



Court of Appeal rules on agency worker test case

When, if ever, will an agency worker be an employee of the end-user?

In recent years, there have been cases which have led to uncertainty over this question. This uncertainty finally came to a head with a Court of Appeal decision this month in the most recent test case.

In most agency arrangements, there is no contract between the agency worker and the end-user client. In order, however, to benefit from statutory employment rights, the worker will sometimes argue that they are in reality an employee of the end-user and that an employment contract should be implied. The Court of Appeal has now confirmed that an employment relationship will only be found to exist between an agency worker and the end-user where it is necessary to give effect to the realities of the relationship. This will be a question of fact in each case but it will generally be difficult for an agency worker to argue this point successfully.

The Court expressly approved guidance to assist tribunals in future agency worker cases. The main points were:

- the key feature of a genuine tripartite agency relationship is that the end-user cannot insist on the agency providing a particular worker;
- the passage of time does not by itself establish any mutual obligations between a worker and end-user (even where arrangements that were initially expected to be temporary have, in fact, continued for longer than expected); and
- if there is a direct contractual relationship between an "employer" and an "employee" that is later converted into an agency arrangement, it is more likely that the implication of a direct employment contract between the end-user and agency worker will be justified.

This is obviously a good decision for businesses which engage agency workers as the courts have drawn back from imposing greater duties on employers to employ contractors. The Court of Appeal was keen to emphasise that it is not the role of courts and tribunals to take policy decisions. However, employers still need to be careful to ensure that the agency arrangements they have in place reflect how the relationship operates in practice. In particular, contracts with agencies should be reviewed to ensure that they do not require the provision of a particular individual by the agency, given the importance attached to this factor by the court.

If you would like to discuss this case or issues arising from it, please speak to your usual contact in the Employment Group.



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