

**EMPLOYMENT LAW FOR CHARITIES SEMINAR JUNE 2005**

**ATYPICAL WORKERS**

*Presented by Fiona Wharton, Solicitor*

This paper is going to cover a rather disjointed group of individuals which I have bunched together and called Atypical Workers. However, this is something of a misnomer as the frequency with which these various classes occur within the voluntary sector makes them far from atypical. Within this group I am going to focus on:-

1. Volunteers
2. Part Time Workers
3. Fixed Term Employees
4. Agency Staff
5. Casual Staff
6. Office holders

**VOLUNTEERS**

In this, the Year of the Volunteer, it seems appropriate to start here. Added to which, the status of the volunteer at work has recently been reviewed in Employment Tribunals and the Employment Appeal Tribunals.

The great difficulty with volunteers, as with the other members of this group of Atypical Workers, is that no single definition of what an employee is exists.

Legal Definitions

The law seeks to reduce individuals into different categories of 'employment':

- Employee / Self-employed
- Employee / Worker

Certain factors go to indicate whether or not an employment relationship exists. A contract of employment is indicated, but not determined, by:

- Personal performance i.e. not entitled to delegate;

- Payment of wages, holiday pay and sick pay, membership of company pension scheme and other benefits;
- PAYE and National Insurance Contributions;
- Provision of equipment, owned by employer, to individual to carry out his/her role.

No single factor will determine whether or not an employment relationship exists. A number of tests have been developed, each of which tends to focus on a particular element of the employment relationship such as the Control Test, where a court will consider the old relationship of 'master' and 'servant' to determine whether the master has sufficient control to hold that an employment relationship exists. In more recent years the test has been to determine whether there is sufficient 'mutuality of obligation' where the employee is to turn up to personally perform his duties and the employer is obliged to provide work.

The legal definition of an employee is:

"... an employee who has entered into and works under (or, where the employment has ceased, worked under) a contract of employment [s230, Employment Rights Act 1996]

The status of employee confers various rights:

1. Employment Rights Act 1996
  - To receive certain written particulars of employment
  - Not to be unfairly dismissed
  - To receive a statutory redundancy payment
  - To receive a minimum period of notice
2. Transfer of Undertakings (Protection of Employment) Regulations 1981
  - Only employees are entitled to the benefit of the TUPE legislation
3. Statutory Sick Pay and Maternity Pay
  - Only for employees
4. Employer's vicarious liability
  - Protects third parties who suffer damage or injury where the employee acts in the course of their employment
5. Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995
  - Right not to suffer harassment or victimisation on grounds of sex, race or disability

## 6. Health and Safety

- The Health and Safety at Work etc Act 1974 requires employers to ensure so far as is reasonably practical the health, safety and welfare of employees.

The definition of a worker is:

“... an individual who has entered into or works under (or, where the employment has ceased, worked under):

- (i) contract of employment; or
- (ii) 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.”

Workers benefit from protection afforded by:

- Discrimination legislation
- Working Time Regulations 1998
- National Minimum Wage Act 1998
- The Public Interest Disclosure Act 1998
- Part-time workers (Prevention of Less Favourable Treatment) Regulations 2000

Consideration has also been given to the particular status of office holders, for example an agency worker where typically no contract exists between the employing organisation and the individual. The question is whether an individual is an employee of an Employment Business (which is in the business of “supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity”) or of the client employing organisation. Please note the distinction between and “Employment Business”, mentioned above, and an “Employment Agency” which is in the business of “finding persons employment work with employers or supplying employers with persons for employment by them.”

The way the law has chosen to deal with this uncertainty is by making specific exemptions and applying protection to agency workers, including:

- The National Minimum Wages Act 1998
- Working Time Regulations 1998
- Discrimination legislation

Please see later for more information on agency workers

Moving back now to continue the discussion on the status of volunteers.

This lack of clarity, as highlighted in the recent Employment Tribunal cases means that it can be unclear whether volunteers (or other atypical workers) might be entitled to the same rights as either "workers" or indeed, the full employment rights of "employees."

When looking at what constitutes an employee relationship as opposed to that with a volunteer, the key questions are:

- The degree of control over when and how work is provided
- Intention to create legal rights
- Binding commitment to provide and do work
- Payment

So, turning to recent case law.

*South East Sheffield Citizens Advice Bureau –v Grayson [2004] IRLR 353*

This case was slightly unusual in that it was brought by an "employer" rather than by a volunteer claiming employment rights, eg unfair dismissal. The individual claimed disability discrimination and sought to show that volunteer advisors were employees thereby bringing the number of employees in the organisation above the small employer exemption under the Disability Discrimination Act 1995 (a piece of law which was in fact scrapped on 1 October last year).

The CAB volunteers had unsigned volunteer agreements which provided, amongst other things for:

- a weekly commitment with a maximum of 6 hours
- Reimbursement of expenses
- confidentiality terms relating to client matters
- In-service training
- Use of grievance and disciplinary procedures

The Employment Tribunal found that the relationship between the CAB and Ms Grayson was contractual and fitted the DDA's definition of employment.

However, the Employment Appeal Tribunal overturned this decision and found that although the volunteers were working under a contract it was not a contract of employment. The key points highlighted by the EAT were:

1. Volunteer agreements

In this case, there was no obligation on either party to sign the document and no intention to create legal relations could be found on the face of the document. The lack of an explicit statement in the document saying it was not intended to create legal relations was not material.

2. Reasonable expectations

The ET had pointed to a minimum commitment of 6 hours as indicating an employment contract. However, the EAT said that the specific wording used here - "The usual minimum commitment" amounted to reasonable expectations rather than the obligation to work or provide work found within an actual employment relationship.

3. No obligation to provide or carry on work

Further, there was no sanction on the volunteer if they simply stopped turning up for work and thus there was no contractual obligation on either party to provide or turn up for work.

4. Reimbursement of expenses

The EAT accepted that the agreement to reimburse expenses did amount to a contract but crucially NOT a contract of employment.

The EAT rejected the ET's conclusion that the CAB provided consideration through the provision of training, supervision, experience and the indemnity against expenses and negligence liability. The EAT said these were necessary consequences of an organisation having volunteers and did not impose or supply a contractual obligation upon the volunteer to come to work.

The message from this case is that all these things:

- reimbursement of expenses
- training
- written agreement with disciplinary and grievance procedure, confidentiality clauses, request for notice of leaving
- a minimum time commitment

Do NOT amount to a contract to provide services (even though some of these elements have been regarded as problematic in the past).

The message seems clear that although you must be clear about mutual expectations, it must not be to the point of creating contractual obligations. It also seems clear that while volunteer agreements must be shown to volunteer, they should not ask to sign these.

This is, however, an unresolved issue. Both the RNLI and Scout Association are at present facing claims in the Employment Tribunal relating to the status of volunteers. The RNLI alone is facing five separate claims for unfair or constructive dismissal. Issues include (again) whether the expenses are a lump sum, ie actual payment or limited to actual expenses incurred and whether or not there were obligations on the RNLI to the volunteers and vice versa.

Although still unresolved it is clear that, although Tribunals will look to each case on its own facts, they will need to take account of the decision in Grayson.

There has also been a recent report in *Third Sector* magazine that talks have commenced between the Home Office and the voluntary sector to clarify the legal status of volunteers.

## PART TIME WORKERS

To recap on the law:

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 which came into force in 2001 and were subsequently updated by two amendments in October 2002, introduced new rights for part-time workers to ensure they are not treated less favourably than comparable full-timers in their terms and conditions..... unless it is objectively justified on the grounds that it can be shown that it is necessary and appropriate to achieve a legitimate business objective.

Historically, part-time workers were forced to rely on establishing claims of INDIRECT SEX DISCRIMINATION if they were treated less favourably because they were part-time. This was based on the argument - (usually successful) - that a considerably smaller proportion of women than men were able to work full time, because many more women had responsibilities for children that prevented full-time work. However, this argument sometimes failed if the statistical evidence was not available and, in any event, did not help men particularly.

This means part-timers must now receive the same benefits (pro rata where appropriate) as comparable full-timers. This will include no less favourable:

- rates of pay (including overtime – over normal full time hours)
- access to pension schemes and pension scheme benefits
- access to training and career development
- holiday entitlement
- entitlement to career break schemes, contractual sick pay, contractual maternity and parental pay
- treatment in the selection criteria for promotion, transfer and for redundancy

The comparator must be a full time (including fixed term) worker who works for the same employer and does the same or broadly similar work.

The case of *Matthews and others v Kent & Medway Towns Fire Authority and others* involved 12 “retained firefighters” who claimed they were treated less favourably than “whole-time firefighters” in that they were denied access to the Firemans’ Pension Scheme, and were treated less favourably in relation to sick pay and pay for additional responsibilities. The case went to the Court of Appeal, Civil Division which confirmed the decisions in the Employment Tribunal and Employment Appeal Tribunal. It was found that the retained firefighters and full-time firefighters were employed under different contracts and that the retained firefighters were not engaged in the same or broadly similar work as full-time firefighters. The full-time firefighters also carried out “measurable additional job functions” – in addition to fighting of fires and responding to other emergencies - which included educational, preventive and administrative tasks. This decision obviously makes finding a suitable comparator much harder, if it is permitted to take such activities into account.

The regulations also protect those who were previously employed full time and, either as a result of varying their contract or after an absence of 12 months, return to work, on a part-time basis.

It is worth noting that the Regulations do not apply to external recruitment. However, failure to consider part-time workers or job sharers may amount to indirect discrimination.

The Regulations do not give a helpful definition of what are "full-time" and "part-time" workers – simply making reference to the time he works and therefore identified as such:

"...having regard to the custom and practice of the employer in relation to workers employed by the worker's employer..."

The DTI issues a useful booklet giving some best practice guidance of employers on how to comply with these regulations. This is available on their website at [www.dti.gov.uk/er/pt-detail.htm](http://www.dti.gov.uk/er/pt-detail.htm).

The guidance includes the following suggestions:

- widening access to part-time work
- organising training at convenient times and locations for both full time and part-time workers
- include more jobs, (including managerial level) which are designated as suitable for part-time working or job-sharing
- Flexible working. At the moment employees have a right to request this, but the employer does not have to grant it. However, perhaps in developing an internal policy to deal with such requests will show staff that the employer is serious about providing such.

If a worker feels that he has been unfairly prejudiced, then he has a right to request in writing a statement giving particulars of reasons for less favourable treatment, which must be issued within 21 days of receipt of request. This statement would be admissible if the worker were to submit a claim for example for unfair dismissal on the basis that he has been unfairly treated because he is a part-time employee. If the complainant were successful (and had brought the complaint within three months) the Tribunal has three remedies at its disposal:

1. make a declaration as to the rights of the complainant and the employer in relation to the matters to which the complaint relates;
2. order the employer to pay compensation to the complainant;
3. recommend that the employer takes reasonable action to obviate or reduce the adverse effect on the complainant of any matter to which the complaint relates.

Any compensation awarded will be:

- just and equitable
- will not include injury to feelings
- reduction for contribution

## **FIXED-TERM EMPLOYEES.**

To remind you, this group of atypical workers are protected by The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and, indeed, only apply to employees rather than the other class of workers. These Regulations have been in force since October 2002.

A fixed-term employee is one employed on a fixed-term contract which provides for termination:

- on a specified date
- on completion of a particular task
- when a specified event does or does not happen

These Regulations do not apply to:

- agency workers
- apprentices
- work experience employees

A fixed-term employee has the right not to be treated less favourably than a comparable permanent employee:

- as regards the terms of his contract, or
- by being subjected to any other detriment by any prior or deliberate failure to act by his employer

A comparable permanent employee could work for the same employer in the same establishment, doing the same or broadly similar work (including where relevant skills and qualifications).

Unlike the part-time regulations, a fixed-term employee can only use a permanent employee as a comparator – not another fixed-term worker who fits the above.

However, an employer can argue that they made a decision which seemingly prejudices a fixed-term worker on the grounds of objective justification. Less favourable treatment will be justified on objective grounds if (using the DTT's three point test) it:

- is to achieve a legitimate objective
- is necessary to achieve that objective
- is an appropriate way to achieve that objective.

Fixed term employees have the right to ask their employer in writing for a written statement giving the reason for any less favourable treatment. This must be produced within 21 days of receipt of the request and can be produced in evidence at a Tribunal hearing.

The protection for unfair dismissal for fixed-term employees is the same as that for part-time workers. And the remedies are also the same.

Another protection afforded by these Regulations is a limitation on the successive use of fixed-term contracts. This means that if fixed-term employees have their contracts renewed, when they already have four or more years of continuous employment, the renewal – a new contract, takes effect as a permanent contract. This applies only from 10 July 2002 (it is not retrospective).

The four year limit on renewal may be modified by a collective or workforce agreement which provides instead for:

- a maximum period pursuant to which a worker may be employed under a fixed-term contract; or
- a maximum number of times a fixed-term contract may be renewed; or
- a requirement for objective reasons to justify the renewal of a fixed-term contract.

You, as employers, should be aware that fixed-term employees must be informed of permanent vacancies in their organisation.

Other things of which employers should be aware are that fixed-term employees of 3 months or less are entitled (on the same terms as other employees) to

- statutory sick pay
- guarantee payments
- remuneration during suspension from work on medical grounds
- minimum statutory notice (for termination prior to expiry)

In addition, all employees and that includes fixed-term and part-time employees, are, since 1 October 2004, subject to the new statutory minimum grievance and disciplinary procedures. All your staff handbooks and grievance and disciplinary procedures should be updated accordingly. If an employer fails to follow these statutory minimums, the claim will be one of automatic unfair dismissal.

Employers must be aware on termination of a fixed-term contract that an employee with more than one year's continuous service may claim unfair dismissal and consideration has to be given to alternative employment on redundancy – even for employees on fixed-term contracts.

The recent Court of Appeal case of *Department for Work and Pensions –v- Webley* [2004 EWCA GV 1745], however, has suggested that non-renewal of a fixed-term contract is not in itself discriminatory, because the whole point of a fixed-term contract is that it is going to end.

In this case, Atasha Webley's fixed-term contract ended at the end of the fixed-term period which was before she had accrued 12 months' continuous service, in line with DWP policy.

However, this does not mean it is permissible to use fixed-term contracts in any situation. This case was decided on its facts. The Court of Appeal focused solely on whether the expiry of the fixed-term could "of itself" amount to less favourable treatment. This does not exclude the possibility that there is an underlying discriminatory motivation for either using a fixed term contract or for terminating that contract. And the DWP could justify its policy of dismissing temporary employees who had accrued 51 weeks' continuous employment because the Civil Service Code required appointments of more than 12 months to be made on merit and on the basis of fair and open competition. The position, therefore, has not moved on substantially.

## **AGENCY WORKERS**

The Conduct of Employment Agencies and Employment Business Regulations 2003 come into force on 6 April 2004 (except from a couple of the regulations in it which were later implemented on 6 July 2004).

It is worth just running through the key provisions of these Regulations briefly for any of you who engage temporary workers.

- obligation on employment businesses to tell the worker whether he is employed by it (the Agency) or the client company.
- limitations on the extent to which employment business can charge "temp to perm" or other transfer fees, when a temporary worker wants to take up a permanent post either with the hirer or another company
- limitations on the extent to which employment businesses can withhold wages from temporary workers either because the employment business has not been paid by the hirer or the worker has not produced authenticated time sheets; and
- agencies and employment businesses will be required to check the identity and qualifications of work-seekers in their books, and will have an ongoing obligation to inform the hirer when they receive information about a worker.

Again, the underlying premise of regulations related to agency workers is that, as we have seen with the other classes of atypical workers today, the idea is that they should not be treated any less favourably than a comparable worker in an identical or similar job taking into account seniority, qualification and skills. Differences of treatment are acceptable if they are objectively reasonably justified.

It is likely that a [significant] proportion of those of you here today will use agency workers as the UK is one of the highest employers of agency workers within the EU.

When engaging a worker through an agency, an end-user employer should ensure terms exist providing:

- the worker is not an employee of the employer;
- it is the agency who has disciplinary control over the worker;
- (if possible) the supply of workers through the agency is rotated;

- the agency should complete forms such as mortgage application forms;
- the agency pays the worker directly
- agencies must obtain information on any health and safety risks known to the end-user company, and the steps taken to prevent or control these risks.

The points above will help to ensure that it is clear the agency worker is under the control of the agency and not the employing organisation.

The recent case of *Dacas* found that, at the date of her dismissal, Dacas, a cleaner who had worked with the Borough Council via an agency for over five years, was an employee of the Council – not the agency – and was therefore entitled to the statutory right not to be unfairly dismissed.

Therefore be clear. Employers must be careful when using agency staff. There is clearly a risk that agency workers will be considered employees and the employer therefore risks an unfair dismissal claim if the contract is brought to an end.

## CASUAL WORKERS

This group covers temporary or occasional work when an individual may be called on as and when work is available. In case law, the important consideration in establishing whether casual work is employment is the issue of mutuality of obligation; whether the “employer” is obliged to provide work and the individual is obliged to accept any of the work available.

Casual work is not limited to seasonal work and will often be used by an organisation to meet fluctuating demand and work levels. It is particularly prevalent in areas such as catering including restaurant and pubs. Where work becomes regular it is very easy for an expectation of availability to become established rendering the relationship one of employment.

With casual workers the question is often whether there is some kind of umbrella relationship that bridges the gap between distinct periods of work. In many cases, the circumstances may be such that it is clear that when working the individual is employed. This could be for a matter of hours, days or even weeks. In such cases the individual rarely acquires sufficient continuity of employment to gain rights, for example, in relation to unfair dismissal or redundancy. However what may at first sight appear to be a casual relationship can quickly develop into a relationship of convenience, for example where an individual begins to work a regular pattern. Here there is a similarity with volunteers. That regular pattern can develop into an expectation both that work will be available and also that the individual will perform it. There, for the unwary, is the development of the employment relationship.

And finally, just to mention one very specific group of workers, some of whom have already been highlighted above – **OFFICE HOLDER, and in particular clergy.**

Currently, members of the clergy and ministers of religion are considered to be office holders answerable to God rather than to a terrestrial authority. The relationship is seen as spiritual, not temporal. Other example of office holders are non-executive directors, trustees and many government appointed officials such as tribunal members. As office holders they do not automatically come within the definition of employees in the Employment Rights Act 1996. The Government has not suggested that this class of atypical workers should become employees –

only that they should have access to many of the rights that employees already have, in particular, the right to appeal to an Employment Tribunal and claim unfair dismissal.

The Government has the power under section 23(2) of the ERA to extend employment rights to groups of individuals giving them such rights as redundancy payments, holidays, protection from unfair dismissal and access to Employment Tribunals. In some of the recent discrimination regulations protection has been extended to office holders and contract workers in this way. A consultation concerning extending employment rights to clergy is under way.

Key issues are still to be resolved however. They include whether the ability to opt out of the maximum of a 48 hour week could be extended for the clergy. How will this work when a recent case found that time on call but asleep for doctors amounted to working time? Will this mean that parish priests will not be on call to administer to their congregation as and when? It seems unreasonable to suppose that such workers would be able to limit their hours to a 48 hour week.

## CONCLUSION

So, having seen how atypical workers are currently dealt with by the law and how their position differs or is the same as that of employees, it now seems that the government is moving more and more to an extension of employment rights, if not employment status, for all atypical workers.

Fiona Wharton  
Wrigleys  
9 Cookridge Street, Leeds LS2 3AG  
[fiona.wharton@wrigleys.co.uk](mailto:fiona.wharton@wrigleys.co.uk)  
Telephone 0113 244 6100

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