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## EMPLOYMENT RIGHTS: AGENCY WORKERS: James v Greenwich Council **and subsequent cases**

Agency workers in the UK face a number of difficulties due to their vulnerable position in the job market. They have no security of tenure, are generally paid less than permanent workers, terms and conditions are often less favourable and access to statutory benefits is mainly limited to the national minimum wage, statutory sick pay and maternity/ paternity pay and state pension.[1] Employees, on the other hand, who work under a contract of service, or employment, are in a much more secure position with their rights relating to dismissal and redundancy being possibly the most important.

To counter the effects of the resulting lack of protection for certain groups of workers, including agency workers, courts and tribunals have in the past been only too ready to imply a contract of employment where this was not the intention of the parties. This was often for reasons of social policy, such as where the case involved a claim for compensation for breach of duty of care; examples appear in *Walker v Crystal Palace [1910][2]* and *Ferguson v John Dawson [1976][3]*. In such cases, to deny the existence of a contract would have been to prevent the claimant from having the capacity to claim compensation for their injuries. Yet, to imply a contract where this was not the intention of the parties *could* be considered a step too far, despite the view of the Court of Appeal in *Dacas v Brook St Bureau (UK) Ltd [4]*. In this case it was said that the absence of an express contract between an agency worker and the end-user *does not preclude the implication of a contract of service between them*.<sup>[5]</sup> However, subsequent cases, discussed below, have firmly reversed the notion that implication of a contract between the worker and either the end-user or the agency is the appropriate means of giving them greater rights, and suggest that greater protection for agency workers should be a concern for the legislator rather than the courts.

The issue has been considered recently in a number of cases that have attempted to clarify when, and if, it is appropriate to imply a contract of employment, and with whom. The line of cases began at the end of 2006 with *James v Greenwich Council*<sup>[6]</sup>, followed shortly afterwards by *Craigie v London Borough Council of Haringey [2007][7]*. Both cases were decided by the Employment Appeal Tribunal, and on each occasion the EAT was reluctant to find that a long-standing worker was an employee of the agency. The EAT published two further judgements in March of this year; these were *Astbury v Gist [2007][8]* and *Heatherwood and Wexham Park Hospitals NHS Trust v Kulubowila*<sup>[2007].</sup><sup>[9]</sup> In May, the decision in the last in the line of cases, *Kalwak v Welsh Country Foods Ltd [2007][10]* was handed down by the EAT.

In the first of these cases, the appellant, Mrs James, was supplied by an agency, BS Project Services Ltd, to carry out work for Greenwich Council, the end-user. She had been dismissed by the Council following a prolonged sickness absence, during which a replacement worker had been supplied by the agency. In order to claim unfair dismissal, she first had to show that there existed between her and the Council a contract of employment, as defined under s.230 of the Employment Rights Act 1996. Her contention was that, despite having no express contract with the Council, there was an *implied* contract. Her reasoning was that she had worked for the Council for five years and had been treated in all respects like those employees with permanent contracts. Following the guidance given by the Court of Appeal in *Dacas v Brook St Bureau*<sup>[11]</sup>, in which mutuality of obligation was held to be a necessary factor in a contract of employment, the tribunal

had concluded that this essential element was missing, and therefore declined to imply a contract between Mrs James and the Council. She appealed on the basis that the tribunal had erred in law and reached a perverse decision. Although she lost her appeal, the EAT (Elias P presiding) did take the opportunity to give some useful guidelines on implying contracts of employment where an agency worker is involved.

Although s.230(1) of the Employment Rights Act 1996[12] is a particularly unhelpful section, giving as it does a somewhat circular definition of what is meant by an employee, the courts have, over a number of years, devised certain tests and identified particular criteria which have proved invaluable in deciding whether or not a contract of employment (a contract *of service*) exists, and the worker is therefore an employee, or whether it is merely an agreement to provide a service (a contract *for services* i.e. self-employment).

In *Ready Mixed Concrete v Minister of Pensions* 1968[13] Mackenna J identified the following three conditions necessary for the existence of a contract of service:

- i. The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master;
- ii. He agrees expressly or impliedly that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master;
- iii. The provisions of the contract are consistent with its being a contract of service.

This passage has since been followed in a number of cases.[14] In *Carmichael v National Power*, the Lord Chancellor, Lord Irvine of Lairg noted that there was “an absence of irreducible minimum of *mutual obligation* necessary to create a contract of service”.[15]

Although there has been some dispute as to what these mutual obligations consist of, Elias P states in *James v Greenwich Council* that “the nature of the duty must involve some *obligation to work*”. [16] He goes on to summarise:

“In short, some mutual irreducible minimal obligation is necessary to create a contract; the nature of those mutual obligations must be such as to give rise to a contract in the employment field: and the issue of control determines whether that contract is a contract of employment or not.”[17]

In agency cases, there is a triangular arrangement whereby the agency and worker have a contract under which he or she agrees to provide services to the end-user, and the agency and the end-user have a contract whereby the agency agrees to provide that worker. There is usually no *express* contract between the worker and the end-user. There is, however, a *relationship* between them, and no doubt a significant element of control being exercised by the end-user over the worker. The question that has perplexed the courts is “whether that work is being provided *pursuant to a contractual obligation* (emphasis added) between the end-user and the worker”. [18]

In *Dacas*, Mummery LJ appeared to recognise the absurdity of the no-man's land in which agency workers find themselves by suggesting the possibility that there *could* be a contract between a worker and the end-user, and that a tribunal should always consider this possibility by looking at the evidence “which includes, but is not confined to, the contractual documents.”[19] In other

words, the tribunal should not confine themselves to the written documents but should consider whether the evidence as a whole would give rise to the implication of a contract of employment arising from a “necessary inference”.

Sedley LJ agreed with this, pointing out that “the conclusion that Mrs Dacas is employed by nobody is simply not credible”. To deny the existence of an employer would be to remove the element of vicarious liability, and thus deny potential victims of torts committed by the worker a remedy from an insured party. However, it was later recognised by the Court of Appeal in *Cable and Wireless plc v Muscat* [20] that vicarious liability *can* arise even if the agency worker is not an employee, thus negating the necessity of finding a worker to be an employee simply on grounds of policy.

Munby J had disagreed, considering that the crucial point was that in *Dacas* the right to control and the duty to remunerate were in different hands. However, this analysis was rejected in the *Muscat case*, and the majority approach in *Dacas* was confirmed. The Court of Appeal upheld the decision of the Employment Tribunal that Muscat had an implied contract with Cable and Wireless, despite being paid by an agency, Abraxas. The court emphasised the importance of looking at the arrangements *in their entirety*: the history of the relationship began as one of employment, but Muscat had been required by his employer to supply his services through a limited company, thus leaving him no choice in the manner of the relationship. Thus the facts differ significantly from *Dacas*, resulting in a different finding, but the approach of the court was exactly the same – “to consider the total situation of the parties.”[21] Muscat owed a personal obligation to provide his labour and the employers had an obligation to accept it.

The crucial point being emphasised in *Muscat*, and by Mummery LJ in *Dacas* was that, in order to imply a contract to give business reality it must be *necessary* to imply it. This follows the judgement of Bingham LJ (as he then was) in *The Aramis 1989*, concerning a commercial contract.[22] Where the agency agreements were intended, not to reflect the true nature of the relationship, but rather to obscure the reality, the courts should be prepared to find that an employment contract exists. This view was expressed by Gibson LJ in *Express and Echo Publications v Tanton 1999*. [23]

Mrs James in the present case accepted that the original agreement was intended by both her and the agency to be a true contract for services, and was not intended to be a sham. Her argument was that after a period of time the arrangement as set out in the documentation was varied, and that a contract of employment could be implied through custom and practice in order to give business efficacy to the relationship. The Council argued, *inter alia*, that there was no mutuality of obligation, the “irreducible minimum” referred to by Lord Irvine in *Carmichael v National Power plc*.

The EAT agreed with the Council’s view and dismissed the appeal. The fact that Mrs James had a desire to create a contract of employment did not support her argument for implication of such an agreement, the Council never having expressly or impliedly suggested that this was its desire or intention.

The conclusions and observations of the EAT can be summarised as follows:

1. Following *Dacas*, circumstances may exist which could lead to the inference of an implied contract in some cases.
2. The focus should be on *mutuality of obligations* and whether it was *necessary* to imply such a contract.
3. The mere passage of time is insufficient to give rise to an implied contract.
4. In agency cases, the focus should be on whether the way the contract is in fact performed as if it was merely an arrangement between an agency and a worker, or whether in fact it is only consistent with it being an implied contract between the worker and the end user.
5. That the money paid by the end-user to the agency is not a simple matter of indirectly paying the wages of the worker, but includes elements of profit and expenses for the agency. It is a payment for services supplied by the agency and cannot be considered as remuneration for the worker.
6. Further, the fact that the end-user cannot insist on the provision of a particular worker from the agency is further evidence of there being no contract of employment.
7. That an implied contract between worker and end-user will be rare, but may occur:
  - i. when there was either a pre-existing employer/employee relationship, such as in *Muscat*, where the only change is in who pays the wages, or;
  - ii. when, *subsequent* to the commencement of the worker/end-user relationship, some words or conduct between the parties are suggestive of a relationship that is consistent with the implication of a contract; the worker should then no longer be working according to the agency arrangement but under one of mutual obligation with the end-user.[24]
8. The EAT recognised the vulnerability of agency workers, who are far less well protected than employees, but also warned that it was for the legislature to undertake a careful analysis of the benefits and disbenefits of the system, saying that the common law could “only tinker with the problem on the margins.”[25]

Hot on the heels of this judgement came a further case which took a similar view. In *Craigie v London Borough of Haringey* [26], Bean J considered the appeal of Mr Craigie who had worked at the Local authority for over a year; when his services were dispensed with, he claimed that he was an employee and therefore qualified to claim that he had been unfairly dismissed.

The contract between Craigie and the agency, Aptus Personnel Support Staff Ltd, provided that he was not an employee of the agency and the agency did not exercise any day to day control over Craigie. Thus, the EAT had to consider whether the Claimant was employed under an *implied* contract of service with *Haringey Council* after a finding by the Employment tribunal that there was insufficient mutuality of obligation between the parties to support such a finding.

The EAT considered the cases of *Dacas*, *Muscat* and *James*. Bean J reminded us that the observation that the council were *probably* employers of Mrs *Dacas* was obiter (since the action was brought against the agency and not the council). The Court of Appeal in *Muscat* clarified the position. Although it was submitted to the court that *Dacas* was binding authority for the proposition that in circumstances such as these there should be a finding of an implied contract of employment between the worker and end user, the court disagreed.

Later in the judgement the court referred to the principle of necessity, contained for example in

the judgement of Bingham LJ, as he then was, in *The Aramis* [27] that:

**“No contract should be implied on the facts of any given case unless it is necessary to do so, necessary that is to say in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.”**

The court then cited an observation in paragraph 16 of the judgement of Mummery LJ in *Dacas* that:

**“Depending on the evidence in the case a contract of service may be implied – that is deduced – as a necessary inference from the conduct of the parties and from the circumstances surrounding the parties and the work done.”**

Bean J in *Craigie* observed:

**“The court in *Muscat* took that, as I do, to be an express appreciation of the principle referred to in *The Aramis*, that the inference must be a necessary one and not merely a possible or even a desirable one.”[28]**

From a legalistic point of view, this conclusion is highly desirable and will be welcomed by both agencies and employers, since it provides a high degree of certainty. Contracts of employment will not arise by implication unless such an inference is a necessary one to make in the circumstances of that particular case.

This would also appear to be the approach of the EAT in *Astbury* and *Heatherwood*, both decided by Judge Peter Clark. In *Astbury*, he took the view that, since Parliament could have included protection for contract workers against unfair dismissal for whistle-blowing, but did not do so, then it was not for the courts to provide such protection.[29] In *Heatherwood*, Judge Clark considered the question of whether the implication of a contract of employment was “necessary” under the *Aramis* test and decided that it was not.

However, from the point of view of the average agency worker, these decisions must have been a great disappointment, particularly following the encouraging remarks made *obiter* in *Dacas*.

Such workers may nevertheless take some heart from the most recent case of *Kalwak v Welsh Country Foods Ltd* [2007][30] in which the EAT heard an appeal from the Employment Tribunal following a finding that, in the particular circumstances of the case, an agency supplying workers to a third party had entered into contracts of employment with those workers. The EAT considered and rejected various grounds of appeal.

The appellant, Consistent Group Ltd, was an employment agency; the respondents were, firstly, Mrs Kalwak and others, who were provided by the agency to the second respondent, a company named Welsh Country Foods Ltd.

The workers had claimed, *inter alia*, that they had been dismissed for proposed trade union membership or activities, contrary to s.15 of the Trade Union and Labour Relations (Consolidation) Act 1992. To be successful in such a claim they first had to show that they were employees as defined by s.230 of the Employment Rights Act 1996, and if so, whether they were employees of the agency or of Welsh Country Foods. The tribunal had concluded that they were not employed by the latter, but that they did have a contract of employment with the agency due to the “sufficient personal obligation” of the workers and the high degree of control exercised over them by the agency. This was highlighted by the tribunal chairman in summarising the case:

**“...I noted the frequency with which the first respondents in the documents (Consistent) sought to emphasize the absence of rights - holiday pay, fringe benefits, the right to complain of unfair dismissal. These were their real concern. They in practice retained a firm measure of effective control over the claimants’ working lives. They told them when and where they had to work, they might deny them days off, they provided them with transport and accommodation (taken away, as it proved, without notice). They ensured further economy in the claimants’ employment by charging them for domestic services that were not provided.”**

In other words, the agency exploited a highly vulnerable, non-unionised group of mainly Polish immigrants, and the decision is therefore right and fair; but it should be remembered that the circumstances were highly exceptional, and we are unlikely to see a sudden plethora of cases where agency workers are found to be employees.

The relative helplessness of this group of workers, and the difficulties faced by the courts in coming to sensible, but fair, decisions highlights the necessity for legislation in this area. The EAT in *Craigie* commented that the law regarding the status of long term agency workers is far from satisfactory and took the view that legislation was need to change it.

Such legislation has been put forward both in the UK and in Europe. However, the draft European Temporary Workers Directive has no immediate prospect of implementation due to the lack of support from some member states. At home, a Private Member’s Bill, the Temporary and Agency Workers (Prevention of Less favourable Treatment) Bill, was presented by Paul Farrelly MP in December 2006. It is a Bill to prohibit discrimination against temporary and agency workers, and to make provision about the enforcement of rights for such workers. The second reading is now scheduled for 19<sup>th</sup> October 2007 but, without government support is unlikely to progress. It is therefore submitted that, although some progress has been made by the courts towards a fairer deal for agency workers, it is unlikely that the legal position of agency workers will be changed for the better for some considerable time.

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[1] *Agency Workers: Counting the Cost of Flexibility*: TUC Equality and Employment Rights Department, February 2007

[2] [1910] 1 K.B. 87, CA

[3] [1976] 1 W.L.R. 1213; [1976] 3 All ER. 817; [1976] 2 Lloyd's Rep. 669; 8 B.L.R. 38; [1976] I.R.L.R. 346; 120 S.J. 603, CA

[4] [2004] EWCA Civ 217

[5] Para 17

[6] Appeal No. UKEAT/2006/0006/06

[7] Appeal No. UKEAT/2007/0556/06

[8] [2007] All ER (D) 480 (Mar)

[9] [2007] All ER (D) 496 (Mar)

[10] Appeal No. UKEAT/0535/06/DM

[11] [2004] EWCA Civ 217

[12] ( S.230) In this Act 'employee' means an individual who has entered into or works under...a contract of employment

[13] Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497

[14] Nethermere (St Neots) Ltd v Taverna & Gardiner [1984] IRLR 240, 245 per Stephenson LJ; Clarke v Oxfordshire Health Authority [1998] IRLR 125, Sir Christopher Slade at para. 22.

[15] Carmichael v National Power PLC [2000] IRLR 43, Lord Irvine LC at para. 18

[16] para. 16

[17] para. 17

[18] para. 21

[19] Dacas v Brook St Bureau (UK) Ltd [2004] ICR 1437 at para. 17

[20] [2006] IRLR 354 at para 27

[21] Mummery LJ at para. 12, Dacas v Brook St Bureau (UK) ltd [2004] ICR 1437

[22] [1989] 1 Lloyd's Rep 213 at 224

[23] Express and Echo Publications Ltd. V Tanton [1999] ICR 693, 697G

[24] paras. 52-60

[25] para. 61

[26] Appeal No. UKEAT/0556/06/JOJ

[27] *The Aramis* [1989] 1 Lloyd's Rep 213

[28] para. 13

[29] para. 29

[30] Appeal No. UKEAT/0535/06/DM