the HRA.

39. Mr Damian Brown QC for the First Respondent contended that the ET did not err by applying the "necessity" task in deciding whether a contract should be implied between the Claimant and John Mowlem. Even if the necessity test were not to be applied their decision still stands as there was no evidence of a meeting of minds that the Claimant and John Mowlem intended to enter into a contract. Further, the interpretative route required by the HRA does not assist the Claimant.

40. The ET referred at paragraph 63 to the "conventional analysis" that the Claimant was supplied to the end-user pursuant to his agreement with the agency and the agency's agreement with the end-user. Mr Brown QC acknowledged that this proposition and the burden of proof resting on the Claimant to establish a contract between him and the end-user would not of themselves defeat his claim. Both parties recognised the evidential difficulties caused by the passage of time which were emphasised by the fact that the Carillion Group acquired John Mowlem after the relevant events.

41. Mr Brown QC submitted that in determining whether there was a contract between the Claimant and John Mowlem, the intention of the parties should be examined and regard paid to

the business reality of their relationship. If no intention by the parties to enter into a contract could be divined from the evidence, then the ET should decide whether it was necessary on the basis of the evidence of the conduct of the parties to infer that they had entered into a contract. Mr Brown QC acknowledged that in paragraph 61 of their judgment the ET set the bar for the necessity test extremely high. Relying on **James** and **Tilson** the ET held that if the facts would be equally explicable without the implication of a contract it is not permissible to imply one. The ET correctly held that the burden of proof was on the Claimant to establish that a contract was to be implied between him and John Mowlem. Mr Brown QC pointed out that although counsel appearing for the Claimant before the ET submitted that the rule on implying contracts of employment should be modified by the HRA, both parties accepted that the burden of proof was on the Claimant to establish that there was a contract between him and John Mowlem.

42. Mr Brown QC referred to the reliance placed by the Claimant on five features of his relationship with John Mowlem as supporting his contention that he was in a contractual relationship with them. Four of those factors were advanced by counsel for Mrs James in **James v Greenwich** and were held not to lead to a conclusion that there was a contract between her and the Council. Mr Brown QC contended that the ET carefully considered the five factors relied upon by the Claimant as supporting a contract between him and John Mowlem and did not err in concluding that they did not result in such a relationship. The fact that John Mowlem interviewed the Claimant was common sense bearing in mind the role he was to perform. The length of the proposed engagement was not relevant. Integration into the organisation and control did not establish the existence of a contract between the parties. The fact that John Mowlem terminated the Claimant's engagement is immaterial. Termination of an engagement is always within an end-user's power. The absence of written terms of the contract between the Claimant and John Mowlem does not affect the relationship between the Claimant and the end-user. On the material before them the ET were entitled to conclude that the

Claimant was "supplied to the end-user pursuant to the agreement with the agency and the agency's agreement with the end-user".

43. Mr Brown QC submitted that the ET rightly distinguished **Autoclenz** from the arrangements under which the Claimant worked for John Mowlem. There was no suggestion in this case, unlike in **Autoclenz**, that the agency arrangement was a "sham". Mr Brown QC referred to paragraph 11 of **Tilson** in which Elias LJ held:

> **"…even where employers are seeking to avoid liabilities with respect to workers who would prefer to enter into an employment relationship, if as a matter of law the arrangements have in fact achieved the objective for which they were designed, tribunals cannot find otherwise simply because they disapprove of the employer's motives."**

44. Mr Brown QC referred to the judgment of the EAT in **James** in which Elias P (as he then was) at paragraph 35 cited **Cable and Wireless plc v Muscat** [2006] ICR 975. In that case the Court of Appeal emphasised that in order to imply a contract to give business reality to an arrangement, the question was whether it was necessary to do so. The Court of Appeal cited from the judgment of Bingham LJ in **The Aramis** [1989] 1 Lloyd's Rep 213 in which he held at page 224:

> **"…I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract."**

In paragraph 58 of **James** Elias P stated that he suspected that where the tripartite agency arrangements are genuine it would be rare that there will be evidence entitling the tribunal to imply a contract between the worker and the end-user. In the Court of Appeal Mummery LJ endorsed the approach of Elias P. The judgment of the Court of Appeal in **Consistent Group Ltd v Kalwak** [2008] IRLR 505 emphasised that it is not for the court or the employment tribunal to recast the parties' bargain. Whether a contract should be implied is a matter of law involving an objective analysis of all the relevant circumstances.

45. Mr Brown QC submitted that the proposition advanced by Mr Hendy QC that the observations of the Court of Appeal on the necessity principle in **James** and **Tilson** only applying to an agency tripartite arrangement where there is an express agreement with the agency that there is no contract between the worker and the end-user is not supported by those authorities.

46. The ET considered the arrangements under which the Claimant worked for John Mowlem on two projects and for Schal on the BT building project at Brentwood from September 1998 until 27 May 1999. On the totality of the evidence before them the ET concluded that the arrangements under which the Claimant worked on the John Mowlem and Brentwood projects were explained by the agency contracts he had with Chanton and Heffo. The evidence did not enable him to establish that a contract with the end-users was necessary to explain the arrangements. This was determinative of the appeal. The Claimant cannot show that the ET erred in holding that there was no contract between the Claimant and John Mowlem.

47. The HRA came into force on 2 October 2000. All of the entries on the Consulting Association record relied upon by the Claimant save for that which is the subject of the cross-appeal were made before that date. The hearing before the ET took place after 2 October 2000. ETs and other judicial bodies including the EAT are required by HRA section 3 to give effect to primary and subordinate legislation in a way which is compatible with Convention rights if it is possible to do so. Mr Brown QC contended that, as was made clear by Lord Hope in **R v Lambert** [2002] 2 AC 545 by endorsing in paragraph 116 the judgment of Sir Andrew Morritt VC in **Wilson v First County Trust (No.2)** [2002] QB 74, Convention rights cannot be relied upon in respect of acts taking place before 2 October 2000. However counsel contended that

the HRA does not enable courts or tribunals to apply the provision of the Convention in respect of acts occurring before that date. Mr Brown QC contended that the express provision of HRA section 22(4) rules out retrospective application of the HRA in this case.

48. Mr Brown QC referred to the agreed list of issues identified by the ET. Issue (7) recorded that the Claimant relied on HRA for a purposive interpretation of the word "employee" in section 146 TULR(C)A and section 44 ERA. The issue of retrospectivity and the approach to the test for ascertaining whether there was a contract between the Claimant and John Mowlem was not raised.

49. Further, Mr Brown QC contended that HRA section 3 does not assist. The section requires a court or tribunal to give effect to domestic legislation in a way which is compatible with Convention rights so far as it is possible to do so. Mr Brown QC submitted that neither Article 8 nor 11 can enlarge domestic legislation to include protection to those of worker status. At the material time domestic legislation gave protection to employees from detriment for trade union activities and pursuing health and safety issues. The fact that the legislation had to be amended to include "workers" demonstrated that the unamended text could not be given effect so as to include them. Nor can the Articles be relied upon to establish a contract where none exists under the rules of domestic law.

50. In any event HRA section 3 is an interpretative not an amending provision. Counsel submitted that **Onu v Akwiwu** [2013] ICR 1039 in which the EAT interpreted domestic race discrimination provisions as applying to victimisation after termination of employment, was distinguishable. Such protection was required by EU law and the "grain" of domestic legislation was compatible with construing it as including such protection. In this case the legislation in force at the relevant time excluded workers from its protection. To include them

would be going against the grain of the legislation. The courts cannot fundamentally change the statutory scheme. Social policy is for Parliament not the courts to decide.

51. In support of the cross-appeal, Mr Brown QC drew attention to the letter from the ET office on behalf of Employment Judge Snelson of 15 August 2013 in which it was said:

> **"Employment Judge Snelson asks me to say that the ET did not intend para 39 of the reasons to be read as containing a definitive finding that the Claimant had worked for Mowlem at Stratford in October 2000. The wording was deliberately loose because the evidence did not permit a categorical finding either way."**

This demonstrated that there was no finding of fact that the Claimant was employed by John Mowlem on or after 2 October 2000.

Discussion and conclusion

52. At the material time, a period ending in October 2000, the protection given by TULR(C)A section 146 from detriment by his employer on grounds of trade union activities was limited to employees. The word "employee" was substituted by "worker" by section 30(2) of the **Employment Relations Act 2004** with effect from 1 October 2004. The term "employee" is defined in TULR(C)A section 295 and "worker" in 296. The existence of a contract between the individual and the person by whom the "employee" is or was employed or the person for whom the worker works or has worked is a necessary element of both definitions. The type of contract required to satisfy the definition of "worker" includes in addition to a contract of employment "any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his".

53. The protection from detriment by his employer on grounds of health and safety activities given by ERA section 44 is restricted to employees as defined in section 230. As with

TULR(C)A, the existence of a contract of employment between the individual and his employer is a necessary element of the definition.

54. The existence of a contract between the Claimant and John Mowlem is a fundamental prerequisite for establishing his claims under TULR(C)A section 146 and ERA section 44. Mr Hendy QC recognised that we do not have to decide whether those provisions are to be read as applying to workers and not just to employees if his contention that the ET erred in holding that the Claimant had not established that there was a contract between him and John Mowlem fails.

55. Mr Hendy QC rightly did not challenge the proposition that it was for the Claimant to establish that a contract was to be implied between him and the end-user, John Mowlem.

56. In the absence of evidence of an express contract between the Claimant and John Mowlem, the task of the ET was to decide whether the Claimant had established that such a contract should be implied.

57. Whether there was a contract between the Claimant and John Mowlem is to be determined in accordance with generally applicable contractual principles. In the absence of an express agreement between the parties, a court or tribunal will determine on the evidence whether the claimant has established that a contract between them is to be implied. In a tripartite agency arrangement, as in this case, the terms of any agreement between the Claimant and the agency and between the agency and the end-user, will form part of the evidence on the basis of which a decision whether to imply a contract between the Claimant and the end-user will be taken. These are not determinative. Such contracts may expressly seek to exclude the possibility of a contract between a Claimant and the end-user. However a court or tribunal will look at the reality of the situation to ascertain whether there is such a contract. The principle in

Autoclenz applied in that case to whether an individual was an employee or self-employed will strip away the express exclusion of the possibility of such a contract if the express arrangements are a sham and do not represent the true position. The importance of looking at the true relationship between the parties, the issue in **Autoclenz** in considering whether the Claimant was an employee, was recognised by Mummery LJ in respect of agency arrangements in **James** in which he held at paragraph 51:

> **"…the question whether an 'agency worker' is an employee of an end-user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements."**

However, **Autoclenz** does not require or permit a different approach to be adopted in determining whether a contract is to be implied between two parties of unequal bargaining power. The ET will look at the reality of the arrangements between the parties to determine their contractual relationships. In the case under consideration in this appeal it was not suggested that the arrangements between the parties were a sham.

58. Elias P (as he then was) in **James** carried out a detailed review of the authorities on implication of contracts between claimants and end-users in tripartite agency arrangements. Elias P referred to the judgment of the Court of Appeal in **Cable and Wireless plc v Muscat** [2006] ICR 975 in which the judgment in **The Aramis** [1989] 1 Lloyd's Rep 213, 224 was cited. Bingham LJ held:

> **"…it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract."**

Courts will have regard to the business reality of a situation to decide whether a contract is to be implied. The test of necessity used in the **Aramis** to decide whether a contract was to be

implied where "the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract" is not confined to commercial arrangements. It has also been applied to agency workers. In **Tilson** Elias LJ held at paragraph 8:

> **"…a contract can be implied only if it is necessary to do so. This is as true when considering whether or not to imply a contract between worker and end-user in an agency context as it is in other areas of contract law."**

59. The Court of Appeal in **James** endorsed the analysis of the law applicable to agency worker arrangements made by Elias P in the EAT. Mummery LJ repeated the "necessity" test for determining whether a contract is to be implied between the worker and the end-user. At paragraph 51 he held:

> **"In many cases agency workers will fall outside the scope of the protection of the 1996 Act because neither the workers nor the end-users were in any kind of express contractual relationship with each other and it is not necessary to imply one in order to explain the work undertaken by the worker for the end-user."**

Having referred to the judgment of the Court of Appeal in **James** which in turn considered two earlier decisions in agency workers in that court, **Dacas v Brook Street Bureau (UK) Limited** [2004] ICR 1437, and **Muscat** in **Tilson** Elias LJ held:

> **"9. If an employment tribunal has properly directed itself in accordance with these principles, then provided that there is a proper evidential foundation to justify its conclusion, neither the EAT nor this court can interfere with the tribunal's decision."**

60. We do not accept the submission made by Mr Hendy QC that the principle of necessity explained in **James** and **Tilson** only applies where there is an express agreement between the end-user and the agency which excludes a contract of employment between the worker and the end-user. Mrs James signed a "Temporary Worker Agreement" with the agency which supplied her services to the Council. It stated that the agreement would not give rise to a contract of employment either between her and the agency or between her and the client. Notwithstanding that it was accepted that the agreement was not a sham the ET considered all

the facts relating to the working relationship between the parties to determine whether there was a contract between Mrs James and the Council. Whilst the arrangements under which Mrs James worked were explained by the contracts between her and the agency and between the agency and the Council it was the totality of the facts which were to be considered in determining whether it was necessary to imply a contract between Mrs James and the Council. Mummery LJ held at paragraph 43:

> **"In brief, the circumstances in which the council received and paid for work done by Mrs James for the council and the facts about the working relationship between them did not lead irresistibly to the result that they were only explicable by the necessary existence of a contract of service between them."**

61. In the complex arrangements for the provision of Mr Tilson's services it was expressly stated they did not constitute a relationship of employer and employee, either between him and the contractor or between him and the client. Elias LJ held at paragraph 15:

> **"However, whether any such relationship is created is a matter of law."**

It is clear from the statement of Elias LJ that:

> **"…the parties' understanding that there is no such contract in place explaining the terms of their relationship and their inability to reach an agreement on the terms which such a contract should contain are extremely powerful factors mitigating against such an implication."**

The facts of the working relationship between Mr Tilson and Alstrom were considered. These were weighed against the expressed intentions of the parties. They were considered in paragraph 48 not to be of sufficient weight:

> **"…to imply a contract on the principle of necessity in circumstances where this was inconsistent with the stated intentions of the parties."**

The Court of Appeal in **James** and **Tilson** did not restrict the generally applicable principle of necessity to implying a contract in agency cases where an agreement declared that there was to be no contract between a worker and the end-user.

62. In our judgment the decision of the ET in **Costain** does not assist the Claimant in this appeal. The ET set out in paragraph 42 the issue to be decided by them:

> **"This Tribunal has first to decide whether the Applicant was an employee or was self-employed and who was his employer."**

In that case the union representative submitted to the ET on behalf of the claimant that he was an employee of Costain and not self-employed or an employee of Chanton. Counsel on behalf of Costain made submissions to the effect that the nature of their relationship with the Claimant was not that of employer and employee. The authority relied upon by the Claimant and considered by the ET was **Secretary of State for Education and Employment v Bearman** [1998] IRLR 431. The EAT in that case considered that the ET misdirected themselves in that after they failed to consider whether the written contractual arrangements reflected the intention of the parties. The appeal was decided on the basis of whether the evidence displaced the express contractual arrangements that the applicants were employees of the RBLI and not the Secretary of State.

63. The first and determinative issue in this appeal is whether the ET erred in holding that no contract was to be inferred between the Claimant and John Mowlem. That was not the issue upon which **Costain** or **Bearman** were decided. Further, the important authorities on whether there is any contract between the worker and end-user, **James** and **Tilson**, were decided by the Court of Appeal after **Costain** and **Bearman**.

64. In our judgment HRA and Convention rights do not require or permit the implication of a contract of employment between the agency worker and the end-user in circumstances in which domestic law would not. As is clear from **The Aramis** and explained in **Tilson** at paragraph 8 the doctrine of necessity in implying contracts applies to all contracts not just to agency contracts. Applying the common law rule that a contract will only be implied between two parties where the relevant facts are capable of interpretation both for and against such a conclusion if such a result is necessary is not demonstrably incompatible with a Convention right. Further to disapply such a rule would be likely to lead to uncertainty and inconsistency. In situations in which the parties would or might have acted as they did in the absence of a contract what principle would be applied to determine whether it should be implied? Further, the existence of a contract is a necessary prerequisite for a large number of employment rights, both statutory and common law. Provisions of the Convention will not be engaged by many of these. Acceptance of the proposition advanced by Mr Hendy QC for the modification of the common law rule on implying contracts would lead to differences in approach when considering different employment rights as well as to differences in applying the common law of contract in other areas. Whilst recognising that ETs and the EAT are public authorities which cannot act in a way which is incompatible with a Convention right that duty does not require overriding the common law principle of necessity in implying a contract where the relevant facts are equivocal.

65. The ET carefully considered the five factors relied upon on behalf of the Claimant to infer a worker/employer contract between the Claimant and the Respondent and gave reasons why they did not, in their view, support or justify a finding of a contract between him and the end-user.

66. The evidence given by the Claimant which Mr Hendy QC submitted that the ET failed to take into account does not alter the position. By analogy with what was said of Mrs James by Mummery LJ in **James** at paragraph 44 the fact that the Claimant might have thought that he was in a contractual relationship with John Mowlem and that he may have appeared to others to be their employee does not affect the proper legal analysis of the facts. The submission verged on a perversity challenge to the decision which is not made in the appeal.

67. The ET rightly relied on **James** and **Tilson** in deciding whether there was a contract between the Claimant and John Mowlem. Each case must be determined on its own facts. On the facts before them the ET did not err in applying the:

> **"…conventional analysis that the Claimant was simply supplied to the end-user pursuant to his agreement with the agency and the agency's agreement with the end user."**

Having regard to the passage of time since the events in question and the fact that the Carillion Group acquired John Mowlem six years later and that neither party believed that there were other relevant factual matters capable of being ascertained than those before the ET, the ET had to do their best on the material before them. In deciding whether a contract is to be inferred with an end-user in a tripartite agency agreement the test of "necessity" continues to be applicable where the facts would be equally explicable without the implication of a contract. The ET did not err in applying it. In our judgment they did not err in reaching the conclusion that there was no contract between the Claimant and John Mowlem. In the words of Elias LJ in **James** paragraph 51, the ET properly directed themselves and there was a proper evidential basis for their conclusion. This EAT will not interfere with the decision of the ET that there was no contract between the Claimant and John Mowlem. Since establishing that there was a contract between the Claimant and John Mowlem was a necessary prerequisite for the claims made under TULR(C)A section 146 and ERA section 44, this appeal fails.

68. Since the appeal has been decided on the prior issue of whether the ET erred in holding that the Claimant has not established that there was a contract in place between him and John Mowlem we do not express a view on the arguments developed by Mr Hendy QC on whether the unamended TULR(C)A section 146 and ERA section 44 should be construed to extend protection from blacklisting to workers as well as employees.

69. In light of our conclusion that the appeal is dismissed the cross-appeal is academic and no Order is made on it.

Postscript

70. We join with the ET in expressing concern as they did in paragraph 71 of their judgment that the Claimant appears to have suffered an injustice from blacklisting as set out in paragraph 52 of their judgment.