

**Tilson v Alstom Transport [2011] IRLR 169**

In Heatherwood v Kulubowila the EAT held in respect of employment status that: "It is not enough to form the view that because the claimant looked like an employee ... acted like an employee and was treated as an employee, the business reality is that he was an employee and the tribunal must therefore imply a contract of employment." This principle was endorsed and applied by the Court of Appeal in this case.

Mr Tilson worked with Alstom for more than two years in a managerial position. He was fully integrated into Alstom's organisation. However, his services were provided to Alstom by a third party contractor, and Mr Tilson chose not to be an employee of Alstom for financial and tax reasons. The question arose that despite these factors could he nevertheless claim that it was necessary to imply a contract of employment between himself and Alstom which would allow him to bring an unfair dismissal claim when the working relationship came to an end?

An employment tribunal considered Mr Tilson to be an employee and the Court of Appeal acknowledged that to all intents and purposes Mr Tilson was performing work in just the same way as any other employee would do. But that is not enough.

A contract can be implied only if it is necessary to do so. The mere fact that there is a significant degree of integration of the worker into the organisation is not at all inconsistent with the existence of an agency relationship in which there is no contract between worker and end user. Indeed, in most cases it is quite unrealistic for the worker to provide any satisfactory service to the employer without being integrated into the mainstream business, at least to some degree, and this will inevitably involve control over what is done and, to some extent, the manner in which it is done.

There was no justifiable basis to imply a contract and this conclusion was amply reinforced by the fact that neither Alstom or Mr Tilson had no shared intention that there should be a contract. 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 militating against any such implication. The Court of Appeal also made it clear that it is not valid for a tribunal to imply a contract just because it objects to the practice of end users entering into agency arrangements in order to avoid incurring the obligations they owe to their employees.

**Keeping You One Step Ahead**



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**Mehta v Child Support Agency IDS 918**

On the first day of the Tribunal hearing, 2 out of 3 of the respondent's witnesses were allowed to read out their witness statements. For reasons of time saving, the Employment Judge asked if both parties were willing for the witness statements of the 3rd witness of the respondent and that of the claimant, who was unrepresented, to be taken as read.

Both parties agreed and on the second day, the witness statements were not read out. The claimant appealed arguing that she did not properly understand what was proposed, and although she understood that the Tribunal would read her witness statement overnight, she believed that she would be able to read it out herself at the hearing the following day.

The EAT rejected the appeal. The phrase 'if the parties are in agreement' made it clear that their consent was invited. The fact that the claimant was recorded as having said in terms that she had no objection showed that she understood that she was being given the opportunity to object. If a Tribunal has, making all proper allowances for the position of a litigant in person, clearly posed a question and received an answer, it is not unfair to proceed on that answer even though the question was not properly understood.

The EAT then went on to give some important guidance about the approach to giving evidence.

The EAT did not believe that it is a requirement of fairness in every case that the statements of every witness be read aloud in full, or indeed at all. In very many cases the process of reading aloud a document which the Tribunal can more efficiently and more effectively read out of court achieves nothing of value and is contrary to the overriding objective inasmuch as it wastes the time of the Tribunal and the parties. This will particularly, perhaps, be the case when the statements in question are lawyer-drafted and where they navigate through masses of detailed material.

On the other hand, there may in particular cases and circumstances be good reason for a witness statement, perhaps particularly of a claimant and even more particularly of an unrepresented claimant, being read aloud either in whole or in part. Such reasons may be to enable the claimant to feel that he or she has had their say; to take a witness through a confused or inadequate witness statement and therefore obtain clarification and/or further information; to assist where the material is very technical; or to allow a witness to settle themselves before being exposed to cross examination.

**Fulcrum Pharma (Europe) Ltd v Bonassera and anor IDS 918**

Ms Bonassera was an HR manager who was supported by a single member of staff. She suffered a heart attack and was off work for a while, during which time her support staff took on many of the claimant's duties. Ms Bonassera returned part-time after several months but the economic situation meant that redundancies were required and the claimant was informed that she was at risk though her support assistant was not placed at risk.

Ms Bonassera queried this at a meeting with the redundancy panel and put forward a proposal where she might take on both roles and reduce hours to a four day week. The panel rejected this and Ms Bonassera was made redundant. The employment tribunal found that the respondents had not acted reasonably in determining that it was only the post of HR Manager that was redundant as in reality the number of HR posts was being reduced from two to one.

The EAT agreed with the tribunal. The facts suggested the issue of pooling had been considered but that the consultation required more and there was no evidence that the issue had been debated by the panel.

On the issue of whether the pool should have included both members of the HR team, The EAT stated "It seems to us that the mere fact that the Respondent had previously carried out the more junior functions and/or the junior employee "acted up" during sick leave of the Respondent would not by themselves be sufficient factors to determine that the pool should inevitably be two persons". However, the tribunal had not considered the relevant factors. i.e. how different the two jobs are; the difference in remuneration between them; the relative length of service of the two employees; and the qualifications of the employee in danger of redundancy and this should be considered in the remedies hearing.