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Not a temporary fix

Tom Poole welcomes the new authoritative guidance on temporary workers given by the Court of Appeal in the recent *James v London Borough of Greenwich* case

THE QUESTION WHETHER a claimant in an unfair dismissal case is an employee within the meaning of the Employment Rights Act 1996 (the 1996 Act) is increasingly litigated before employment tribunals in unfair dismissal cases, particularly those involving workers on the books of employment agencies.

This is hardly surprising given that the length of the qualifying period for protection has been reduced to one year, making it possible for "temporary workers" to qualify for protection. In addition, the maximum award of compensation in unfair dismissal claims has been substantially increased and the number of workers engaged under arrangements with employment agencies has grown to an estimated 1.3 m.

Authoritative guidance

Since *Dacas v Brook Street Bureau (UK) Ltd* [2004] ICR 1437, with its emphasis on an implied contract of employment, the Employment Appeal Tribunal (EAT) has considered the status of agency workers in over 10 substantive appeals. Unhappily, however, it remained extremely difficult for practitioners to advise claimants and respondents which way the wind might blow, often due to the unsatisfactory and incomplete evidence of the facts relevant to the legal analysis of the relationship between the worker, the agency and the end user. It is for this reason that the Court of Appeal considered it high-time to give authoritative guidance on the subject and did so in *James v London Borough of Greenwich* [2008] EWCA Civ 35.

The issue on appeal was whether the employment tribunal (ET) erred in law in its decision that Ms James was not an employee of the respondent London Borough of Greenwich (the council). Ms James had worked for three years for the council through a well-known employment agency (the agency) when the council decided to replace her with another worker from the agency.

In the absence of an express contract of employment, the ET considered whether it was necessary to imply a contract of employment between Ms James and the council.

The ET focussed on the absence of mutuality of obligations, notably the lack of any obligation on the council to provide Ms James with work and the fact that during her absence through sickness the agency provided another worker for the council. In the circumstances, the ET found that there was no basis to imply a contract of employment between Ms James and the council.

The EAT held that there was no error in law in the ET's decision ([2007] IRLR 168). Elias J gave some general observations on how tribunals might approach the implication of a contract with the end user and made clear his disagreement with the view expressed by Sedley LJ in *Dacas* that the mere passage of time could justify an implied contract between the worker and the end user as a matter of necessity. The EAT pointed out that "something more is required to establish that the tripartite agency analysis no longer holds good".

Dismissing the appeal, the Court of Appeal held that, although Ms James could hardly be described as a "temporary worker", the ET had correctly applied the test of necessity in assessing whether a contract of employment should be implied between her and the council. The Court of Appeal also expressed its approval of the guidance handed down by the EAT, which is now likely to be instrumental in all future agency worker cases.

Moreover, the Court of Appeal analysed the state of the authorities. Mummery LJ held that *Dacas* is not authority for the proposition that the implication of a contract of service between the end user and the worker in a tripartite agency situation is inevitable in a long term agency worker situation. It is only a possibility, the outcome depending on the facts found by the ET in the specific case.

As a result, the question whether an "agency worker" is an employee of an end user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements. In this regard, practitioners will remember that labels are not a substitute for legal analysis of the evidence.

As a postscript Mummery LJ noted that it would be very unusual for an appeal to the EAT or the Court of Appeal to have a real prospect of success if the ET applied the correct test of necessity, as explained by Elias J in the EAT's judgment. He also noted that some litigants and their advisers appeared to have unreasonable expectations about what courts and tribunals can legitimately do to remedy their grievance that the statutory right not to be unfairly dismissed was confined by Parliament to workers who have a contract of service with the respondent. Although the courts are "fully aware" of the controversy about the absence of job protection for agency workers, it is not for them to express views about a change or to initiate a change.

Growth of a two-tier workforce

Although the question of the status of agency workers can be answered by application of common law principles of implied contract, there is a growing tension between the need for a flexible labour market and the unsatisfactory growth of a two-tier workforce. There are plainly arguments of social and economic policy as to whether the present position under Part X of the 1996 Act should be maintained, particularly where the individual renders services to the same person for a significant period of time. Unless and until Parliament alters the position, practitioners must continue to advise in accordance with the principles of the law of contract, as set out clearly in the judgments of Mummery LJ and Elias J in the EAT, and analyse carefully the facts of each case.

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