

WARNING! YOUR TEMPS MAY BE YOUR EMPLOYEES

A few years ago things were simple. Your employees were your employees. Temps, agency workers and casual workers were usually not your employees. The problem with this situation was that it led to abuse. Workers who were provided through an employment agency to work for the same end user business, carrying out the same tasks in the same place of work for a number of years, found themselves with no protection when their employment ended. The government opted to maintain the status quo to preserve market flexibility when it adopted the Conduct of Employment Agencies and Employment Businesses Regulations 2003, which came into force in April 2004. The Regulations set out the principle that the worker should be contracted to the employment agency and not the end user. The Regulations left employment agencies with the choice of hiring the job seeker as an employee or as a self-employed person. However, the courts are not satisfied with this and are taking more and more opportunities to intervene in favour of the worker to the detriment of the end user.

In *Brook Street Bureau (UK) Ltd v Dacas [2004]*, Mrs Dacas was a cleaner hired as a temporary worker by an employment agency to work exclusively for a single end user. She had been working under the same arrangement for over four years when her work was terminated. The terms of her agreement with the agency expressly stated that there was no contract of employment. However, Mrs Dacas claimed unfair dismissal against the agency and against the end user. In order to claim unfair dismissal she needed to be an employee. The employment tribunal found she was not an employee of either the agency or the end user. The Employment Appeal Tribunal (EAT) found that Mrs Dacas was in fact an employee of the agency, not the end user. The agency appealed to the Court of Appeal. Unfortunately for Mrs Dacas, she did not appeal against the decision that the end user was not the employer.

The Court of Appeal overturned the decision of the EAT. It focused all of its attention on the relationship between Mrs Dacas and the end user. It criticised the tribunal for failing to analyse whether there was an implied contract of employment between Mrs Dacas and

the end user. The majority of the court was of the view that there was a contract of employment between Mrs Dacas and the end user, as the end user had a sufficient degree of control and direction over Mrs Dacas. It added that there was an inexorable inference to be drawn when a worker had been working under this arrangement for a year or more and that inference was that a contract of employment had arisen. The case stopped there. As Mrs Dacas had not appealed, she was unable to pursue her unfair dismissal claim against the end user.

Until the *Dacas* case, the Court of Appeal had been reluctant to look beyond the contractual documentation and to look at the facts of the relationship between the parties.

In February this year, Mr Muscat became one of the first workers to benefit from the *Dacas* decision and was able to pursue his claim of unfair dismissal against the end user: *Cable and Wireless plc v Muscat [2005]*. In this case, Mr Muscat was originally employed by the end user. In 2001, Mr Muscat was paid a termination package and told to set up his own limited company so that he could continue to provide his services to the end user. In 2002, the end user was bought by another company. Mr Muscat was told that his limited company should provide his services through an agency. There were therefore four parties in the relationship; the agency hired the limited company to provide the services of Mr Muscat to the end user. The agreement between the agency and the limited company provided that the limited company could provide a substitute to Mr Muscat. This never happened. During the whole period, Mr Muscat appeared on the end user's company structure as an employee and the end user provided him with a mobile telephone and a laptop computer. The EAT decided to follow *Dacas* and found that there was an implied contract of employment between him and the end user.

In April this year, the EAT found that a temporary worker, who was later appointed as a permanent employee of the same end user, was an employee of the end user throughout the period: *Royal National Lifeboat Institution v Bushaway [2005]*. Ms Bushaway, was originally provided to the end user by an agency as a temporary worker because the end user had been operating a recruitment freeze. From the beginning, it was envisaged that if

Ms Bushaway proved to be satisfactory she would be offered permanent employment. Ms Bushaway worked five months as a temporary worker, before being offered employment by the end user.

There were a number of agreements and letters setting out the contractual arrangements between Ms Bushaway, the agency and the end user. Although all the agreements agreed that Ms Bushaway was not an employee of either the end user or the agency, there were discrepancies between the agreements regarding the working arrangements for Ms Bushaway. There were also discrepancies between the written document and the way in which the work was carried out.

Ms Bushaway resigned 11 months after she became an employee of the end user and therefore 16 months after she commenced working for them as a temp. In order to bring her claim of constructive dismissal she needed 12 months' length of service and had to establish that she was an employee of the end user when she was temping for them. The EAT found in Ms Bushaway's favour. The EAT found that it could look behind the written agreements, as there were discrepancies between the agreements and as they did not accurately reflect the relationship between the parties. The EAT found that there was an implied contract of employment between the end user and Ms Bushaway, because apart from the payment of her salary, she was treated in exactly the same way as any employee of the end user would be treated. In particular, Ms Bushaway would have to obtain authorisation from her manager at the end user before taking leave.

These cases will create a lot of uncertainty for businesses that regularly use temporary staff or agency workers. The *Dacas* case was brought about because it was felt to be an injustice that someone who perceives himself as in stable employment, finds himself with no employment protection. As explained above, the 2003 Regulations regulating employment agencies provides for the option of a contract of employment between the agency and the worker. The end user may be able to avoid being classed as the employer if it requires that all the temps it uses have a contract of employment with their agency. In

these circumstances, as the temps would be able to enforce their rights against an employer, the courts may be reluctant to ignore the express contract of employment.

We also recommend that you review all documentation setting out your arrangements with your agencies and between the agencies and the workers you hire. It would also be prudent to use temporary workers only when you need them, for example to replace an employee on maternity or extended sick leave or for a special fixed term project. You should limit the length of the temporary worker's assignment and interrupt continuity of work between them working for you as a temporary worker and them being offered permanent employment. It is hazardous to use temporary workers solely to avoid your responsibilities as an employer.

These cases create a very unsatisfactory situation for British employers. However, you may take comfort in the fact that when French employers hire workers through a third party outside an extremely regulated legal framework, they commit a criminal offence leading to a fine and even imprisonment.

For more specific information or to discuss your requirements please call either Amanda Galashan or Julie Calleux at EmployEase on 0207 831 5052, or email us at info@employease.co.uk.

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