Implied contract with agency worker not necessary

Craigie v London Borough of Haringey, EAT

Contracts of employment

An agency worker who had worked for a local authority for over a year was not an employee and therefore could not claim unfair dismissal when the authority dispensed with his services. The employment tribunal had correctly held that it was not necessary to imply a contract of employment between the agency worker and the authority. In so finding, the EAT followed guidance set down in James v Greenwich Council on the circumstances in which tribunals may imply an employment contract between an agency worker and an end-user.

In the absence of much-needed legislation on the subject, it has been largely left to the courts to determine the status of agency workers supplied by employment agencies and businesses. Their traditional view has been that, in the absence of an unambiguous provision to the contrary, such workers are not employees of either the employment business or the end-user, meaning that they do not qualify for any of the key statutory employment rights conditional upon being an employee. In recent years, however, the courts have shown increased willingness to imply a contract of employment between agency worker and end-user in certain circumstances.

In Dacas v Brook Street Bureau (UK) Ltd (Brief 754), the Court of Appeal advised that when determining the employment status of a worker who was part of a triangular relationship with an employment business and an end-user, tribunals should consider the possibility of there being an implied contract of employment between the worker and the end-user. Although the Dacas guidance was obiter (i.e. incidental to the decision and non-binding), it was later approved and applied by the Court of Appeal in Cable and Wireless plc v Muscat (Brief 802).

In James v Greenwich Council (Brief 822), however, the EAT set out guidance that tightly defined the circumstances in which a tribunal may infer an implied contract. Among other things, it ruled that Lord Justice Sedley's observation in Dacas that the fact that a worker has worked for a particular client for a considerable period could give rise to a contract of employment was wrong.

In the case below, the EAT upheld an employment tribunal's decision that a worker supplied by an agency to an end-user did not have an implied contract of employment with the latter. In so deciding, the EAT cited with approval the guidance set out in James.

Agency worker claims unfair dismissal

In November 2004, C registered for work and entered into a written contract with an employment agency, APSS Ltd. This document expressly provided that he was not an employee of the agency, and also set out his rate of pay, which would be paid by the agency, and his entitlement to annual leave and sick pay. It also confirmed that C was not obliged to accept any work offered to him by the agency but if he did, he must accept the direct supervision of any responsible person in the client's organisation. In addition, if he declined any offer of work, the agency had the right to terminate his contract.

'the state of the law regarding the status of long-term agency workers is, in my view, far from satisfactory, but it will need legislation to change it' – Bean J

The agency supplied temporary staff to Haringey Council, and on 15 November, C began working for the Council as an Estates Services Officer. When a permanent position with the Council arose in June 2005, C applied. He was given a provisional offer on 19 August but that offer was withdrawn after three months on the basis of unsatisfactory references. In particular, it had been alleged that C had taken nine and a half days' sick leave since June 2005 – which later proved untrue. The Council told the agency that it no longer required C's services and the agency subsequently ended his contract. Shortly afterwards, C brought claims of unfair dismissal and breach of contract against the Council in an employment tribunal. The tribunal had to decide as a preliminary issue whether C was employed by the Council under a contract of employment within the

meaning of S.230(2) of the Employment Rights Act 1996 and could therefore proceed with his claim of unfair dismissal.

Tribunal: no implied contract

In the absence of an obligation upon the Council to provide C with work and a corresponding obligation on C to do work provided by the Council, the tribunal concluded that it could not imply a contract of employment between the parties. The fact that C had worked for the Council for over a year, and that the Council had exercised a high degree of practical control over his working arrangements, was not sufficient to create a contract of employment in the absence of the irreducible minimum of mutual obligation required to support the existence of a contract of employment.

'in line with the observations in James v Greenwich Council which I have already cited, and with which I agree, [the tribunal was entitled to conclude that the implication of a contract of employment was not necessary]' – Bean J

Furthermore, the tribunal went on to conclude that the test of necessity, as recognised by Lord Justice Mummery in Dacas, had not been satisfied for implying a contract of employment between C and the Council – i.e. it was not necessary to imply such a contract in order to give business efficacy to the arrangement. It followed that C was not an employee of the Council, and thus could not claim unfair dismissal against it. C appealed to the EAT.

EAT approves James guidance

Before the EAT, C contended, first, that the facts of his case were indistinguishable from those in Dacas, meaning that, as in that case, a contract of employment should be implied; secondly, that there was mutuality of obligation between the parties because the agreement between C and the agency provided that if he declined any offer of work, the agency had the right to terminate his contract; and thirdly, the tribunal had erred in holding that it was not necessary to imply a contract of employment in order to give business reality to the parties' situation.

The EAT began by reviewing the Court of Appeal's decisions in Dacas and Muscat and then turned to the more recent EAT decision in James, which in its view provided a valuable analysis of the two Court of Appeal decisions. In that case, the President of the EAT, Mr Justice Elias, observed that when agency arrangements are genuine and when implemented accurately represent the actual relationship between the parties, it will be rare that there will be evidence entitling the tribunal to imply a contract between the worker and the end-user.

With this in mind, the EAT considered C's grounds of appeal. It gave short shrift to his first argument, stating that while the facts in the instant case and Dacas were similar, they were not identical. In any event, the Court of Appeal in Muscat had emphasised that it was not sufficient, to establish the existence of an implied contract of employment, to say that the circumstances were as in Dacas. Indeed, the Court had emphasised that Dacas was not binding authority for the existence of an implied contract of employment in such circumstances.

Test of necessity not satisfied

The EAT further held that the tribunal had been entitled to accept C's own evidence that he could have chosen not to go into work on any particular day, thus defeating his argument that there was mutuality of obligation between the parties. Lastly, it agreed with the tribunal that, on the facts of the instant case, it was not necessary to imply an employment contract in order to give business efficacy to the arrangements between the Council and C despite the fact that he had worked for the Council for over a year. The triangular relationship expressly provided for in the agreement between the Council and C and between the Council and the agency had governed the situation without difficulty for a year. The necessity test had therefore failed, meaning there was no need to imply a contract of employment. In reaching that conclusion, the EAT followed the decision in James, where it was held that the mere passage of time does not justify the implication of a contract between worker and end-user on the ground of necessity. C's appeal was accordingly dismissed.

Note

The EAT in the instant case, like Elias P in James, expressed the view that the law regarding the status of long-term agency workers is far from satisfactory, and that appropriate legislation is needed to address this. For further comment on agency workers, see the Forewords in this Brief.

Case references

Craigie v London Borough of Haringey. EAT, 12.1.07 (0556/06).

Cable and Wireless plc v Muscat. Court of Appeal, 2006 IRLR 354.

Dacas v Brook Street Bureau (UK) Ltd. Court of Appeal, 2004 ICR 1437.

James v London Borough of Greenwich. EAT, 2007 IRLR 168.