



Temporary measures

Do you use agency workers? If so, do you know when they might become your employees? Vanessa Nicholls reports

Many employers in the UK use agency workers: their use helps employers to respond quickly to fluctuating workloads, to cover short and longer term staff absences, and to cope with unfilled vacancies. Many employers also see it as an advantage that the agency deals with payroll and HR issues. Furthermore, under current law, there is no need for employers to offer agency workers the same pay or benefits as their own employees.

Historically, a company using agency workers (we will refer to this as 'the company') also had the comfort of knowing the agency workers were not its employees. This is significant because many employment law rights are available exclusively to employees, such as unfair dismissal claims and statutory redundancy payments.

Over the last few years, however, a large body of case law has developed on the employment status of agency workers. Are they employees? If so, are they employed by the agency or the company?

The 2004 Court of Appeal case of *Brook Street Bureau v Dacas* set the cat among the pigeons by suggesting that the company might be the agency worker's employer. In that case, the facts were fairly typical of many agency arrangements. There were two contracts: one between the agency and company for the provision of agency staff; and another 'temporary worker's agreement' between the agency and Mrs Dacas, which stated that no contract of employment would arise between her and the agency, nor between her and the company. There was no written contract between Dacas and the company.

Dacas was supplied by the agency exclusively to the company for four years. The agency was responsible for discipline, payment and deduction of income tax and NI, and for the payment and administration of statutory sick pay and annual leave. The

company had day-to-day control over her work and supplied her with the equipment required for her job. When the agency followed the company's instructions to withdraw her from its service, Dacas claimed unfair dismissal against both agency and company. An employment tribunal found her to be

A further Court of Appeal judgment and a flurry of EAT cases later, the law was in a state of flux with cases going both ways. Very recently, however, another important 'agency worker' case, *James v Greenwich Council* has been heard by the Court of Appeal. It throws more light on the likelihood or otherwise of a company being found to be an agency worker's employer.

The contractual documentation in place was very similar to that for Dacas. Mrs James was supplied to the company for five years. The agency set her rate of pay and administered annual leave. James went off sick. When she returned to work at the council, she was told that she was no longer required and that the agency had sent a replacement. She claimed unfair dismissal. An employment tribunal ruled that she was not the council's employee. The EAT, dismissing her appeal, provided some guidance on when it might be necessary to imply a contract of employment between a worker and a company. The Court of Appeal dismissed James' further appeal and approved the EAT's guidance.



Henning Lohlein

employed by neither party. She successfully appealed to the EAT against that part of the tribunal's decision which dealt with her claim against the agency, but the agency successfully appealed to the Court of Appeal. This meant Dacas was unable to claim unfair dismissal against either party.

In giving judgment, however, the Court of Appeal ruled that the tribunal should have considered the possibility of an 'implied' contract of service between Dacas and the company, and that in the future, tribunals should consider that possibility. It emphasised the need to focus not just on the contractual documentation in place, but also on what had been happening between the parties in reality. The upshot was that, in this type of three-party relationship, there was a significant risk that the company could be found to be the employer of the worker.

1. Do you think the EAT and Court of Appeal thought it would be the norm or exceptional for a contract of employment to be implied between worker and company (or council, in the *James* case)?

2. If there is no express contract of employment between agency worker and company, are there any circumstances in which a contract of employment might be implied between them?

3. What steps can a company take to decrease the risk of being held as the employer of agency workers?

To find out the answers to these questions turn to page **80** >>



What would you have done?

What's your view of the subject discussed on page 11? Here, you can compare your answers with those of Vanessa Nicholls

1. The Courts in this case agreed that it will be an exceptional case where a contract of employment can be implied between agency worker and company (council, in this instance) in such a three-way relationship. In reaching this conclusion, the Courts were influenced by various factors:

- The company is not paying directly for the work done by the worker, but for the services supplied by the agency. Frequently, the company has no idea what sums the agency worker is receiving
- The company cannot insist on the agency providing the particular worker at all
- Where the arrangements are genuine and represent the actual relationship between the parties (likely where no previous contract of employment is in place between worker and company), it is likely that the express contracts in place between (i) worker and agency; and (ii) agency and company, explain the nature of the relationship and no further implied contract between worker and company is justified
- For a contract of employment to be implied between worker and company, there must, after the agency relationship has commenced, be some words/conduct which mean that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed, and which

mean that the reality of the relationship is only consistent with a contract between agency worker and company

- The mere fact that the agency arrangements carry on for a long period of time can be explained by the fact that it is convenient for all three parties. The passage of time does not, of itself, mean it is necessary to imply a contract between company and agency worker. The agency often prefers to send the same worker to the company; the company, in turn, often prefers to have the same agency worker supplied to it who understands its systems; and finally the worker often prefers to work in the same environment.

Remember the practical point that if a contract of employment is implied between agency worker and worker, the passage of time is relevant because employees need a year's continuous service to be able to claim unfair dismissal, and two year's continuous service to be eligible to qualify for a statutory redundancy payment.

2. The Courts thought that it would be more likely to be necessary for a contract of employment to be implied between worker and company where the agency arrangements were introduced subsequent to an employment relationship being in place between the individual and the company, especially where the only real change is who pays the individual's wages. The agency arrangements might then not have brought the original employment contract to an end at all.

3. Even though the *James* case means it is now less likely that contracts of employment will be implied between agency workers and companies, those companies that use agency workers may still wish to take a belt and braces approach and:

- Request that the agency enters into an express contract of employment with any workers being provided by it to the company.

Retain a copy of the signed agreement

- Request that the contract in place between agency and company expressly stipulates that any workers being provided are (i) the agency's employees; and (ii) not the company's own employees. Retain a signed copy
- Ensure that, in practice, the agency is responsible for paying the worker, administering any sick pay and holiday pay and disciplining its employees
- Monitor the reality of the working relationship, to avoid the perception of an employment relationship with the worker. For example, companies should not require such workers to liaise with them directly over when to take holiday; they should ensure the workers contact the agency directly when sick; they should not pay the workers' expenses directly (such as mobile phone bills); and they should not enter into direct negotiations with such workers over pay increases, notice periods or other terms and conditions. They should also endeavour to reduce day-to-day control over such workers (ie, not appraise or discipline them)
- Monitor the length of agency workers' assignments with an effective diary system so they are automatically put on notice when a worker has been assigned for three, six and nine months. This will force companies to consider the reason for continuing to use the agency worker, and help them avoid the worker accruing enough service to be able to bring claims such as unfair dismissal in any event
- Where possible, the company should: obtain indemnities from the agency to cover the eventuality of a worker supplied by an agency being deemed its employee; and seek a full indemnity from the agency in respect of any successful employment tribunal claims brought by the agency worker against the company.

Vanessa Nicholls is a legal adviser for EEF, the manufacturers' organisation: www.eef.org.uk

