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Agency workers: where are we headed?

The issue of the employment status of an agency worker is one which has vexed the Employment Tribunals (and the Appeal Courts) for a number of years.

The situation is really rather complex. In a typical relationship (although not exclusively) the agency workers have a contract with the agency themselves only and the agency has a contract with the end-user, the worker does not have a written contract with the end-user. This is known as a triangular relationship.

The first case of note was Dacas v Brook Street Bureau (UK) Ltd [2004] EWCA Civ 217. This case was a classic example of an agency worker in a triangular relationship. Mrs Dacas was on the books of Brook Street Bureau and was sent to work at a hostel run by Wandsworth Borough Council. She brought a claim for unfair dismissal against both Brook Street Bureau and Wandsworth Borough Council. The Employment Tribunal held that she was not employed by the Council because there was no contractual relationship between them. The Tribunal held that it was not possible to imply a contract where there was not one. Mrs Dacas appealed against the decision that she was not employed by the agency, however, she did not appeal against the decision with regard to the Council. At the time her decision not to do so was not particularly surprising because the rationale behind the decision seemed fairly sound. However, when the matter eventually came before the Court of Appeal, it made comments which made it possible to imply a contract of employment with the end-user, in this case the Council. However, these comments did not form any precedent because the Council were not a party to the proceedings by then.

In 2006, the issue arose again in the case of Cable & Wireless plc v Muscat [2006] EWCA Civ 220. Mr Muscat was engaged by Exodus as a contractor via a one man limited company that invoiced for his fees. Cable & Wireless took over Exodus and Mr Muscat continued to work for them on the same basis. However, Mr Muscat was eventually told to go through an agency which he did. When the work stopped, Mr Muscat claimed unfair dismissal and Cable & Wireless defended the claim using the rationale referred to above, i.e. there was no contract between themselves and Mr Muscat. The Employment Tribunal, The Employment Appeal Tribunal and the Court of Appeal all held that Mr Muscat was an employee of Cable & Wireless. It is fair to say that the decision did take into account the fact that Mr Muscat was, without doubt, an employee prior to the setting up of the agency worker relationship. However, it was felt in most circles that this represented a definitive indication that end-users were no longer able to hide behind the agency relationship to avoid employment liabilities. The extending of employment rights to agency workers was very much seen as the “next big thing” in employment law.

However, this year has seen a number of cases which indicate that the Courts are not going to be as readily inclined to find employment relationships between agency worker and end-user as was initially thought. In James v London Borough of Greenwich [2007] IRLR 168, Mrs James claimed unfair dismissal by the Council for whom she “worked” through an agency. Rather surprisingly, given all the above, her claim failed. Mrs James was trying to imply a contract of employment, where there had never been one (as opposed to the Muscat case) and the EAT found that in order to do so it must consider whether it was necessary to imply such a contract. The EAT felt that it was quite possible for these arrangements to be entirely

consistent with an agency arrangement and therefore no need to imply a contract with the end-user (and, indeed, to do so would be totally contrary to the parties' express contractual agreements). The EAT gave some useful guidance as to how the Tribunals should deal with agency cases. It stated that where there is a genuine and implemented agency relationship there will rarely be a need to imply a contract of employment with the end-user. It seems that some conduct effectively breaking the agency relationship is needed.

Hot on the heels of the James have come two more EAT decisions on the point. In Craigie v London Borough of Haringey UKEAT/05556/06/JOJ, the EAT followed the James decision and held that, whilst the law relating to agency workers was not ideal, changes in legislation would be necessary to effect a change in the law. However, in cases such as this (which was very similar factually to the Dacas case) it was simply not necessary for a contract to be implied because the agency relationship set out perfectly the relationship between the parties.

In Heatherwood and Wexham Park Hospitals NHS Trust v Kulubowila & Others UKEAT/0633/06/LH, the EAT overturned an Employment Tribunal decision implying an employment contract between the agency worker and the end-user. The EAT specifically pointed out that it was not its job to lay down social policy where the legislation had failed to do so. In particular, it noted that legislation could easily extend the law of unfair dismissal to cover workers, but the Government has chosen not to.

The upshot of the recent case law is that just because an agency worker appears to be an employee of the end-user (and in some cases may have been so for many years), that is not in itself any reason to imply a contract of employment between the two and usurp the agency arrangement. Whilst the case law is now consistent on this issue, it is highly likely that we will see some legislation in the near future as there does appear to be a compelling argument that some agency workers may be left high and dry without any employment rights against any parties in scenarios where, on any analysis, this would seem unfair. However, we would suggest that any new legislation needs to bear in mind that many agency arrangements are entered into perfectly voluntarily to the advantage of both the worker and the end-user. These are arguments that have been well rehearsed in debates surrounding employment/self-employment status.

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