

James v London Borough of Greenwich

The Court of Appeal upheld a tribunal decision that **an agency worker was not employed by the end-user** to which she had been supplied by an employment agency. As a result it would be wrong to consider all agency workers to be outside the protection of the Employment Rights Act 1996 and similarly it is not possible for all agency workers to argue successfully that they are employees.

THE FACTS

The Claimant worked full-time for the Respondent Council through an employment agency. The agency entered into a contract with the Council to provide "temporaries". Any work carried out by the workers supplied was restricted to the duties set out by the Council to the agency. There was no direct contract between the Claimant and the Council. When she was unwell an alternative temporary worker was supplied to the Council. When she recovered and attempted to return to work she was told she was no longer required.

THE PROCEEDINGS

Ms James issued proceedings for unfair dismissal against the Council. The original tribunal held that there was no contract of employment between the Claimant and the Council. Ms James appealed.

THE EAT

The EAT upheld the tribunal's decision. It held that there was no need to imply a contract in this case. The EAT also provided guidance on the circumstances in which to properly infer an implied contract of employment between an agency worker and an end-user. The Claimant appealed again.

THE COURT OF APPEAL

The Claimant argued that the original decision was perverse and that the tribunal had erred in its decision. She also maintained that the tribunal had failed to recognise that her legal status had changed over time from a non-contractual to a contractual one and that her status became that of an employee 12 months after her initial service began.

THE DECISION

The Court of Appeal dismissed the appeal. It held that the correct legal question in a tripartite worker/agency/end-user case is whether the claimant was employed by the respondent end-user under a contract of employment and that question must be assessed by factual evidence. In the absence of an express written or oral contract of employment, a tribunal must decide whether it is necessary to imply a contract of employment between the parties.

The Court of Appeal expressly approved the guidance given in the EAT's judgment on the necessary implication of a contract of employment. It also endorsed the EAT's suggestion that the mere passage of time is insufficient for a contract of employment to be implied.

The Court of Appeal stated that, although it was fully aware of the ongoing debate about the absence of protection for agency workers, they could not confer the right not to be unfairly dismissed on a worker who does not have a contract of employment.

Therefore, thorough preparation and ensuring all the relevant facts in dispute are before a tribunal is extremely important.

Consequently, subject to it being necessary to imply a contract, parties to tripartite agency working arrangements can expect to have their declared contractual positions respected.

***TEMPORARY AND AGENCY WORKERS
(EQUAL TREATMENT) BILL***

The Temporary and Agency Workers (Equal Treatment) Bill has recently been passed at its second reading. However, some commentators have stated that, as the Bill does not have the support of the Government, it has little chance of becoming law. Gordon Brown has offered to set up an independent commission to consider the protections given to agency workers and meet union representatives to discuss proposals.

If you would like to know more about the subjects covered in this publication, please contact Louise Attrup on 01727 735663 or la@turnerdebs.co.uk