

## Contractors see change of courts position on employee rights

With the [Agency Workers Directive delayed](#) at least in the short-term, contractors who seek [employment rights](#) must go to the Employment Appeals Tribunal. But case law on employment rights is evolving. In our [previous story](#) on this subject, we predicted a reversal in the courts. But there is another possible interpretation of the current situation.

### All Cases Stayed

At the end of November, the Chair of the Employment Tribunal issued an order staying all cases involving agency workers/contractors, because a new ruling affecting these cases is due to come in the appealed case of James v. Greenwich. A ruling from the Court of Appeal is expected shortly, and will clearly have an effect on all cases involving agency workers/contractors who seek employment rights.

Adrian Marlowe, managing director of the Hove-based legal consultancy [Lawspeed](#), explains, in an interview with ContractorCalculator, what this latest appeal in James v. Greenwich could mean to the recruitment industry.

### Issue of Necessity

"The decision to order a stay is unusual," says Marlowe, "and could indicate that there is concern about how cases in which agency workers and contractors seeking employment rights are being handled. Under the last appeal of James v. Greenwich [a court case which dates back to 2006 in which an agency worker who worked for five years supplying services to Greenwich Council was refused employee rights] the [Employment Appeals Tribunal](#) said that where normal agency contracts are used there is no "necessity" to consider whether or not there was an implied contract between the client and the contractor."

This issue of "necessity" is the key one, as Marlowe explains. Under the last ruling, the Employment Appeal Tribunal issued guidance indicating that in cases involving agency workers signed up on usual agency contract arrangements there may be no need for the Tribunal to consider whether there is any need to think about an implied employment contract. As a result many of them may not be properly considering all the issues. If this has been happening, there may have been cases where the worker's case is not being properly considered. seeking their employment rights don't stand much chance.

“ There is concern about how cases in which agency workers and contractors seeking employment rights are being handled ”

Adrian Marlowe-Lawspeed

This view, that there is no "necessity," effectively challenges the ruling in the 2004 case *Brook Street Bureau (UK) Ltd v Dacas* which first made the courts turn their attention to implied contracts in agency work. It is possible that the Appeals court intends to support this view.

But Marlowe sees it differently. "The last ruling [in the previous James v. Greenwich appeal] was effectively opposite to the intention in *Dacas* originally," Marlowe points out. "The ruling resulted in tribunals deciding not to consider whether there is an implied employment contract and therefore workers are not getting employment rights. In staying the cases the indication would be that workers are not getting rights which they otherwise may get. This in turn may imply that the impending decision in James v Greenwich will uphold and clarify the intention of the Court of Appeal in the *Dacas* case, leaving the door open again to employment claims by agency workers and contractors in certain circumstances"

So, if there is a consideration by the tribunal as to whether there is an implied employment agreement between AW and H), the Court of Appeals may be worried that workers' rights decisions are being prejudiced.

It follows that to stop the wrong decisions being made by Tribunals, a stay is required. This in turn could mean that the Court of Appeals is about to reverse the Employment and Appeals Tribunal guidance in James v. Greenwich, and uphold and clarify the decision in *Dacas* at the same time. All of which means that the courts will have the "necessity" to investigate whether there is an implied contract between contractor and client or not.

Marlowe does not think that in any respect there are any implications for [IR35](#), since the IR35 rules enable HMRC to avoid having to consider whether there is actually any contract between hirer and worker. What is under consideration here concerns actions on the part of the courts who could now be obliged to investigate the existence of an implied contract. between client and contractor. it is the mandate to consider this question that could be the basis of this new ruling in the James v. Greenwich appeal.

“ Courts could have the necessity to investigate implied contracts of employment ”

Adrian Marlowe-Lawspeed

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