



Employment alert

Employee-friendly decision on casuals and umbrella contracts

If your business uses casuals on a regular basis then the recent Employment Appeal Tribunal ('EAT') case of *Haggerty v St Ives* will be of interest to you.

Can a relationship with your casuals ever become a proper employment relationship? For example, if you use casuals for long enough, can they sue you for unfair dismissal if you choose not to use them any more?

This situation arises when the relationship becomes an "*umbrella contract*" (so-called because the employee is not just an employee during assignments but over the whole period of the relationship).

In the case of *Haggerty* a company had a regular workforce which it supplemented with casuals to cope with production surges. It used a bank of casuals and gave no guarantee that any amount of work would be offered; on the other hand, the casuals did not promise to work unless they wanted to. If a casual refused to work a shift that was offered the company simply asked another casual instead.

This is important because a crucial element of a proper employment relationship is that the parties agree with each other to offer/accept work on a continuing basis.

The problem sometimes arises, however, when the "occasional production surge" reaches a plateau and certain casuals are offered and accept work consistently over a fairly long period of time.

Some employees have successfully argued in the past that this turns them into proper employees so that they get unfair dismissal and redundancy rights etc.

On the other hand some employers have successfully argued that a casual relationship shouldn't be replaced just because a certain pattern of engagements suits the parties. Just because one or both parties fear that if they are awkward with offering/accepting assignments, it doesn't follow that the parties are actually obliged to offer/accept them.

At BSDR, we see no reason why a relationship that starts out as a casual one should be turned into a proper relationship unless the parties actively decide to do this. However, we perceive a general trend towards including as many workers in the employment right framework as possible. This case is part of that trend.

This case went the way of the casual who was found to be a regular employee.

Conclusion

We have tried to extract some guidance from the case for employers anxious to preserve the ad-hoc nature of their relationships with casuals.

The decision on whether a casual is an employee outside of assignments is one for the Tribunal judge to make and the EAT is extremely unlikely to interfere with the Tribunal's decision, so stack the odds in your favour by following these guidelines:

- Don't insist that a casual must do assignments if requested. Allow the casual to be replaced by someone else if they don't want an assignment (not just in cases of illness or holiday).

- The casual should be responsible for his/her own taxes, insurance and equipment and not claim expenses. Payment should be by the hour or day or by commission.
- The casual should not be entitled to holidays, sick pay, pension contributions and other employee benefits.
- Your employment policies should not apply to casuals.
- Do not micro-manage the casual's work.
- Ensure that self-employed staff are treated separately from genuine employees where possible.
- We have until now advised employers to ensure that casuals are not treated like members of your regular workforce. In particular, don't apply disciplinary procedures to them as this makes them look like employees. You are entitled to tell a casual that you won't use them again. But this case says that acting fairly towards a casual shouldn't count against an employer. Until other decisions back this up, we advise you to err on the side of caution and don't apply your usual disciplinary procedures (but by all means look into the facts and even hold a meeting before removing an individual from your bank of casuals).



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