

## Employment news - spring: Temp status clarified

25 APRIL 2008

**CATEGORY:**  
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Employers and agents can finally breath a sigh of relief (well almost!) over the long running saga as to whether agency workers are in fact employees, either of the agency or the end-user client. The Court of Appeal decision in *James v London Borough of Greenwich* has left the issue pretty much settled: only in very rare circumstances will agency workers have employment status and the right not to be unfairly dismissed.

The debate about agency workers and employment status often arises when agency workers work for their end-user for long periods of time, sometimes years, without the same rights as the employees they work alongside.

In the case of *Dacas v Brook Street Bureau (UK) Limited* the Court of Appeal advised that tribunals should consider the possibility of an implied contract of employment between the worker and the end-user. Subsequently, in the case of *Cable and Wireless plc v Muscat* the Court of Appeal did just that and held that an agency worker was employed by the end-user.

However, in *James v London Borough of Greenwich*, the Court came up with a different answer: there was no implied contract of employment with the end-user despite the five years the agency worker had spent working for the local authority. The Court said that each case must be decided on its facts but approved the following guidelines for determining the issue:

- an implied employment contract will be rare where the agency arrangements are genuine and accurately represent the relationship between the parties;
- just because an agency worker has worked for an end-user for a long period of time does not justify the implication of a contract between the two;
- the real issue is the way in which the contract is performed. The Courts will look at whether it is consistent with an agency relationship or an implied contract;
- a tribunal may more readily imply a contract where the agency arrangements are superimposed on existing contractual arrangements (this happened in the *Muscat* case).

All of the above means that in cases where the agency arrangement is really a sham, or not an accurate reflection of the relationship between the parties, the tribunals may be able to rule that the agency worker is an employee. However, in the vast majority of cases this will not be the case, leaving agency workers without employment status.

As for the future, in *James* Lord Justice Mummery suggested it was for Parliament and not the Courts to decide the issue of whether or not agency workers should have more employment rights. At the moment, some reforms are on the horizon – a Private Members Bill before Parliament and a proposed EU Directive. However, while these proposals cover reforms to working conditions, they do not cover the right to be unfairly dismissed. So, for the foreseeable future most agency workers will not be able to claim unfair dismissal.