

Number 18

Agency Workers – But Are They Your Employees?

CARE HOMES BRIEFING

The recent Court of Appeal decision in the case of *Dacas –v- Brook Street Bureau* suggests that agency workers could be employees of the end client, with resulting rights not to be unfairly dismissed. As a result of this decision, the use of agency staff may in the future may be less attractive.

The case involved an agency worker, Mrs Dacas who worked for six years through an agency, Brook Street, to carry out work for local authority, Wandsworth Council. Mrs Dacas was dismissed for misconduct and brought proceedings in an Employment Tribunal for unfair dismissal.

In her claim to the Employment Tribunal, Mrs Dacas cited Brook Street Bureau and the local authority as her employers. The Employment Tribunal which heard the case rejected Mrs Dacas' argument that she was employed by either Brook Street or the local authority and dismissed her claim. Mrs Dacas appealed successfully to the Employment Appeal Tribunal. The Employment Appeal Tribunal found that Mrs Dacas was an employee of the agency, Brook Street.

Brook Street then appealed to the Court of Appeal, and was successful. The Court of Appeal held that the relationship between the agency and Mrs Dacas could not amount to a contract of employment. One of the factors that pointed to this was the fact that the day to day control of Mrs Dacas' work rested with Wandsworth Council and this is a necessary requirement if an employment relationship is to be established. The majority of the Court indicated that the most likely outcome in such cases is that agency staff are employees of the end user; in this case the local authority.

The case has given rise to some criticism. However, unless or until it is overturned, the case has far reaching implications. It now appears, that agency workers who have been retained with one client for more than 12 months may qualify for the right not to be unfairly dismissed. Whether the agency worker becomes an employee of the end user will depend on the circumstances of each individual placement. However, in most cases where the day to day control is carried out by the end user, it will be likely that the agency worker will be the end-user's employee. If you find yourself in such a situation, you should ensure that fair processes are undertaken before dismissing the employee and ensure that the reason for the dismissal is for a fair reason.

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The new Conduct of Employment Agencies and Employment Business Regulations 2003 serve to clarify the relationship between agencies, agency workers and hirers. This will assist any confusion that may arise. The new Regulations provide that the first time an agency or employment business provides services to a hirer, it must agree with the hirer the terms and conditions which apply or will apply between them. These terms and conditions include:

- a statement as to whether the services provided will be those of an employment agency or an employment business;
- details of any fee which may be payable to the agency or employment business; and
- the procedure to be followed if the arrangement proves unsatisfactory.

If you do use agency workers frequently, you may seek to negotiate with the agency, an agreement whereby the agency will indemnify the end user against any claims that arise, but equally, one can see the agency resisting this.

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