

Out Of Sight, Out Of Mind, Out Of A Job?

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Question: If an employed agency worker finishes an assignment, then does not contact the agency for a new assignment and the agency does not look for or offer the employee any new assignment, has a dismissal or resignation occurred?

Answer: That is exactly what the Employment Appeal Tribunal has looked earlier this month in ***Sandle v Adecco***. In short, neither, but the EAT decision went a little further to consider whether a dismissal could be implied in such a scenario.

It was a sad tale of worker and agency drifting apart, losing the spark that initiated the relationship and neither knowing how to rekindle the flame. Sounds like the beginning of a badly-written romantic novel, and not that far from the truth!

Ms Sandle was employed by Adecco as an agency worker and working on an assignment for a third party. When that assignment came to an end, Adecco did not look for a further assignment for her and made little attempt to contact her. It seems that it assumed that she did not want to carry out any further agency work because she had not chased it. Ms Sandle made no attempt to contact Adecco in return, assuming that if it had work for her it would be in touch, each waiting for the other to make the first move. The spark had fizzled...

Ms Sandle then brought a claim for unfair dismissal. At first instance, the ET found that there had been no direct dismissal. Adecco had not communicated any form of dismissal to Ms Sandle and so the employment relationship was still continuing when she brought her claim. Claiming a divorce settlement while still married – that would make for an awkward twist in the novel! The ET did suggest that constructive dismissal could have been argued, although Ms Sandle had not raised this.

On appeal, the EAT decided that a direct dismissal can be implied from an employer's conduct without the express giving of notice but an *“unequivocal intention to dismiss still had to be communicated to the employee”*. Ms Sandle had to prove that Adecco had shown her such an unequivocal intention and she was unable to do so. It hadn't done anything at all to convey this, such as issuing her P45 or taking her off email lists or org charts or some other form of proactive contact with her. Consequently she had not resigned nor been dismissed and in those circumstances her unfair dismissal claim was clearly a goner.

Lessons for employers

On the face of it, a good lesson for agencies that employ their people and then send them on assignments to clients. If an agency worker finishes an assignment and there is no further contact, you should not assume that the employment relationship has ended. The easiest way for an agency to be sure (if that is what it wants) is to unequivocally dismiss the individual, leaving no room to argue that an employment relationship has continued in the background.

An implied dismissal can also work in reverse as an implied resignation though. If the agency worker finishes his work assignment and tells the agency that he has decided to leave it all behind to whittle spoons and forage for mushrooms, you could first of all be worried for their state of mind. However, once that has passed, although there has been no mention of resignation, it could be argued that they have impliedly resigned. To make sure, you could then write to him/her just to make clear you are viewing that as their resignation from [x] date unless they say different within 7 days. However, an employee's just dropping silently off the radar will not by itself be a resignation. You would need to know why – is it just extended unauthorised leave probably giving grounds to dismiss. It is a catastrophic illness or an extended stay at Her Majesty's pleasure which might lead the contract to be ended by frustration? Or have they done something which is incompatible with continued employment, (leaving the country, etc.) which could then be treated as a resignation?

What if Mrs Sandle had claimed that the contract with Adecco had terminated by her constructive dismissal? That would require Adecco to have committed a fundamental breach of her contract and her to have quit as a result. If Adecco's silence were to be such a breach, she would need to point to some express or implied term about its obligations to keep in touch or offer new assignments when the last one finished. That might be hard, especially since no agency can guarantee that a next assignment will come along. It could also be side stepped easily by a term in the contract making it clear that the agency had no such obligations. Mrs Sandle's other problem, on the facts, is that she didn't resign anyway. So while in principle an extended period of silence from your employer might warrant such a claim, it does not appear that it would have worked here.

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