

## Has the tide finally turned on the status of Agency Workers?

**Employers or ‘end-users’ of temporary agency staff may take heart from the recent Court of Appeal decision in *James –v- London Borough of Greenwich*. This decision addresses the uncertain employment status of agency workers under typical tripartite arrangements with agencies.**

The much anticipated judgment was disappointing to the extent that it failed to formulate hard and fast criteria for determining how and when a temporary agency worker might become an employee of the end user. However, the decision *is* likely to make it more difficult for agency workers to argue successfully that they should all be treated as employees in disguise.

In a typical agency arrangement there will only be contracts between the worker and the agency and between the agency and the end user, but none between the worker and the end user. Agency workers thus fail to qualify for the full complement of employment protection, which permanent employees enjoy. However, agency workers have attempted to argue that there is an implied relationship between the worker and end user, and thus giving full employment rights.

In this case, the Claimant initially worked directly for the Council’s Asylum team for several years before moving abroad. She returned to the Council’s Housing team later, this time supplied through an agency. Two years

later, Ms James transferred to a different agency offering a better rate of pay, staying with the Council until she was replaced by another worker during a period of sickness absence.

She brought a claim of unfair dismissal against the Council on the basis of an implied contract of employment between her and the Council. The terms of her contract with the agency were quite standard, describing her as a self-employed worker in each assignment she accepted.

The Employment Tribunal held that the Claimant was not an employee. In doing so, the Employment Tribunal emphasised the mutuality of obligation test. The Tribunal observed that:

1. The Council was not obliged to provide or the Claimant obliged to accept work
2. The Claimant was replaced by another agency worker during her absence
3. The Claimant did not notify the Council of her sickness absence
4. She did not receive sick pay or holiday pay from the Council

5. The Claimant must have been aware such benefits were available, but chose to remain with the agency for the better pay
6. The Council's disciplinary and grievance procedures did not apply to the Claimant and they were not entitled to dismiss her.

The Employment Appeal Tribunal upheld that decision, but placed less emphasis on mutuality of obligation. It simply applied contractual principles to the facts, and found that it could not be justified as necessary to imply a further contract, in order to give business reality to the relationship between the Claimant and the Council, or to confer enforceable obligations where one would expect them to exist.

Without further words or actions evidencing an intention to enter into a contract in place of the existing agency arrangement, no contract will be implied.

The Court of Appeal decided that:

1. A genuine, accurately implemented agency arrangement will not create an employment contract between the agency worker and the end user
2. The Courts will only imply a contract of employment between the agency worker and the end user where it is necessary, because the reality of the relationship is only consistent with there being such a contract and not consistent with any other contractual relationships
3. Once the working relationship has begun, there must be distinctive subsequent words or actions between worker and end user entitling the Tribunal to find the agency arrangement no longer dictates or adequately reflects the reality of how the work is actually being done and it has become necessary to imply an employment contract
4. The mere passage of time from the start of an assignment is alone insufficient to confer employee status

The Court considered it would rarely be necessary to imply a contract.

The focus in James marks a shift away from the supremacy of the fundamental requirements of an employment relationship: mutuality of obligation - employer provides work, employee does the work- and control, employer dictates who, when, what, where and

how the work is done. Though still relevant, these have been subsumed into the necessity test for determining whether to imply a contract.

Since James few agency workers have successfully claimed there was an implied contract with the end user. In Kalubowila v Heatherwood and Wexham Park Hospitals the Judge said both the conduct and intention of the parties must be considered,

"It is not enough ..... to form the view that because the Claimant looked like an employee of the Trust, acted like an employee and was treated like an employee, the business reality is that he was an employee and the Employment Tribunal must therefore imply a contract of employment."

However, where the temporary worker had entered into direct negotiations with the end user over pay and other benefits, or the level communication and cooperation between the worker and the end user was such that the agency had merely set up the introduction, the Courts have considered that the original agency contracts were superseded and implied a new one.

## Advice to Employers

The necessity test does not offer practical guidance on the situations giving rise to an implied contract, however some precautionary steps which may limit an end user's exposure to such a claim include: -

1. Auditing your current use of temporary or agency workers to identify potential 'employees' and weaknesses
2. Ensuring that overall control of the worker remains with the agency
3. Preventing the worker from becoming fully integrated with the permanent workforce
4. Avoiding taking on temporary workers for extended periods
5. Seeking an indemnity from the agency against potential claims by the worker provided
6. Excluding the application of internal disciplinary and grievance policies to temporary workers
7. Not inviting or entering into direct negotiations over benefits or other terms

8. Ensuring the reality of the relationship is clearly set out in respective contracts between you and the agency and the worker and the agency.

There will be a degree of latitude between decisions because whether or not to imply a contract is based on the Tribunal's interpretation of the facts, against which there is no right of appeal. Appeals only lie where either: -

1. A Tribunal has erred in law; or
2. Given a perverse decision.

Thus, the opportunity for appealing a decision on implied contracts will therefore be limited to a failure to properly apply the necessity test.

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## **The Future**

There is currently a Private Members Bill inviting equal rights for temps after 6 weeks' service, which recently won support from MPs at its second reading, although Gordon Brown would prefer an independent commission to examine the issues. France has pledged to champion an EC Agency Workers Directive during its EU presidency tenure.

Only time will tell of the costs to industry and flexibility on the labour market, feared by those opposed to strengthening workers rights, with the emergence of a two-tier workforce if equal rights are not granted.

For further information on this article or advice on managing your relationship with temporary or agency staff please contact Sejal Raja at [sejal.raja@rlb-law.com](mailto:sejal.raja@rlb-law.com).

If you would like any information on any of these or other employment matters, then please contact Sejal Raja ([sejal.raja@rlb-law.com](mailto:sejal.raja@rlb-law.com)) or Lara Crane (Lara Crane ([lara.crane@rlb-law.com](mailto:lara.crane@rlb-law.com)) or telephone on 020 7222 7040.

Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.