

Employment Status of Agency Workers



The employment status of agency workers has gone through considerable development in the courts during the last two years. Readers will be aware that in the case of *Dacas v Brook Street Bureau* it was held by the Court of Appeal that an agency worker could be an employee of the end-user by virtue of an implied contract of employment. The latest decision on the status of agency workers is the case of *Cable & Wireless plc v Muscat*. In *Muscat*, the Court of Appeal developed the principle established in *Dacas* to a further level as it involved a contractor who supplied services through his own limited company.

Muscat was initially employed as a telecommunications specialist by a company called Exodus Internet Limited. Exodus needed to reduce the number of its employees in order to facilitate a potential buyout. Muscat was told that he would have to provide his services through a limited company. Muscat duly did so and set up his own company for the purposes of receiving his pay and car allowance. Subsequently Exodus was taken over by Cable & Wireless. Cable & Wireless advised Muscat that their policy was not to deal with its contractors directly and that Muscat must supply his services through an employment agency, Abraxas plc. The agreement between Cable &

Wireless and the agency provided expressly that Muscat was not to be regarded as an employee of Cable & Wireless.

Muscat provided his services to Cable & Wireless on a continuous and exclusive basis, he worked under the direction of their managers, and he was labelled as a Cable & Wireless employee within the Cable & Wireless departmental structure and was assigned a Cable & Wireless employee number. Cable & Wireless supplied Muscat with his equipment, including a mobile telephone which they also paid for. Muscat also arranged his annual leave with Cable & Wireless. Muscat's only contact with the agency was in relation to the payment of his own company's monthly invoices. An express provision of the agreement between Muscat's service company and the agency was that the agreement constituted the "entire contract" between the agency and Muscat's company and would govern the assignment undertaken by Muscat's company. It provided that "no verbal or other written contract shall be valid".

Subsequently Cable & Wireless stopped using Muscat's services. Muscat brought an unfair dismissal claim against Cable & Wireless on the alleged basis that he was an employee of Cable & Wireless.

The Court of Appeal upheld the decision of the Employment Tribunal and the Employment Appeal Tribunal that Muscat was an employee of Cable & Wireless. The Court of Appeal endorsed the guidance given by the Court in *Dacas* that:-

1. Employment Tribunals should consider whether an implied contract of employment exists between an agency worker and the end-user of their services;
2. An implied contract of employment can exist even where the worker has signed a contract with the agency which provides expressly that he is not to be regarded as an employee of the end-user; and
3. So long as the remuneration is being provided by the "employer", it matters not that it is not paid directly, but through some other arrangement made by the employer, such as in the present case, through the agency. In other words, the person who would otherwise be the worker's employer did not cease to be his employer simply by arranging for their wages to be paid via a third party.

Cable & Wireless attempted to rely on the contractual provisions set out above in the contract between Muscat's company and the agency

in which it was provided that that contract would constitute the entire agreement between the agency and Muscat's company and would govern the assignment undertaken by Muscat's company and also that no verbal or other written contract would be valid. This argument was rejected by the Court of Appeal. The above provisions did not have that effect, because Cable & Wireless was not a party to that agreement. A contract for services between Muscat's company and the agency did not necessarily preclude the existence of a contract of employment with Cable & Wireless.

It is potentially significant that the Court of Appeal considered that a contract of employment between Cable & Wireless and Muscat required to be implied in order to give business reality to the relationship and arrangements between Muscat and Cable & Wireless. This was an issue that had not been considered in detail by the Court in *Dacas*. Normally, terms can only be implied into a contract where this is necessary to give business efficacy to the agreement. In *Muscat*, the Court held that it was not difficult in that case to find that it was necessary to infer the existence of an employment contract. Before *Muscat* had been required to enter into the arrangement with the agency, he had already been in an employment relationship with Cable & Wireless. The employment had been transferred from *Exodus* and, until or unless the terms were varied, they would remain as they had been with *Exodus*. That meant that Cable & Wireless were under an obligation to provide Muscat with work. Muscat was under an obligation to attend their premises and do the work of a telecommunications specialist, subject to the direction and control of Cable & Wireless management. These were all hallmarks of an employment relationship. The only thing that changed when the agency became involved was the arrangements for payment. Cable & Wireless arranged payment of Muscat's invoices through the agency. However, there was no express or implied termination of the existing arrangements between Muscat and Cable & Wireless. The obligations to provide work and do it remained as before. So too did the level of control by Cable & Wireless. What Muscat agreed with the agency had no effect at all on the substance of his existing relationship with Cable & Wireless.

The Court of Appeal held that it was necessary to infer the continuing existence of the employment contract in order to give business reality to the relationship and arrangements between Muscat and Cable & Wireless. There was no other possible explanation for what they were doing. Also, it was necessary to infer the existence of an employment contract in order to establish the enforceable obligations that one would expect to see in these circumstances. Before the involvement of the agency, there were enforceable obligations between Muscat and Cable & Wireless. After that, it could not be said that those obligations had disappeared.

While on the one hand, the Court of Appeal's judgment can be seen as presenting further difficulties to end-users who wish to avoid creating employment relationships with agency staff, it is significant that the Court accepted that a contract of employment can be inferred only in

certain circumstances. Unlike Muscat, most agency workers will not be in an existing employment relationship with the end-user before converting to agency status.

Nonetheless, care should be taken to avoid reading too much into the fact that in *Muscat*, there had been a prior employment relationship. In terms of the Court's judgment, the contract of employment was capable of being inferred by examining the conduct of Cable & Wireless and Mr Muscat. The arrangements bore all the hallmarks of an employment relationship. The instance of a prior employment relationship was one factor in the assessment of whether a contract of employment required to be inferred in order to give business reality to what was happening.

In light of *Dacas* and *Muscat*, it is clear that employers face a risk, as high as ever, that a long term temp/agency worker is in fact their employee. In order to mitigate this risk, employers should consider re-assessing their use of long term temps and considering whether temps should only be used for short term assignments, in any event, before one year's service has arisen, being the trigger date for unfair dismissal rights. Employers should also consider requiring agencies to provide an indemnity against employment claims. This will obviously be a matter for negotiation between the parties.