

**Bulletin 159**

**March 2010**

## **AGENCY WORKERS VULNERABLE TO END-USER DISCRIMINATION**

The recent Court of Appeal decision in *Muschett v HM Prison service* has highlighted that the employment status of agency workers (or more specifically, the lack of it) can render the worker vulnerable to discriminatory behaviour by end-users without recourse.

Mr Muschett (Mr M) commenced a working relationship with HMPS as an agency worker placed with it by an employment agency, Brook Street (UK) Limited.

Mr M's right to advance his claims for unfair dismissal and discrimination depended upon him being either an 'employee' of HMPS under a contract of employment (re unfair dismissal) or else in its 'employment' within the wider sense necessary to be shown by those mounting discrimination claims in an employment context.

### **The Employment Tribunal**

It held that he was neither an 'employee' of HMPS as defined in section 230(1) of the Employment Rights Act 1996, nor in its 'employment' within the wider sense of the definitions in section 82 of the Sex Discrimination Act 1975, section 78 of the Race Relations Act 1976 or regulation 2 of the Employment Equality (Religion or Belief) Regulations 2003.

As a result, the Employment Judge concluded that the Tribunal had no jurisdiction to hear Mr M's claims and so he dismissed them. Mr M appealed.

### **The Employment Appeals Tribunal**

Here, the Judge, largely agreeing with the decision of the ET, referred to the leading case of *James v London Borough of Greenwich* where it was held that:

*"... in order to imply a contract to give business reality to what was happening, the question was whether it was **necessary** to imply a contract of service between the worker and the end-user, the test being laid down by Bingham LJ in *The Aramis*"*

Mr Muschett was permitted to take his appeal to the Court of Appeal.

### **The Court of Appeal**

The Judge at the EAT had pointed out that Mr M was under no obligation to work for HMPS and could terminate the engagement at any time by giving notice to the agency.

Mr M's legal representative argued that notwithstanding the above, a contract of service ought to be implied into the relationship because 'extra duties' performed personally by Mr M were carried out in exchange for an undertaking from HMPS that it would carefully consider giving him a permanent contract when a vacancy arose.

The question was whether in order to reflect the reality of the business relationship that existed between Mr M and HMPS it was necessary to imply a contract of service.

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The Court of Appeal held that there was *“nothing in the evidence that necessitated the implication of such an agreement: and in this context, nothing less than necessity will do.”*

Lord Justice Rimmer said *“The facts proved no more than that Mr Muschett was a temporary agency worker with HMPS who aspired to apply for a permanent post with them if such came up, of which aspiration HMPS were aware. The bid to deduce from those facts that there impliedly arose an implied contract for services between the parties is, in my judgment, an ambition too far”.*

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact: Paul Chamberlain in Manchester on 0161 836 8864, Andrew Cross in Liverpool on 0151 600 3062 or Kevin James in Preston on 01772 229847.

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