



employ

Contact

Employment

John Quigley
+44 (0)20 7873 1058
john.quigley@williamsturges.co.uk

www.williamsturges.co.uk

Offices

Westminster

Burwood House
14-16 Caxton Street
London SW1H 0QY

Tel: +44 (0)20 7873 1000
Fax: +44 (0)20 7873 1010

Ealing

55 Uxbridge Road
Ealing
London W5 3TP

Tel: +44 (0)20 7873 1000
Fax: +44 (0)20 8579 5352

in practice

Garden leave clauses

"At any time during any [period of notice of termination (whether given by the Company or the Executive)] [unexpired period of the fixed term] the Company may at any time and for any period(s) require the Executive to cease performing his/her job or to assign reduced or alternative duties to him/her and/or exclude him/her from entering any premises of the Company or any Group Company. During any such period of garden leave, the Company will continue to pay salary and provide all contractual benefits and the Executive will continue to be bound by all his/her other obligations under his/her contract and as implied by law."

Value and danger of garden leave

Garden leave can be a valuable tool for employers when they wish to minimise damage that might be caused by executives leaving and joining competitors or setting up on their own. Whilst an executive continues to be employed (albeit not attending work) he continues to be bound by all the strict implied duties not to compete, and generally by express contractual obligations not to carry out any other work.

But garden leave can also be a great danger for employers. If an employer acts in breach of contract in putting an executive on garden leave, there may be serious consequences: the executive may be able to claim constructive dismissal; and the executive may no longer be bound by any post-termination restrictive covenants in his contract.

And the recent case of **RDF Media Group v Clements** [2008] IRLR 207 highlights the need for employers to be careful about making comments, both internally and externally, about an executive's departure. In that case, the executive had resigned and been put on garden leave. During the garden leave, the executive claimed constructive dismissal based on comments made by the company to the press and others. Although the executive did not win, the judge in the High Court ruled that comments to the press could be a breach of mutual trust and confidence, giving rise to constructive dismissal, even if the comments were true.

Importance of written contract

So, when is it in breach of contract to put an executive on garden leave? The answer is that it depends on what the contract of employment says. If the executive's contract does not contain an express garden leave clause, the current law is that an employer probably has an implied contractual duty not to unreasonably withhold work from that executive when there is work available to be done. This has developed somewhat since 1940 when Asquith J said in a judgment: "provided I pay my cook her wages she cannot complain if I choose to take all or any of my meals out". Therefore, the safe course of action is to include an express garden leave clause in all contracts of employment.

"In practice" is a regular column explaining clauses that may be included in employment documentation. If there is a particular clause you would like to see featured please contact John Quigley on 020 7873 1058

When are agency temps employees of end-users?

Uncertain Legal Position

Agency temps are not specifically covered by the 'unfair dismissal' legislation. However, there have been numerous cases of agency temps working for the same client (or end user) for more than 12 months, and then claiming that an 'implied contract of employment' has developed between them and the client/end user.

Following the 2004 Court of Appeal decision in **Dacas v Brook Street Bureau** [2004] IRLR 358 it was a fair assumption that an agency temp who worked for one client (or end-user) continuously for more than 12 months would acquire the right to bring unfair dismissal claims against the client/end user on termination of the engagement. As a practical precaution, many end-users rotated temps to avoid individuals building up more than one year's service.

Since Dacas, there have been a number of conflicting decisions on the same point, and the law has been unclear. So all tribunal cases concerning the status of agency workers were stayed pending the Court of Appeal's judgement in **James v Greenwich Borough Council** [2008] IRLR 302.

James v Greenwich BC

The Court of Appeal has recently handed down judgment. It is good news for companies who use agency temps.

The facts of the case are a simple and typical triangular arrangement. Merana James was a housing support worker. She signed a 'temporary workers agreement' with an agency, BS Project Services. The agency supplied her as a temporary worker to Greenwich BC and the placement lasted for some 3 years. The agency and Greenwich had an agreement under which Greenwich paid the agency a sum to cover workers' pay and expenses, plus commission for the agency. There was no express written or oral contract between Ms James and Greenwich BC.

When Greenwich terminated the arrangement, Ms James brought a claim for unfair dismissal against Greenwich. It would not have been possible for Ms James to bring an unfair dismissal claim against the agency, because the 'temporary workers agreement' between her and the agency did not amount to a contract of employment.

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The William Sturges & Co employment department runs workshops and seminars in Ealing and Westminster in conjunction with other employment law specialists. If you would like to be included on the mailing list for these events please contact Clare Gardner. For further information see page 2.

Topics covered in this issue:

- Agency temps
- IVF patients
- ACAS code of practise
- Immigration and Asylum
- Garden leave clauses

Important: The purpose of this newsletter is to give an overview of some current issues. No decision should be made in reliance on the contents of this publication as it is not intended to replace the need to seek expert legal and tax advice.

William Sturges September Workshop Staff redundancy

In September the William Sturges employment team in conjunction with barristers from 2 Grays Inn Square will be holding a number of employment law workshops at our Ealing office.

If you would like to receive an invitation to attend please contact Clare Gardener on 0207873 1041 or claregardner@williamsturges.co.uk

Legal Proceedings

The employment tribunal held that she had not been an employee of Greenwich BC. That decision was upheld by the Employment Appeal Tribunal and the Court of Appeal.

The Court of Appeal have held that if the existing contractual arrangements are genuine and make sense, and are consistent with the actual relationship between the parties, then it will not be necessary to imply a contract of employment between an agency temp and an end user.

And if it is not necessary to imply such a contract, then no such implication should be made, even if an agency temp 'looks like' an employee, and has worked for the end user for years.

When are temps employees of end users?

Hardly ever. The effect of James v Greenwich BC is that very few agency workers will have unfair dismissal rights against end users. A contract of employment will only be implied between an agency temp and a client/end user in very exceptional circumstances. This will not depend on length of service (which was a key factor in Dacas) or the degree to which the agency temp has been integrated into the end user's workforce.

There has been considerable political pressure to change this by legislation. A private members bill introduced by Labour MP Andrew Miller had some success. Although the government opposes the bill, it has nevertheless promised to set up a 'Temporary and Agency Workers' Commission' under the chairmanship of Sir George Bain to look into and report on these matters.

On 20th May 2008, a joint declaration was published in which the government, the CBI and the TUC committed to achieving equal rights for agency temps after 12 weeks in the same job. Although the government indicated that implementing legislation may be introduced in the next parliamentary session, this seems unlikely given the negotiations that will have to take place in the UK and Europe. The CBI described the deal as '...the least worst outcome available for British business', and joined in the declaration to avoid '...a major risk of damaging legislation coming from Brussels'.

Employment protection for IVF patients

IVF and employment law

Until recently, it has not been clear what employment protection rights a woman had whilst undergoing IVF treatment. In practice, some employers disciplined women for taking time off work for IVF treatment, regarding it as a voluntary absence.

Sabine Mayr case

The law has been clarified by the recent European Court of Justice decision in the Austrian case of **Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG** [2008] IRLR 387.

Sabine Mayr was dismissed when she took off work to undergo IVF treatment. On the date of dismissal, her eggs had been fertilised and embryos created, but not yet implanted within her.

The European Court of Justice confirmed, if confirmation were needed, that a woman is not pregnant prior to the implantation of fertilised eggs. Accordingly, she cannot take advantage of the statutory protections for pregnant women.

However, the Mayr case went on to decide that the dismissal of a woman, if related to her IVF treatment, amounts to discrimination on the grounds of sex contrary to the EC Equal Treatment Directive, since only women receive such treatment.

So by extension, in relation to matters other than dismissal, it will now be possible for women to argue that any disadvantage related to IVF Treatment amounts to sex discrimination. This makes it dangerous for employers to discipline women for taking time off work for IVF treatment.

Of course when fertilised eggs are implanted, a woman is pregnant and therefore covered by the plethora of European and British legislation ranging from time off for ante-natal appointments to the right to return to the same job at the end of maternity leave.

Employer responsibilities

It would be sensible for employers to try to accommodate women undergoing IVF and if practicable help them by making appropriate adjustments to working arrangements.

In relation to paid time off for treatment, a woman is not entitled to Statutory Sick Pay if she is away from work for IVF treatment unless she suffers ill health as a result of the treatment (eg depression or stress). Entitlement to company sick pay will depend upon the wording of the company's sick pay policy and procedure.

It would be sensible for employers to review their sick pay and maternity policies in the light of this case.

- ACAS have just published a draft revised Code of Practice on Discipline and Grievance. It can be downloaded from www.ACAS.org.uk. It will come into effect at the same time (probably April 2009) as the statutory dismissal and grievance procedures are abolished.

- Since the Immigration Asylum and Nationality Act 2006 came into force on 29th February 2008, some 150 employers have been prosecuted, and fines of some £500,000 levied. It is essential to have proper procedures in place to avoid employing someone in breach of their conditions of stay in the UK, or someone who has no permission to live and work here.