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## THE CONTINUING SAGA OF THE AGENCY WORKER'S PLIGHT...

**Jackie Lane, University of Huddersfield**

In 2007 an article appeared in these columns in which I wrote of the unsatisfactory position of the agency worker in relation to the typical employee, having no employment status and yet enjoying none of the benefits of self employment.<sup>1</sup> It ended with a reference to the European Temporary Workers Directive which at the time had no prospect of implementation due to the reluctance of Member States to accept its contents. This article examines the recent case law and legislation that has addressed the status and rights of agency workers and asks whether they are now better protected or if they still exist in a no-man's-land of workers' territory.

The issue has undoubtedly received considerable attention in recent years; the UK courts have continued to grapple with the eternal problem of, on the one hand, recognising the unfairness of the agency worker's position but, on the other, being powerless to circumvent the legal constraints of contract law within which employment status is set. Freedom of contract is arguably an unassailable right, but the courts have in a number of situations found sufficient reason to intervene. Where agency workers are taken on by employers deliberately to avoid according their staff valuable employment rights, the courts may see themselves as the last line of defence for the weaker party, and find mechanisms to redress the imbalance of power. The UK Government has also moved to redress this imbalance by implementing, the Agency Worker Directive<sup>2</sup> in the form of the Agency Workers' Regulations 2010<sup>3</sup>, due to come into force in October 2011.

Employment laws sit uneasily between a raft of statutory protection, and contract law, and it is perhaps that uneasy juxtaposition that continues to perplex the courts. There remain a number of situations for which statute has not legislated and where rules of contract must provide the answer, such as considering when it is necessary to imply terms including, for example, the implied terms of mutual trust and confidence, or the duty to take care of the

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<sup>1</sup> Higgins, E., Tatham, L. and Lane, J. (2007) 'Recent Legal Developments'; *The Law Teacher*, 43 (3), pp 310-315.

<sup>2</sup> Directive 2008/104/EC of the European Parliament and of the Council

<sup>3</sup> SI 2010/93

employee; or whether there is a right to be paid when off work through sickness, as in *Mears v Safecar Security Ltd.*<sup>4</sup>

Applications have come before the courts and tribunals to decide on employment status for a number of different reasons. Only employees as defined under s.230 (1) of the Employment Rights Act 1996 are qualified to claim protection from unfair dismissal and redundancy, and positive rights such as minimum notice periods. Rights under the Equality Act 2010 for freedom from discrimination are extended to the wider category of worker, and protection under health and safety legislation is extended to all workers and visitors, including the self employed. Agency workers are usually treated as self employed for purposes of paying income tax and National Insurance, and the courts recognise that some employers prefer to engage such workers in order to avoid fiscal responsibility. Furthermore, only employers are vicariously liable for the torts of their employees and, unless employment status is established, the employer could potentially escape liability when an agency worker whom he has engaged commits a tort against an employee or other person. Thus, the question of agency worker status has received considerable scrutiny for a wide variety of reasons.

However, it is in relation to unfair dismissal and redundancy that the applicant is most likely to seek a determination of employment status, and courts and tribunals have consistently examined each case on its own merits and considered whether it is appropriate to imply a contract of employment. Section 230 (2) of the Employment Rights Act 1996 states:

“In this Act ‘contract of employment’ means a contract of service or apprenticeship, whether express or implied...”

The difficulty for the courts then, is the conflict between the common law freedom of contract principle and the statutory definition of a contract of employment that clearly states that the possibility of an implied contract of employment must at least be considered. It is left to the courts to weigh up the arguments for and against implying a contract, and they must then turn to common law principles; in this context the determining factors have been the passage of time, the level of control, mutuality of obligations and whether it is *necessary* to imply a contract.

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<sup>4</sup> [1982] 2 All ER 865;

In the early years of the 21<sup>st</sup> century, a series of Court of Appeal decisions gave a strong suggestion that an employment contract could evolve between an agency worker and the client over time; in *Franks v Reuters Ltd*<sup>5</sup> and *Dacas v Brook St Bureau*<sup>6</sup>, obiter judgments leaned towards this possibility. In fact in *Franks*, Mummery LJ stated at para. 29:

“Whilst I would agree that a person cannot become an employee simply by reason of the length of time for which he does work for the same person...Dealings between parties over a period of years, as distinct from the weeks or months typical of temporary or casual work, are capable of generating an implied contractual relationship.”

In *Dacas* the following year Mummery again was called upon to adjudicate on whether a cleaner was an employee of the agency and admitted that “the particular problem in this case may in due course be regarded as a matter for legislation.” He went on to quote Professor Freedland:

“The problems were firstly, that there is great resistance to the construction of triangular personal employment contracts, secondly, that there may be great difficulty in deciding whether the worker's bilateral personal employment contract is with the end-user or the intermediary, but thirdly and most fundamentally that the triangular nature of the arrangement may have the effect that the worker fails to qualify as having a contract of employment or even as having a personal work or employment contract of any kind.”<sup>7</sup>

Mummery LJ summed up the practical reality of the triangular relationship between the worker, the client and the agency at para.68, directing that the Employment Tribunal should at least consider the possibility of an implied contract of service, pointing out that the end-user usually exercised powers of control or direction over such a person in such a working environment, was the ultimate paymaster and that in this case the Council (the end-user) was paying for the work done by Mrs *Dacas* under its direction and for its benefit.

Mrs *Dacas* had worked for the client, Wandsworth Borough Council for at least four years, and there is a strong argument for distinguishing cases where there is a long period of engagement from the truly temporary or casual assignment. Later cases have continued to consider that length of service may lead to an implied contract of service and therefore to qualification for an application for unfair dismissal or redundancy.

This movement went further in *Cable and Wireless v Muscat*<sup>8</sup> when the Court of Appeal upheld a tribunal decision that an agency worker had *in fact* become an employee of the client after a two year period of continuous working.

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<sup>5</sup> [2003] EWCA Civ 417

<sup>6</sup> [2004] ICR 1437

<sup>7</sup> *Ibid.* para 9

<sup>8</sup> [2006] ICR 975

It now seemed that agency workers were indeed to be accorded full employment status at a point in time at which the agency, which normally does no more than introduce the worker to the client and thereafter has little or no involvement other than as an intermediary for payment purposes, can no longer be said to be a significant participant in the triangular relationship. It would therefore seem logical that the relationship has become merely bilateral between the client and worker and that a contract of employment could therefore be implied.

The EAT, however, declined to follow this line of authority in a series of cases culminating in *James v Greenwich Borough Council*<sup>9</sup> where the tribunal, the EAT and the Court of Appeal were agreed that an agency worker could *not* transmute into an employee of the client simply by the passage of time, no matter how much he or she appeared to be treated as a permanent member of staff. Nevertheless, the opportunities to reconsider this position have arisen before the employment tribunal since *James* – after all, if the courts could effect a *volte face* once, perhaps they could be persuaded to do so again.

A number of the most recent cases involving agency workers are considered here in order to examine whether the position of agency workers has become more settled, whether they may be considered to be employees of either client or agency and whether the passage of time is a fundamental factor in the implication of a contract of employment. In *Muschett v HM Prison Service*<sup>11</sup>, the appellant, Mr Muschett, went to work for HMPS as an agency worker placed with it by an agency, Brook St (UK) Ltd. The issue to be determined was whether that relationship had at any time developed into one of employer/ employee between HMPS and Muschett. The appellant had brought a number of claims against the respondent, including claims for race discrimination under the Race Relations Act 1976 and wrongful and unfair dismissal, the latter dependent on demonstrating that he was indeed an employee of HMPS and the former requiring evidence that he was either an employee or in its employment in the wider sense. Neither the employment tribunal nor the Employment Appeal Tribunal accepted that he was employed in either sense, and Muschett appealed to the Court of Appeal.

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<sup>9</sup> [2007] IRLR 168

<sup>11</sup> [2010] EWCA Civ 25, [2010] IRLR 451

Rimer LJ gave the judgment of the Court on the first ground of appeal [that Muschett was an employee of HMPS under an employment contract], stating:

*“The sea change in employment law over the last half century or so has resulted in remarkable developments; but it still remains the law that an employment contract cannot be created by the mere, and unilateral, wish of the putative employee. There is no basis upon which this court can question the employment judge’s finding that Mr Muschett never became an employee of HMPS.”*<sup>12</sup>

On the second ground of appeal, that turning on the interpretation of the definition of employment under section 78(1) of the Race Relations Act 1976, the question was whether Muschett was employed under a contract ‘personally to execute any work or labour’ (that is, a contract for services). It was submitted by the appellant that it was *necessary* to imply such a contract between himself and the respondent, but Rimer LJ was clear that:

*“... there was nothing in the evidence that necessitated the implication of such an agreement: and in this context nothing less than necessity will do.”*<sup>13</sup>

In this, Rimer LJ was following the line of judgments relating to the implication of contracts by law when it is necessary to do so, begun in *The Aramis*<sup>14</sup> by Bingham LJ (as he then was) and applied in other cases<sup>15</sup> where agency workers have shown a desire to imply an employment contract into their working relationship where no express agreement existed.

In the same year, a further case came before the Court of Appeal based on similar facts and grounds of appeal. This was *Tilson v Alstom Transport*<sup>16</sup> and the question again was whether an agency worker (the appellant) had a contract of service with the end user (Alstom), a question that had to be settled in order to confer jurisdiction on the Employment Tribunal to hear his claim for unfair dismissal. The Employment Tribunal had, unusually, found that an employment contract existed between the two parties and the employment judge awarded unfair dismissal to Tilson who provided his services through an

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<sup>12</sup> Ibid [34] (Rimer LJ)

<sup>13</sup> Ibid n10 [para 38] (Rimer LJ)

<sup>14</sup> *The Aramis* [1989] 1 Lloyd’s Rep 213

<sup>15</sup> *Craigie v London Borough Council of Haringey* [2007] Appeal No. UKEAT/2007/0556/06; *Dacas v Brook St Bureau (UK) Ltd* [2004] EWCA Civ 217; *James v Greenwich Borough Council* [2008] ICR 545

<sup>16</sup> [2010] EWCA Civ 1308

umbrella company to the respondent train company. The employment judge based his decision on his finding that the contracts between the two intermediaries were a sham; the further intermediary involved was a recruitment business, making this a quadrilateral relationship. He thought this was 'an attempt to engineer a structure so as to avoid any employment relationship'.<sup>17</sup> The finding had been overturned by the Employment Appeal Tribunal.

The appellant worked for over two years for the respondent and was fully integrated into the business, a company providing maintenance services for a train operating organisation. There was undeniably mutuality of obligations and a significant degree of control, thus satisfying the test for determining whether there is a contract of service laid down in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*<sup>18</sup>. However, no tax or NI was deducted from his pay which would normally be indicative of self employment.

Tilson had been placed with the company by an agency and enjoyed certain benefits as an agency worker; he had in fact refused an offer of an employment contract from Alstom, since he received considerably higher wages as an agency worker than he would have as an employee of the company, and he also perceived there to be tax advantages to remaining as an agency worker.

Not surprisingly, when he was dismissed by the agency on Alstom's instructions, he thought better of it and decided that in those circumstances it would be an advantage to have an employment contract so that he could pursue a claim for unfair dismissal. The appellant's case was that as a matter of law he had been engaged by Alstom under such a contract; in other words, there being no *express* contract, that it was *necessary to imply* one.

HH Judge Peter Clark had observed in *Heatherwood and Wrexham Park Hospitals NHS Trust v Kulubowila and Others*<sup>19</sup>:

*"...it is not enough to form the view that because the Claimant looked like an employee of the Trust, acted like an employee and was treated like an employee, the*

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<sup>17</sup> Ibid [para 50]

<sup>18</sup> [1968] 2 QB 497

<sup>19</sup> UK/EAT/0633/06

*business reality is that he was an employee and the ET must therefore imply a contract of employment.”*

Elias LJ, giving the judgment of the Court in *Tilson*, quoted the above and continued:

*“Nor is it legitimate for a tribunal to imply a contract because it objects to the practice of employers entering into arrangements of this kind in order to avoid incurring the obligations they owe to their employee”<sup>20</sup>*

In his discussion, Elias LJ concluded:

*“In my view, there is no legitimate basis to imply a contract on these facts...In my judgment the only proper inference is that the parties would have acted in exactly the same way if there had been no contract, and as Lord Bingham pointed out in *The Aramis* [1989] 1 Lloyd’s Rep 213 that is fatal to the implication of a contract.”*

He also referred to a Court of Appeal decision involving a commercial contract, from which he derived support for his findings. In *Baird Textile Holdings Ltd v Marks and Spencer plc*<sup>21</sup> Baird supplied Marks and Spencer with clothing on a seasonal basis over a lengthy period spanning three decades until the latter terminated the agreement. Baird laid claim to the existence of an implied umbrella contract under which they were entitled to reasonable notice of termination of the arrangement. Mance LJ had observed that it was “unrealistic” to conclude that there was an intention to enter into a contract when Marks and Spencer were already deliberately seeking to avoid that result (para. 73).

Likewise, it is unrealistic to conclude that a contract existed between Mr *Tilson* and Alstom Transport when *Tilson* himself had deliberately avoided that result in the past. The courts will rarely imply a contract where none existed, as the outcomes of many employment, tort and commercial cases have shown.

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<sup>20</sup> *Ibid* n15 [para 11]

<sup>21</sup> [2002] 1 All ER (Comm) 737



*“Once again, this litigation shows not only some consternation on the part of the judiciary in dealing with possible tax evasion but also an inability to develop sufficient legal tools to combat the problem, particularly in the light of the freedom and sanctity of contract.”<sup>22</sup>*

Another area of law where the determination of an employment contract has proved necessary before the main issue can be considered is that of vicarious liability; this may arise where an employee in the course of his business injures a third party or his goods. Could an agency worker be deemed to be an “employee” for the purposes of finding vicarious liability? In such cases it is not the unfairness to the agency worker that is to be considered, but the unfairness to the third party; however, by implying a contract of employment in order to render the employer vicariously liable, the courts must be wary of thereby creating additional rights for the agency worker. This question was given consideration in *Mahood v Irish Centre Housing*<sup>23</sup> in a judgment given in March 2011 by the Employment Appeal Tribunal (EAT); the question of employment status arose in the context of vicarious liability for race discrimination allegedly committed by an agency worker against an employee of the respondent.

In summary, it was held that an employer is only liable for the discriminatory acts committed by an agency worker who became part of its workforce if either:

1. he became its employee as defined in cases such as *James v London Borough of Greenwich* [2008] ICR 545, or;
2. if he acted as the employer's agent in the sense that when doing a discriminatory act he was exercising authority conferred by the employer. In other words, if he had authority to do an act which was capable of being done in a discriminatory manner just as it was capable of being done in a lawful manner.

The respondent had taken on a temporary worker, Mr Toubkin, through an employment agency, Synergy Group. Mahood, the appellant, and Toubkin had an uneasy working

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<sup>22</sup> Patricia Leighton, Michael Wynn, *Classifying employment relationships - more sliding doors or a better regulatory framework?* Industrial Law Journal 5, 2011

<sup>23</sup> UK/EAT/0228/10ZT

relationship and the appellant complained that Toubkin had made derogatory comments about his ethnic origin and religion.

The EAT had to answer the question whether Toubkin, the agency worker, was either an employee of the respondent, or was exercising authority conferred by the respondent organisation, in order to determine whether the latter was vicariously liable for Toubkin's discriminatory acts.

The classic speech of Lord Porter in *Mersey Docks and Harbour Board v Coggins and Griffiths* was referred to at para. 39:

*"An employer will only be liable for torts committed by an agency worker or some other temporary member of his workforce in the employment of another or who is self-employed, if he both controls the work to be done but also the method of performing it."*<sup>24</sup>.

Other more recent cases were referred to where the courts have also recognised that an "employer" may be liable for the torts of agency workers or persons employed by others where they exercised control over the way the worker carries out his work.<sup>25</sup>

The EAT observed that *"the position of Mr Toubkin is indistinguishable from that of Mr Muschett; neither was an employee of either Respondent or Synergy and we presume Mr Toubkin was not obliged to accept work from the agency (or from the Respondent) nor were they obliged to provide work for him."*<sup>26</sup>

Giving the judgment of the EAT, HH Judge Serota QC found that *"there is no support in the authorities (particularly Muschett) for importing into this area of the law the concept of the "temporary worker" used to create vicarious liability at common law in tort."*<sup>27</sup>

He continued: *"As we have said, even if a sufficient degree of control could be established over Mr Toubkin by the Respondent so as to render the Respondent liable at common law in*

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<sup>24</sup> *Mersey Docks and Harbour Board v Coggins and Griffiths* [1947] AC 1 HL, per Lord Porter, para 17

<sup>25</sup> *Dubai Aluminium Company Ltd v Salaam* [2003] 2 AC 366 and *Viasystems (Tyneside) Ltd v Thermal Transfers (Northern) Ltd* [2005] EWCA Civ 1151.

<sup>26</sup> *Ibid* n22 [Para 51]

<sup>27</sup> *Ibid* n22 [Para 63]

*tort for his actions, such has no bearing on issues of liability under employment legislation relating to discrimination.”<sup>28</sup>*

The EAT therefore refused to use the test for establishing vicarious liability for torts under common law to establish liability for discrimination under statute. It distinguished between the “temporary worker” found in cases such as *Mersey Docks and Harbour Board v Coggins and Griffiths*, where the worker was “loaned”, and the agency worker. Yet it could be argued that the control exercised over a worker, whether that person is on loan or supplied through an agency, is so similar as to be identical in each case, yet employees are given less protection from discriminatory acts committed by an agency worker than when a tortious act is committed by a “borrowed servant”.

It may have been possible in the future to claim that an agency worker harassed an employee for reasons relating to a protected characteristic under the Equality Act 2010, rendering the employer liable, as the worker would be classified as a third party under section 40 of the Equality Act 2010.

However, the Government has announced that it will consult on **removing** this provision. *“We are unaware of any cases of third party harassment being brought forward since this protection was introduced to the Sex Discrimination Act three years ago. It is not clear therefore whether it is working as intended and whether, indeed, it is fit for purpose. We will start the consultation in the autumn.”<sup>29</sup>*

To conclude the discussion of this case, although the matter of whether Toubin was an employee was answered in the negative, the further question of whether he was acting as the employer's agent (in the sense that when doing a discriminatory act he was exercising authority conferred by the employer) was remitted to the same Employment Tribunal for consideration. It is to be hoped

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<sup>28</sup> Ibid n22 [Para 63]

<sup>29</sup> [http://www.equalities.gov.uk/equality\\_act\\_2010/faqs\\_on\\_the\\_equality\\_act\\_2010/harassment.aspx](http://www.equalities.gov.uk/equality_act_2010/faqs_on_the_equality_act_2010/harassment.aspx). Accessed 23.6.11

that the potential for unfairness demonstrated by *Mahood* is a consideration in the Government's consultation, since failure to implement the section on third party harassment could lead to workers having little protection if the harassment comes from an agency worker, even though the agency worker will continue to enjoy protection from all forms of discrimination from other workers.

The employment status of an agency worker was considered in the recent decision in *Secretary of State for Business Innovation and Skills v Studders*<sup>30</sup> for a very different reason, but still one that involved a right under the Employment Rights Act – the right to arrears of wages following the insolvency of the employer under s.188. The employment judge had found that an employment contract existed between the insolvent agency and the claimant workers based on the mutuality of obligations between the agency and the workers. The Employment Appeal Tribunal allowed the appeal from the Secretary of State saying that he could find nothing in the agreement that would suggest a contract of employment existed between the worker and the agency; thus the claimants were not entitled to arrears of pay from the insolvent agency.

Thus many have tried, and many have failed, to convince the courts that it is necessary to imply a contract (of either employment or commerce) when none was intended by at least one of the parties. Yet, the injustice done to agency workers, acknowledged by Elias LJ (above), by employers wishing to avoid the liabilities and obligations they would normally owe to an employee, to a third party or indeed to HM Revenue and Customs, continues in the absence of any remedy through the courts.

The Agency Workers' Regulations 2010 should thus be given a welcome, albeit muted, as an addition to the statute books since they provide at least partial relief from the lack of security that comes from working under the conventional tripartite worker/ agency/ client arrangement; however, the rights conferred therein do not go as far as one might have

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<sup>30</sup> UKEAT/0571/10/DM

wished, and do not give rise to the type of full employment contract that the various litigants in the above cases have sought.

The Employment Rights Act 1996, section 209(8) specifically empowers the Secretary of State to amend the Act to extend its operation in relation to any person or employment; thus the statutory power to extend full employment rights to agency workers has been a possibility for many years, and the Agency Workers' Regulations could have been the vehicle for closing the gap that has failed to be addressed by the courts. In the absence of such a provision in the Regulations, it will continue to be a question to be litigated by agency workers in the future.

A common factor in all these cases is that it is the worker and not the employer who wishes to demonstrate the existence of an employment contract. Employers clearly see greater benefits in maintaining the status quo and this is borne out by the extensive use made of agency workers and the opposition of the Confederation of British Industry (CBI) to the Directive as originally drafted. In its response to Parliament it made clear its opposition:

*'The CBI accepts the principle of non-discrimination, but believes that equal treatment should be delivered in a way that balances employee protection with flexibility for employers. Given that there are many possibilities for the way in which equal treatment can be applied within the complex tri-partite relationship between agency worker, agency and user-company, the CBI believes that the current proposal for user-comparisons is too prescriptive. In particular:*

- *in the UK and other Member States, agency workers' primary relationship is with the agency. User-companies do not get involved in the details of an agency worker's terms and conditions, and a requirement to compare conditions between permanent and agency staff would require complex and time-consuming calculations before an assignment could begin.'*

The CBI was clearly concerned that the proposals would put too much of a burden on employers and also claimed that many jobs would be lost in the process.

The CBI also objected to the point in time at which agency workers would gain equal treatment with a comparable permanent worker, originally set at 6 weeks, and proposed that this be extended to 18 months! That it was finally set at 12 weeks is nothing short of a triumph for agency workers in the UK; however, there is some justification for the CBI's concern that the new Regulations will add an unwelcome burden to the employer of temporary staff who will undoubtedly seek to avoid such liabilities and responsibilities when the Regulations come into force in October 2011 by either refusing to take on agency staff in future or ensuring that assignments last no longer than 12 weeks.

The Directive and Regulations follow the comparator model as used in previous EU based legislation relating to fixed term and part time workers; that is, the agency worker must compare himself with a similarly employed worker at the client's place of work.

Regulation 3 gives a definition of an agency worker

**3.—(1)** In these Regulations “agency worker” means an individual who—

(a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and

(b) has a contract with the temporary work agency which is—

(i) a contract of employment with the agency, or

(ii) any other contract to perform work and services personally for the agency.

Here the possibility is made explicit that a worker could be in a contract of employment with the *agency* (a proposition which has been explored in a number of cases, though never resulted in such a finding)<sup>33</sup>. Agencies have in the past refused to give employment contracts to workers, and it is doubtful that there will be a change in this policy despite this provision.

The Regulations provide new rights for all agency workers. If an organisation hires agency workers, it must ensure that they can access all facilities normally available to permanent

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<sup>33</sup> E.g. *Dacas v Brook St Bureau (UK) Ltd* [2004] EWCA Civ 217; *Wickens v Champion Employment* [1984] ICR 365

employees, and also that they can access information on job vacancies within the organisation from the first day of their assignment.<sup>34</sup>

After twelve weeks in the same job the worker will enjoy equal treatment in other respects too, when compared with a relevant comparator, that is someone working for and under the supervision and direction of the hirer, and engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills.<sup>35</sup>

**Regulation 5.**—(1) Subject to regulation 7, an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer—

- (a) other than by using the services of a temporary work agency; and
- (b) at the time the qualifying period commenced.

**7.**—(1) Regulation 5 does not apply unless an agency worker has completed the qualifying period.

(2) To complete the qualifying period the agency worker must work in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments.

This would entitle the worker to the same terms and working conditions relating to pay, annual leave, rest breaks, duration of work time and night time work<sup>36</sup>, and comes into effect after an agency worker completes a twelve week qualifying period in the same job with the same hirer. This is a significant restriction on the opportunity for agency workers to gain such rights. According to the BERR report, “the duration of assignment is less than three months for around 55 per cent of agency workers who knew the length of time they had been on their current assignment.”<sup>37</sup> It is therefore unlikely to benefit more than 45% of agency workers *on current statistics*, but it is almost certain that employers will be careful

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<sup>34</sup> Reg 13

<sup>35</sup> Reg 13(a)

<sup>36</sup> Reg. 6(1)

<sup>37</sup> No. 4 at p. 7

in future not to take on agency workers for more than 12 weeks in order to avoid according them these extra rights.

Pay is also given a narrow meaning and includes any pension, fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise, but excludes any payments or rewards<sup>38</sup> within Regulation 6 (3) which, it could be argued, still leaves the agency worker at a severe disadvantage compared with permanent employees. Regulation 6 (3) is a comprehensive list of monetary advantages such as occupational sick pay, maternity and paternity pay, redundancy compensation, expenses incurred in the course of the work done, bonuses which are not attributable to amount or quality of work, and so on, all of which are excluded from the meaning of pay for these purposes.

These rights are not retrospective and for those agency workers already on assignment, the twelve week qualifying period will start from 1 October 2011.

Of course, agency workers will continue to enjoy a range of basic rights and the Regulations do not affect these.

All workers, including agency workers, are entitled to the following rights:

- 5.6 weeks (28 days) paid holiday<sup>39</sup>
- rest breaks and limits on working time<sup>40</sup>
- no unlawful deductions from wages<sup>41</sup>
- the National Minimum Wage<sup>42</sup>
- not to be discriminated against under any of the equality legislation<sup>43</sup>
- protection under health and safety laws<sup>44</sup>

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<sup>38</sup> Reg. 6(2)

<sup>39</sup> Reg. 13 Working Time Regulations 1998 (as amended)

<sup>40</sup> Working Time Regulations 1998 (as amended), Part II

<sup>41</sup> Wages Act 1986, Part I

<sup>42</sup> Section 1, National Minimum Wage Act 1998

<sup>43</sup> Section 41 Equality Act. Although it is significant that in *Muschett* the appellant was not protected from race discrimination under s.78(1) of the Race Relations Act 76 as he was found not to be employed under a contract 'personally to execute any work or labour'.

<sup>44</sup> Section 3 Health and Safety at Work Act 1974



However, there is no reference to other important rights available to permanent staff. Notice periods are a significant omission and so agency workers can still be removed with little or no notice. There is no explicit access to disciplinary or grievance procedures, and the exclusion of pension arrangements “would make any attempt to lift the status of temporary agency workers to the same status as permanent workers meaningless.”<sup>45</sup>

The severe restrictions on rights for agency workers, the most significant being the obligation to be on assignment for 12 weeks to qualify for these contractual rights, is likely to mean that very few such workers will eventually benefit from the Regulations, and that employers will be free to continue to avoid treating agency staff equally with permanent staff. Case law will therefore continue to be of significant importance to the fate of agency workers in future.

*Muschett v HMPS* is authority for the proposition that an employment contract cannot be created by the mere, and unilateral, wish of the putative employee and that such a contract can only be implied by law on the basis of necessity. The Court of Appeal in *Tilson v Alstom Transport* reached the same conclusion. The EAT in *Mahood v Irish Centre Housing* followed the same line of reasoning in refusing to find a contract of employment between the respondent and an agency worker that may have given rise to vicarious liability for the alleged discriminatory conduct of said worker. Finally, the case of *Secretary of State v Studders* demonstrates that agency workers are again disadvantaged in that they are not entitled to arrears of pay from an insolvent employer since the agency was not an employer. These cases collectively confirm that there is little prospect in the future of agency workers gaining employment status, either through an implied contract of employment with the agency or with the end-user. The new Regulations also give little in the way of protection and may well result in temporary contracts in the future being limited to under 12 weeks in duration, further diminishing the stability of work patterns for such workers.

In summary, recent case law has done nothing to extend protection towards the agency worker in terms of rights to be protected from unfair dismissal, to redundancy pay, to arrears of wages on the insolvency of the employer or even to protection from race

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<sup>45</sup> M Sargeant, and D Lewis, *Employment Law*, 4<sup>th</sup> edition, Pearson Longman; 2008, p. 57

discrimination; and for those who share the workplace with agency workers it appears there is to be no protection from harassment directed at them by such workers. However, what we are witnessing is a period of relatively settled case law which is unlikely to alter significantly in the foreseeable future, while legislation will almost certainly prove to be no great defender of rights for this group of workers when it comes into force later in 2011. Agency workers may indeed find themselves worse off as employers shy away from the potential to incur responsibilities and obligations towards them and look to other methods of recruiting temporary staff, leaving agency staff out in the cold.