

Agency workers: relief for employers

Important employment rights such as the protection against unfair dismissal are only available to those people who “fit” the legal definition of an employee. The latest ruling from the Court of Appeal demonstrates that agency workers face an uphill battle if they attempt to persuade a tribunal that they qualify for the same level of protection as afforded to permanent staff in the same workplace.

Background

At its most basic level, a contract of employment between the employee and employer is necessary in any claim asserting employment status. In the classic agency situation, the agency has a contract with both the end user or client and the agency worker but there is often no contract between the end user and the agency worker. In the absence of a contract, agency workers have traditionally had an uphill struggle in arguing they are an employee of the end user, as in the absence of a contract there cannot be a contract of employment.

However, this belief was thrown into confusion with the Court of Appeal’s decision in the case of *Dacas v Brook Street Bureau (UK) Ltd (2003)*. In this case, the court stated that even if there is no express contract of employment, it is necessary to consider whether there is an implied contract. Indeed, comments made by two of the judges in this case also led to a wide spread belief that an employment contract was to be automatically implied after 12 months of continuous service from the worker.

Clarification of agency worker status by the Court of Appeal

The case of *James v London Borough of Greenwich* has gone a long way in clarifying the uncertainty which came out of *Dacas*. In its judgment handed down on 5 February 2008, the Court of Appeal held that an employment tribunal can only imply a contract of employment between an agency worker and the end user of his or her services on the grounds of **necessity**. In doing so, the Court has made it clear that it is not for the courts or tribunals to extend employment protection rights to agency workers, and that any such developments should be left to Parliament to introduce.

The Court also explicitly stated that the case of *Dacas* is **not** authority for the proposition that the implication of a contract of employment between the end user and the worker in a tripartite agency relationship is inevitable in a long-term agency worker situation.

Care still needed when drafting contract of employment

In both *Harlow District Council v O'Mahoney (2007)* and *National Grid Electricity Transmission Plc v Wood (2007)* the EAT confirmed tribunal decisions that the claimant agency workers were employed by the end-user. In each of these cases, the workers negotiated changes to their terms of engagement directly with the end-user, as opposed to the agency that supplied them to the end-user, which was a crucial factor in the EAT’s conclusion that the workers were in fact employees of the end-user.

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Accordingly, to minimise the risk of creating contractual obligations where it is not intended, the contractual documentation in place (i.e. the agreement between the agency and the end user, and the agreement between the agency and the agency worker) should accurately reflect the relationships between the parties, who should continue to work in accordance with the contractual documentation.

Over time, it is easy for the actual working relationships to drift away from the provisions found in the contractual documentation. For example, even if the contractual documentation requires the agency worker to contact the agency if ill or if they want to take holiday, if the agency worker has been with the client for a long time they may get into the habit of only contacting the client in such circumstances. Alternatively, where changes to terms and conditions are to be made e.g. as part of an annual rate review, the end user should negotiate this with the agency, not with the agency worker direct.

Whilst the above clarification of the law will be welcomed by agencies and end users, and businesses might well regard this as a definite win in curbing unrealistic expectations of some agency workers, it should be noted that this may not be the final position.

Agency worker rights have long been debated by the government and subject to significant interest from the Press. We will of course update you if and when there are further changes to this area of law.

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