



Bulletin 194

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## **AGENCY WORKER NOT AN EMPLOYEE (DESPITE SUBSTANTIAL INTEGRATION INTO THE END USER'S BUSINESS)**

In the recent case of *Tilson v Alstom Transport* [2010] EWCA 1308, the Court of Appeal held that an agency worker was not an employee of the end user, despite the fact the agency worker had been substantially integrated into the end user's business.

The agency worker (T) provided services to Alstom Transport (A) through certain intermediaries (including an agency). T worked as a manager for A for approximately two years and had a number of responsibilities, including managing A's employees, reporting to a line manager of A, negotiating contracts, ordering business materials and having the power to recruit permanent employees on behalf of A. A offered T a contract of employment on two occasions and T rejected both offers.

On termination of the arrangement, T brought a claim for unfair dismissal against A. However, in order to pursue a claim of unfair dismissal, it had to be established that T was in fact an employee of A.

Both T and A agreed that T had been fully integrated into A's business. T sought to persuade the Court that despite the fact he had not formally entered into a contract of employment with A (under an express written agreement), he had been engaged by A as an employee as a matter of law and it was necessary for such a contract to be implied based on the specific facts of the case.

At first instance, the Employment Tribunal held that T was an employee of A. The Employment Tribunal was of the view that the contractual arrangements (which stated that A did not have any supervision, direction or control over T and that the relationship between them was not one of employer and employee) did not genuinely reflect the relationship between T and A.

The Employment Appeal Tribunal later reversed this decision and the case was considered by the Court of Appeal thereafter.

The Court of Appeal held that:

- T was not an employee of A
- The fact that T had been substantially integrated into A's business was not sufficient evidence to conclude that a contract of employment existed between the parties. T's "significant degree of integration" into A's business was not inconsistent with the existence of an agency relationship (in which there is no direct contract between the agency worker and end user)
- The contractual arrangements governing the agency arrangement (which stated that the relationship between T and A did not constitute a relationship of employer and employee) fully explained the reasons for which T was working for A. There was no evidence that A had acted inconsistently with such terms in its dealings with T. The Court acknowledged the fact that A was able to exercise a considerable degree of control over T, however, the Court did not consider the overall working relationship between T and A to be a sham
- The fact that T was required to apply to a line manager before taking annual leave was not sufficient evidence to imply a contract of employment (it was inconsistent with the stated intentions of the parties)

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- Although not determinative in all cases, the parties' understanding that there was no direct contract between them (explaining the terms of their relationship), and their inability to reach an agreement on the terms of such a contract, were "extremely powerful factors" against the implication of a contract of employment. The Court noted that T had refused to enter into a contract of employment with A on two occasions
- Consequently, T was not entitled to pursue a claim for unfair dismissal against A.

This case illustrates that even where an agency worker "looks and acts" like an employee (carrying out the same duties that an employee of the end user would do) this may not be sufficient to render the relationship one of employee and employer.

In *Tilson*, the contractual documentation governing the provision of services from T to A confirmed that the relationship between T and A was not one of employer and employee. Further, the Court found that there was additional evidence from the actions of the parties that neither party believed such a contract had been put in place (T had abstained from entering into a contract of employment with A on two occasions).

Whilst not conclusive, the stated intention of the parties (as set out in any contractual agreements governing the provision of services from agency worker to an end user) may be taken into account when determining the true nature of the relationship between the parties.

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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