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Lane, Jackie

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# Workplace underclass

New EU regulations on agency workers will bring some relief from insecurity but will benefit few and do little to clarify workers' employment position. **Jackie Lane** reports



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THE STATUS OF the agency worker compared to the typical employee continues to be debated and examined in the courts, but the status quo appears to remain, despite several attempts by agency worker claimants to be recognised as employees.

However, there is at least the possibility for such workers to gain equality with permanent employees in the form of the Agency Workers' Regulations 2010, which came into force in October 2011.

Applications have come before the tribunals in recent years for a number of different reasons where it is necessary to establish employment status. The claims have centred around wrongful and unfair dismissal, vicarious liability for discriminatory acts, liability to pay tax and national insurance, health and safety, and entitlement to rights on insolvency of the agency.

Only employees as defined under section 230(1) of the Employment Rights Act 1996 may claim protection from unfair dismissal and redundancy, and certain positive rights such as minimum notice periods. The right not to be discriminated against under the

Equality Act 2010 applies to the wider category of "worker", while protection under the Health and Safety at Work Act 1974 and related legislation is extended to all workers and visitors, including the self-employed and agency workers.

## Status question

A number of recent cases have required tribunals and courts to consider the status of agency workers in order to determine their legal rights. In *Muschett v HM Prison Service* [2010] EWCA Civ 25, the appellant, Mr Muschett, went to work for HMPS as a temporary worker, placed there by an agency, Brook St (UK) Ltd.

The appellant had made a claim against HMPS for race discrimination under the Race Relations Act 1976 which required evidence that he was either an employee of HMPS or in its employment in the wider sense. In addition, he had claimed that he had been either wrongfully or unfairly dismissed, which also required him to demonstrate that he was an employee of HMPS.

Neither the employment tribunal nor the Employment Appeal Tribunal (EAT) accepted that he

was employed in either sense. Mr Muschett appealed unsuccessfully to the Court of Appeal. The courts relied on previous case law which was almost uniformly consistent in refusing to imply an employment contract where none existed.

Shortly afterwards, the case of *Tilson v Alstom Transport* [2010] EWCA Civ 1308 came before the Court of Appeal, based on similar facts and grounds of appeal. The question that had originally to be settled, in order for the employment tribunal to be able to hear his claim for unfair dismissal, was whether an agency worker, Tilson, had a contract of service with the end user (Alstom).

The tribunal had decided that an employment contract did exist between the two parties and that Tilson had been unfairly dismissed. But this finding was overturned by the EAT and Tilson appealed that decision.

The appellant had worked for over two years for the respondent and was fully integrated into the business; there was evidence of mutuality of obligations and a significant degree of control. These factors were indicative of a contract of service. However, no tax or National Insurance was deducted from his pay, which would normally be evidence of self-employment.

Tilson enjoyed certain benefits as an agency worker: he received considerably higher wage than comparable employees of the company, and his agency worker status brought certain tax advantages.

When he was dismissed by the agency on Alstom's instructions, he claimed to have had an employment contract with Alstom in order to be able to pursue a claim for unfair dismissal. He argued that as a matter of law he had been engaged by Alstom under such a contract – that is, that it was necessary to imply an employment contract in the absence of an express one.

**Hard labour: Position of temporary staff likely to remain weak**

Elias LJ, giving the judgment of the Court, said: "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."

## Vital factor

Employment status becomes a vital factor when assessing vicarious liability which may arise where an employee in the course of the employer's 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? That was the question raised in *Mahood v Irish Centre Housing UK* EAT/0228/10ZT, where an allegation of race discrimination was brought against the employer, the act having been committed by an agency worker against an employee of the respondent.

It was held that an employer is only liable for the discriminatory acts committed by an agency worker who was part of his workforce if either (a) the worker became its employee as defined in cases such as *James v London Borough of Greenwich* [2008] ICR 545, or (b) 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.

The EAT in this case refused to use the test for establishing vicarious liability for torts under common law to establish liability for discrimination under statute. It may, however, be possible in future to claim that an agency worker harassed an employee for reasons relating to a protected characteristic under the Equality Act 2010, which would render the employer liable, as the worker would be classified as a third party under section 40. However, this area of law remains uncertain while the government continues to consult over this provision.

The decision in *Secretary of State for Business Innovation and Skills v Studders and Ors* UKEAT/0571/10/DM involved an appeal from the Secretary of State following a finding of employment status between the respondents and the agency, Unity, which had placed them with

the client engineering company, Mathers.

Unity had become insolvent and the claimants (respondents to this appeal) were found to be employees of Unity by the employment judge. It followed that, pursuant to section 188 of the Employment Rights Act 1996, the Secretary of State was bound to make certain payments to them of arrears of wages under section 182 of the Act.

The employment judge had made a declaration that the claimants were employees of the agency. He said that he was "satisfied that during the assignment at the foundry there was a mutuality of obligations between the claimants and the insolvent company."

The appeal judge considered that this "flew in the face of the terms of the contract"; he could find nothing in the agreement that would suggest that the claimants were employees of the agency, and the appeal was allowed.

## Partial relief

The Agency Workers' Regulations 2010 will provide at least partial relief from the lack of security that comes from working under the conventional tripartite worker/agency/client arrangement. But the rights conferred therein do nothing to clarify the position of the agency worker as an employee of either the agency or the client.

The UK is probably the largest market for agency staff in the European Union, and the regulations will almost certainly lead to a review by employers of the benefits of taking on temporary agency workers. When the regulations come into force it is likely that employers will either refuse to take on agency staff or ensure that assignments last no longer than 12 weeks – the point at which the worker gains a measure of equality with permanent staff in the organisation.

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

After 12 weeks in the same job, the worker will enjoy equal treatment in other respects too: he will be entitled to the same terms and working conditions relating to pay, annual leave, rest breaks, duration of work time and night time work. To claim equality of rights, the agency worker must compare himself with a similarly employed and qualified worker at the client's place of work.

Pay is given a narrow meaning and includes any pension, fee, bonus, commission, holiday pay or other emolument referable to the employment, but excludes any payments or rewards within regulation 6(3), 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, and bonuses which are not attributable to the amount or quality of work.

These rights are not retrospective and for those agency workers already on assignment, the 12-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 of paid holiday;
- rest breaks and limits on working time;
- no unlawful deductions from wages;
- the national minimum wage;
- not to be discriminated against under the equality legislation; and
- protection under health and safety law.

The strict limitations on rights for agency workers is likely to mean that very few such workers will eventually benefit significantly from the regulations, and despite some obvious attempts by employment judges to do justice on the case by implying an employment contract in order to confer rights on an agency worker, the unenviable position of such workers is unlikely to change significantly to their advantage in the near future.

*Jackie Lane is a senior lecturer in law at the University of Huddersfield*