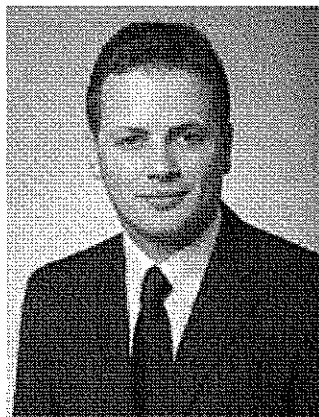


TEMPORARY STAFF - ARE THEY EMPLOYEES?



As a rule, temporary agency workers are not employees of the company for whom they work – the “end-user”. This is precisely because the end-user desires a flexible relationship that allows termination at very little notice. The tripartite contractual relationship between agency, temp and end-user is crafted to relieve the end-user of many of the statutory responsibilities incumbent upon employers (and the employees of their concurrent statutory rights).

Two recent EAT cases, however, have clarified the legal principles that determine when a temporary worker hired via an agency will be deemed to have an implied contract of employment with the end-user.

Craigie v London Borough of Haringey followed *James v London Borough Council of Greenwich* and laid out the defining characteristics of this notoriously illusive species of implied contract:

1. there must be sufficient mutuality of obligation between the temporary worker and the end-user;
2. it must be necessary, not merely possible, to imply an employment contract in order to give business reality to the working relationship; and
3. the mere passage of time is not determinative.

Craigie v London Borough of Haringey
Mr Craigie, the Claimant, worked via an agency for Haringey as an Estates Officer. A typical tripartite

contractual relationship existed where the Claimant signed a written contract with the agency but he worked for the local authority. When the local authority stopped offering Mr Craigie work he brought a claim to the employment tribunal against it for unfair dismissal and breach of contract. The issue for the tribunal was whether the Claimant had an implied contract of service with the council. The rationale applied by the tribunal drew upon the case of James that was handed down less than a month earlier.

Mutuality of Obligation

First, the tribunal considered the express terms of the written contract between the Claimant and the agency and compared them to the way the triangular contractual relationship worked in practice.

The two pertinent express terms of the agency contract were that the Claimant was not under an obligation to accept every offer of work from the council and this was mirrored by a term that entitled the council to stop instructing the Claimant at any time without notice or liability.

In giving his evidence to the Employment Tribunal the Claimant accepted that he knew he could have chosen not to work but his pay would have immediately ceased. This indicated that the practical workings of the arrangement reflected the written terms of the contract.

The EAT made it clear that in order to defeat the terms of the written agency contract, which expressly stated that the agency worker was not employed by the end-user, there had to be an irreducible mutuality of obligation in the practical operation of the agreement.

This mutuality of obligations principle was reduced to two identifiable obligations: (1) an obligation on the employer to provide work and (2) an obligation on the employee to perform it without either party being at liberty to decide at any given moment not to continue to do so. In

addition, it was held that the employer must exercise a sufficient degree of control over both the kind of work to be done and over the manner in which it is to be carried out.

Applying this principle to the facts of the case, the tribunal did find some mutual obligations vis a vis the Claimant and Haringey. The council was under an obligation to pay the Claimant via the agency for time-sheeted hours and there were practical constraints on the Claimant not to absent himself from work because he did not want to lose his pay. However, these obligations were similar to many sorts of contracts for service and did not amount to the distinct mutuality of obligation which characterises a contract of employment.

It must be necessary to imply the contract of employment

The EAT also identified a principle of general contract law as a prerequisite to implying a contract of employment - that no contract should be implied on the facts of any given case unless it is necessary, not merely possible, to do so in order to give business reality to a situation. Bingham LJ's seminal judgment in *The Aramis* was cited and approved by the tribunal.

There will be no need to imply a contract of employment between the temporary worker and end-user if the express terms of the written contract between the agency and the temporary worker explain and are consistent with the practical workings of the tripartite relationship.

The passage of time test
Craig and James clarify prior case authorities that mooted a passage of time test. The high water mark was the (albeit obiter) suggestion of Sedley LJ in *Dacas* that an employment contract might be implied between the temporary worker and the end-user after one year's service. This passage of time test was explicitly rejected by Elias J in *James* who went as far as to state that the length of time served by the worker is almost irrelevant and

he emphasised the pre-eminence of the mutuality of obligation test.

In the same judgment, however, Elias J ruefully acknowledged that as the law currently stands it permits end-users to exploit the arrangement to defeat the rights of workers. It is a common criticism that an organisation can instruct an agency worker for years on a wide variety of different jobs without them ever gaining a bare minimum level of job security – treating them as an expendable factotum.

At the same time Elias J recognised the high level of flexibility that agency staffing arrangements can offer which can benefit both organisations and workers in certain industries, particularly in highly skilled and fast moving industries such as IT where the tax benefits are a more tangible advantage for the worker.

The future of the law in this area may be revolutionised by the Temporary and Agency Workers (Prevention of Less Favourable Treatment) Bill that has started its way through Parliament. No doubt, the competing interests of job security and flexibility in the work place will ensure that parliamentary debates over the bill will be heated.

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Cases

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