

Agency Workers – Mind The Gap!

The question of whether a person supplied by an agency to another business (“an end-user”) can ever become an employee of that end user has been considered by the appeal courts, most recently in *Muschett v HM Prison Service*. The early cases indicated a willingness to imply a contract between the agency worker and an end user, where an examination of the relationship revealed features typical of an employee/employer relationship. However the test which the Court of Appeal has favoured since the 2008 case of *James V London Borough of Greenwich* is one of “necessity”. In that case, the Court of Appeal:

1. Confirmed that the mere passage of time will not result in an implied contractual relationship between the individual and the end-user.
2. Found that unless an end-user can insist on an agency supplying a particular worker, a contract between the worker and the end-user cannot be implied.
3. Established that, where the parties enter into a particular arrangement at the outset of the relationship, that arrangement will continue to apply unless it no longer accurately reflects the way that the relationship operates in practice.

In Mrs James’ case there was an express contractual relationship between her and the agency and between the agency and the Council. The Court of Appeal concluded that there were no grounds for treating these express contracts as anything other than genuine. Accordingly, it wasn’t necessary to imply another contract in order to give business reality to the situation.

The principles established in the James case have been followed in several subsequent cases including *Muschett v HM Prison Service* (2010). Mr Muschett was supplied to HM Prison Service to carry out laundry duties. When the assignment came to an end, (after only four months), he raised claims of unfair dismissal, wrongful dismissal and race, sex and religious discrimination. When the Tribunal examined the relationship, certain aspects of the way in which the relationship operated were indicative of an employee/employer relationship between Mr Muschett and HMPS. However, the Tribunal Judge reminded himself of the test laid down in the James case and concluded that the way in which the relationship operated in practice was consistent with the express arrangements between the parties. Accordingly, it was not necessary to imply a contract between Mr Muschett and HMPS. The decision was upheld by the EAT and the Court of Appeal.

Of Course, in both the James and Muschett cases there were written contracts which depicted the arrangements between the parties. It will be considerably more difficult for an end-user to rebut a claim of the types raised by Mrs James or Mr Muschett in the absence of a clear written documentation. Agencies and businesses which utilise the services of agencies are well advised to ensure that written contracts are in place that adequately explain the relationship between the parties and that those arrangements are actually applied.

Agency workers fall into a gap when it comes to the protection offered by the employment legislation. Agency workers will not typically be 'employed' by the agency and, therefore, will only have the protection of the employment legislation if they can convince the Employment Tribunal that there is a contractual employment relationship between the individual and the end-user. As the James and Muschett cases demonstrate this will be a difficult test to satisfy. Some employment protection will be offered to agency workers by virtue of the Agency Workers Regulations 2010, however the Regulations do not address the gap highlighted in the James and Muschett cases. In its current form, nor does the Equality Bill.

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