# England and Wales Court of Appeal (Civil Division) Decisions



**Neutral Citation Number: [2008] EWCA Civ 35**
Case No: A2/2007/0368

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**
**MR JUSTICE ELIAS PRESIDENT**
**UKEAT/0006/06/ZT**

Royal Courts of Justice
Strand, London, WC2A 2LL
05/02/2008

B e f o r e :

**LORD JUSTICE MUMMERY**
**LORD JUSTICE THOMAS**
**and**
**LORD JUSTICE LLOYD**

---

**Between:**

| | |
|---|---|
| **MS MERANA JAMES** | **Appellant** |
| **- and -** | |
| **LONDON BOROUGH OF GREENWICH** | **Respondent** |

---

**MR RICHARD O'DAIR (instructed by Hammersmith & Fulham Law Centre) for the Appellant**

**MR JONATHAN COHEN (instructed by Legal Service Department London Borough of Greenwich) for the Respondent**
**Hearing date: 30th October 2007**

---

**HTML VERSION OF JUDGMENT**

---



**Lord Justice Mummery :**

**The issue**

1. The issue in this appeal is whether the employment tribunal (ET) erred in law in its decision of 13 October 2005 that the appellant/claimant, Ms Merana James, was not an employee of the respondent London Borough of Greenwich (the Council), for which, through an employment agency, she performed paid work for a period of three years prior to the Council's decision to replace her with another worker supplied by the agency.

2. The ET's rejection of her unfair dismissal claim was upheld by the Employment Appeal Tribunal (the EAT) on 21 December 2006, BAILII: [2006] UKEAT 0006_06_2112, on the ground that her appeal raised no question of law. On 23 March 2007 Sir Henry Brooke granted permission to appeal to this court on the ground that, although the EAT judgment was "impressively reasoned", he could not say that "there is no real prospect of success."

3. Ms James could certainly be described as an "agency worker" in the general sense that she had a "Temporary Worker Agreement" with a well-known employment agency, which found her a position as a housing support worker with the Council. After several years the Council replaced her with another worker supplied by the agency. In response to her claim for unfair dismissal, the Council disputed her legal status as an employee under Part X of the Employment Rights Act 1996 (the 1996 Act). The decisions of both ET and of the EAT (chaired by its President, Elias J) were that she was not employed by the Council under a contract of service. So she fell outside the job security scheme of statutory protection from unfair dismissal.

4. As evidenced by other recent decisions of the EAT (**Cotswold Developments Construction Ltd v. Williams** [2006] IRLR 181; **Cairns v. Visteon UK Ltd** [2007] IRLR 175; **Consistent Group v. Kalwak** [2007] IRLR 560;**Craigie v. LB of Haringey** UKEAT/0556/06/JOJ, BAILII: [2007] UKEAT 0556_06_1201; **Astbury v. Gist Ltd** UKEAT/0619/06/DA, BAILII: [2007] UKEAT 0619_06_2803; **Heatherwood & Wrexham Park Hospitals NHS Trust** UKEAT/0633/06/LA, BAILII: [2007] UKEAT 0633_06_2903; **Harlow District Council v. SJ O'Mahony & APS Recruitment Limited ...**21 June 2007- UKEAT/0144/07/LA), BAILII: [2007] UKEAT 0144_07_2106; **Wood Group Engineering (North Sea) Ltd v. Robertson** UKEATS/0081/06/MT, BAILII: [2007] UKEAT 0081_06_0607; and **National Grid Electricity Transmission PLC v. Mr D Wood** (24 October 2007- UKEAT/0432/07/DM, BAILII: [2007] UKEAT 0432_07_2410) and the decisions of this court in **Franks v. Reuters Ltd** [2003] ICR 1166; **Dacas v. Brook Street Bureau (UK) Ltd** [2004] ICR 1437 and **Cable v. Wireless plc v. Muscat** [2006] ICR 975, the question whether a claimant in an unfair dismissal case is or is not an employee within the meaning of the

1996 Act is increasingly litigated before employment tribunals in unfair dismissal cases, particularly those brought by workers on the books of employment agencies. This is not surprising in view of recent developments: the length of the qualifying period for protection has been reduced to 1 year making it possible for more "temporary workers" to qualify for protection; the maximum award of compensation for unfair dismissal has been substantially increased making it more worthwhile for claims to be brought and providing employers with an additional reason for resisting claims; and, most important of all, there has been an explosion of numbers in the workforce (estimated at 1.3m) engaged to work under arrangements with employment agencies. I understand that, pending guidance from this court on this appeal, proceedings in the tribunals concerning the disputed legal status of agency workers have been put on hold.

5. Of course, the correct legal question is not whether the claimant was "an agency worker" (whether working for an employment agency or for an end user under an employment agency agreement) but whether the claimant was employed by the respondent end user under a contract of employment. The two types of contract-agency agreement and contract of employment-are not necessarily mutually exclusive. It is legally possible for a worker to have one kind of contract with an employment agency and another kind of contract with the end user to whom he renders services. This is an exercise in legal classification. It requires the fact-finding tribunal to examine and assess carefully all the relevant evidence placed before it by the parties in the particular case for the purpose of determining whether the claimant fits the description of an "employee", as defined in the 1996 Act.

6. In the absence of an express contract of employment, which may be written or oral, the ET is faced with the question whether it is necessary to imply a contract of employment between the claimant and the respondent. It is not always possible to predict with certainty how this question will be answered by the tribunal.

7. The distinction between workers who are employees and those who are not is crucial for the determination of statutory rights, principally the right not to be unfairly dismissed. The legal problem confronting the tribunals and courts is to identify and apply to the facts of each case clear, comprehensible and correct criteria for determining who is an employee and who is not. This is the only way to achieve the consistency necessary for the fair administration of the law. It is, however, unrealistic to expect perfect predictability. The very nature of the judgment that has to be made allows for a degree of latitude without falling into legal error. Sometimes the tribunal has to reach a judgment on unsatisfactory and incomplete evidence of the facts relevant to the legal analysis of the relationships between the worker, the employment agency and the end user of the worker's services.

8. On appeals the EAT and this court must also aim for consistency in applying the statutory requirement that an appeal only lies on a question of law. Appellate bodies must not interfere with a decision of an ET that a worker is or is not an employee simply on the ground that it would not have decided the point that way. An error of law must be identified in the decision of the ET challenged in the EAT or in this court.

**Background facts**

9. The ET considered the case on the basis that there was no dispute about the relevant facts. It was agreed by the parties that the Tribunal did not need to hear live evidence. Accordingly the ET read the witness statements and an agreed bundle of documents. As Elias J observed in the EAT, there may in fact have been more disagreement about the facts than the representatives appreciated. With the

benefit of hindsight it might have been preferable for certain aspects of the witness statements to have been explored in more depth in oral evidence.

10. In 1997 Ms James began to work on a full time basis for the Council providing support work on behalf of the Council's Asylum Seekers Team. She helped at a hostel which provided semi-independent accommodation for unaccompanied under-18 year old asylum seekers. She said that she was placed on a permanent rota to provide continuous 24 hour staff cover at the hostel and that she was a permanent, as distinct from part-time, member of staff. Later the same year she ceased working for the Council and spent time in St Lucia.

11. On 21 September 2001 Ms James began an engagement with the Council through the Greenwich Social and Care Staff Agency (Greenwich Nursing Agency), an employment agency which provided her services to the Council. According to the Council's revised Code of Practice on the Recruitment and Selection of Employees (paragraph 26) it did not, as a general principle, use the services of employment agencies to fill permanent or temporary vacancies because of the costs involved and the inability to control either the agencies' recruiting practices or the terms of employment they offer their staff, though occasionally the needs of the service and/or lack of suitable potential employees might result in a particular service area need to use agency staff.

12. The Council conceded that, while she was undertaking work for the Council as a Housing Support Worker, she was subjected to a degree of control consistent with a contract of employment. Ms James explained in her evidence that the Council, not the employment agency, arranged all her instructions, orders and her working conditions, provided the materials used in her work and organised the procedures followed by her. She wore a staff badge bearing the Greenwich Council logo with "Social Services" written under her name. But, the Council contended, there was an absence of that mutuality of obligations which is required to found a contract of employment between her and the Council.

13. In 2003 Ms James changed agencies. From 28 September 2003 a new agency assumed responsibility for providing her services to the Council. On 28 April 2004 she signed a "Temporary Worker Agreement" with an employment agency called BS Project Services Limited (B.S. Social Care), which paid her a better hourly wage. There was also an agreement between the new agency and the Council under which the agency received from the Council a sum to cover the worker's pay, its expenses in making the arrangements for the supply of "Temporaries to carry out Assignments" and the agency's own commission. The agency assumed responsibility for the payment of remuneration and payment of statutory deductions and contributions.

14. According to the terms of the agreement between the agency and Ms James she contracted in the capacity of a self-employed worker in relation to each assignment undertaken by her. She was not obliged to consider any assignment offered to her by BS Social Care. It was stated that the terms constituted a "contract of services between BS Social Care and the Temporary Worker" and did not give rise to a contract of employment between them or between the Temporary Worker and the client (clause 2 (c)).

15. She was paid by the agency following receipt by the agency from her of completed weekly timesheets. The ET found that the Council's Disciplinary Procedure and Grievance Policy did not apply to Ms James and that she was not entitled to benefit from the Council's sick pay or holiday pay provisions applicable to employees.

16. In August and September 2004 she was absent from work through sickness. She did not notify the Council's Team Manager in the Council's Asylum Seekers Team, Ms Marichu Canete, of the reasons for her absence. She did not receive sick pay from the Council. She provided BS Project Services with medical certificates and informed a work colleague that she was ill and unable to attend for work. While she was away the work previously undertaken by her was undertaken by another worker provided by BS Project Services.

17. Following the period of absence through sickness she turned up for work on 24 September 2004 only to find that another agency worker had arrived to cover the same shifts. A meeting with Ms Marichu Canete, managers from the agency and a trade union representative took place on 28 September, at which a number of issues were raised about Ms James's conduct and other matters, but they were not resolved. No further meetings took place. Ms James did not undertake any further work for the Council. She said that, as she found herself without a job and without a reference, it was hard to obtain another job.

18. On 12 November 2004 she presented her complaint of unfair dismissal against the Council. BS Project Services was later joined as a respondent, though it was not contended that Ms James was an employee of the agency. She claimed that she was dismissed on the termination of her working arrangement with the Council and that dismissal occurred when she had raised health and safety issues.

19. The Council responded that Mrs James was an agency worker, who had provided services to the Council as a Housing Support Worker, but never as an employee of the Council; that she had been supplied to the Council through agencies that were entirely independent of the Council; that, given her status, the Council's disciplinary and grievance procedures were not available and that no disciplinary action was taken against her; that she was not entitled to sick leave under the Council's policies; that she was not dismissed by the Council; that the Council was powerless to dismiss her, as she was not an employee of the Council; and that she was informed that, when she had failed to attend work, the Council had engaged another agency worker in her place. It contended that Ms James was self-employed, had no access to employment benefits, could be replaced at any time and was herself free to leave the Council's engagement at any time she pleased.

**ET decision**

20. At the ET hearing Ms James' Unison representative, Mr Roger Barton, appeared for her.

21. The ET summarised the submissions, reviewed the law and concluded as follows-

> "17. The Tribunal concluded in circumstances where there was no obligation upon the claimant to provide her services to Greenwich Council and there was no obligation on the part of Greenwich Council to provide the claimant with work, there was an absence of what Lord Irvine of Lairg described in **Carmichael v. National Power PLC** as the irreducible minimum of mutual obligation necessary to create a contract of service. The Tribunal noted that during the Claimant's absence through sickness the agency provided another worker for Greenwich Council. We considered that in circumstances where

> the Claimant did not have the benefit of any entitlement from Greenwich Council in the form of remuneration and benefits such as sick pay, holiday pay, there was an absence of any obligation on the part of Greenwich Council towards the Claimant. In addition we noted that the Claimant failed to notify Greenwich Council that she was absent through sickness and she was replaced by another agency worker. We concluded that there was the absence of the required mutuality of obligation necessary to support the existence of a contract of employment between the Claimant and Greenwich Council.
>
> 18. We did not consider that when the Claimant was undertaking work on behalf of Greenwich Council she was working under Greenwich Council's control, such as working to a rota, was relevant in circumstances when there was the absence of mutuality of obligation necessary to found a contractual relationship between the Claimant and Greenwich Council. Further we did not conclude that there were any facts from which a contract of service could be implied from the nature of the arrangement which existed between the Claimant and the end user Greenwich Council. We considered that by the time the Claimant had entered into the relationship with BS Project Services Ltd in 2003 she had already undertaken work for Greenwich Council through the agency of another employment agency and had chosen to switch to BS Project Services Ltd because of the higher rates of pay from such agency. By such stage she must have been aware of at least some of the employment terms of her colleagues, who were employees of Greenwich Council, but she had chosen to continue to work for Greenwich Council through the agency of the second named Respondent because of higher rates of pay."

**The EAT decision**

22. In its judgment reported at [2007] IRLR 168 the EAT held (paragraphs 52 and 62) that no error of law in the ET decision was identified. The ET was entitled to find that there was no basis for implying a contract of employment between Ms James and Greenwich Council in this case. It rejected the contention that the ET decision was perverse. Although the ET had focused on the absence of the mutuality of obligations, it could simply have said that there was no necessity to imply a contract of employment in this case. The mere passage of time was not sufficient to require such an implication to be made.

23. After a valuable review of the relevant case law covering the range of circumstances which give rise to the question whether a contract of employment exists and, in particular, the circumstances of agency workers, in which there is normally no express contract of any kind between the end user and the worker, it was stated that the question is whether some contract, pursuant to which work is being provided between the worker and the end user, can properly be implied according to established principles. The judgments of this court in **Dacas** and **Muscat** were cited and analysed. It was correctly

pointed out (paragraph 35) 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 that laid down by Bingham LJ in **The Aramis** [1989] 1 Lloyd's Rep 213 at 224

> " …necessary …in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."

24. As Bingham LJ went on to point out in the same case it was insufficient to imply a contract that the conduct of the parties was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract.

25. In considering the grounds of appeal the EAT commented that the submission that the only proper inference was that there was a contract of employment in place between Ms James and the Council was an attack on the ET decision on the ground of perversity, though Ms James's representative was reluctant to call it that.

26. The EAT summarised the submissions in support of the appeal: that Ms James had not chosen to be an agency worker, as she was never given the option of an express contract; that she had virtually no contact with the employment agency; that she had worked only for the one employer, under the directions of which she acted without the intervention of the agency, save as an intermediary for the payment of wages, and by which she was treated as a full time member of staff on a permanent rota; and that her length of service with one end-user well exceeded the period of one year (ie the minimum period of qualifying service for the acquisition of the right not to be unfairly dismissed) from which a contract of service should be implied.

27. The EAT concluded that the perversity argument could not succeed, saying

> "52. …..We do not accept that the only proper conclusion that could be reached in the circumstances of this case was that Ms James was employed by Greenwich. **Dacas** indicates that circumstances may exist which could justify the inference of an implied contract in an appropriate case, but the Tribunal was fully entitled to find that it did not do so here. It did so by focussing on mutuality of obligations, although it might more pertinently have said simply that there was no necessity to imply a contract in this case. In our view, the mere passage of time is not sufficient to require any such implication, for reasons we give below. No error of law has been identified in the Tribunal's approach."

28. The EAT also commented that Ms James' desire to have a contract of employment did not support the implication of a contract and that her change of agencies was consistent with a recognition by her that she was an agency worker without any direct contractual relationship with the Council.

29. The EAT added some general helpful observations (paragraphs 53 to 61) on how Tribunals might approach the implication of a contract with the end user which I shall not repeat, but with which I agree. I also agree with Elias J's summary of the relevant legal principles in paragraph 21 of the later decision of the EAT in **National Grid.**

30. The real issue in "the agency worker" cases is whether a contract should be implied between the worker and the end user in a tripartite situation of worker/agency/ and end user rather than whether, as in "the casual worker" cases where neither the worker nor the end user has an agency contract, the irreducible minimum of mutual obligations exists. In the agency worker cases the problem in implying a contract of service is that it may not be necessary to do so in order to explain the worker's provision of work to the end user or the fact of the end user's payment of the worker via the agency. Those facts and the relationships between the parties are explicable by genuine express contracts between the worker and the agency and the end user and the agency, so that an implied contract cannot be justified as necessary.

31. The EAT made clear its disagreement with the view expressed by Sedley LJ in **Dacas** that the mere passage of time could justify an implied contract between the worker and the end user as a matter of necessity. As pointed out by the EAT (paragraph 59) "Something more is required to establish that the tripartite agency analysis no longer holds good."

**Appellant's submissions**

32. Mr Richard O'Dair, who appeared for Ms James, accepted that there was no express contract between the Council and Ms James; that the arrangements between the Council and the employment agency for the supply of agency workers were not a sham; and that his case rested on the implication of a contract of service between Ms James and the Council, which was only possible if it was necessary in all the circumstances to imply such a contract. He relied on the following grounds in support of his submission that the ET erred in law in concluding that Ms James was not an employee of the Council under an implied contract of service.

33. The first was a perversity ground. The ET was perverse, Mr O'Dair argued, in not making a finding that Ms James was employed under an implied contract of service on the basis of the relevant undisputed primary facts appearing from the witness statements supporting her case. A finding that Ms James was an employee of the Council was, Mr O'Dair contended, the only decision open to the ET and it was the only one that accorded with the practical reality of the workplace relationship between her and the Council. This court should substitute a finding that she was employed by the Council under an implied contract of service.

34. The facts relied on by Mr O'Dair as pointing to a contract of service were that Mrs James had provided her services to the Council for a continuous period of 3 years prior to September 2004; that the meeting of 28 September to which she was called by her manager (Ms Marichu Canete) could only be characterised as a disciplinary meeting; that she had been working on a monthly rota and was expected to work on the days indicated; that she was expected to be at work on 30 August 2004 when she failed to arrive; that the Council expected her to return to work after her sickness; that like other staff working at the hostel she was issued with a permanent staff badge; and that it was the Council's policy that agency relationships were appropriate only to meet short-term staff shortages.

35. The second ground was a self-misdirection in law relating to the mutuality requirement for a contract of service. The ET erred in law in assuming (see paragraph 17) that the obligation which must exist before the Council could be found to be an employer was an obligation to provide remuneration for work done and for sick pay, whereas it is sufficient to show that there was an obligation to provide work and/or to provide the agency with sufficient funds to pay for the work done by the claimant. There were mutual obligations to provide work and to pay for it sufficient to support a finding that a contract existed. The Council paid for Ms James's services, including her sick pay, through the agency.

36. The third ground was a self-misdirection in law as to the implication of a contract of service between the Council and Mrs James in accordance with the test laid down in **The Aramis**. The ET erred in not finding that an implied contract existed between them, as an implied contract was necessary to give business reality to the workplace relationship between them. The features of that relationship were that she was not a temporary worker, as she had rendered her services to the Council for over three years in circumstances where the required minimum of mutual obligations existed; that her work was subject to the Council's control; that the Council paid for her work directly or indirectly; and that she was not an employee of the agency or other third party nor was she carrying on business on her own account. It was for the Council to show that in these circumstances she was not an employee. The officious bystander would certainly have given only one answer to the question whether it was necessary to imply a contract of service between her and the Council.

37. The fourth ground was the ET's failure in law to recognise a change that had occurred in the legal status of Mrs James over time. The ET should have recognised that there had been a change in her status from a non-contractual one into a contractual one, in which she was integrated in the Council's organisation and was an employee within it.

38. It was submitted that, even if there was no original offer and acceptance leading to the formation of a contract of service, it was to be inferred, in the absence of evidence to the contrary, that 12 months after her initial service her status changed to that of an employee of the Council under a contract of service. This, it was argued, was legally possible even if it was impossible to identify the relevant offer and acceptance leading to the formation of a contract. See **The Eurymedon** [1975] AC 514 per Lord Wilberforce.

39. Instead the ET had wrongly treated her change to a different competing employment agency in 2003 in order to benefit from a higher rate of pay as a decisive factor against an implied contract of service, being an indication that she had chosen agency status and must live with the consequences of her choice. The contract of service, which already subsisted between her and the Council, remained in existence. Only the employment agency was changed. What mattered was the substance of the continuing relationship between her and the Council.

**Discussion and conclusion**

40. Although four grounds of appeal have been argued in detail on behalf of Ms James, I agree with the EAT that the overall challenge to the legal correctness of the ET's conclusion can only succeed if it is shown that the ET's decision, which does not contain any misdirection as to the applicable law, was perverse. The ET considered the relevant authorities and, as appears from paragraph 8, the ET correctly stated that it had to consider "whether, if in the absence of an express employment contract, an implied contract of employment between the worker and the end user may be deduced from the

conduct of the parties and from the work done." On a perversity challenge the case that no reasonable tribunal could have reached the conclusion that the ET reached must be overwhelming in order to succeed on appeal.

41. On the implied contract of service approach to the facts found by the ET it was, in my judgment, entitled to conclude that Ms James was not an employee of the Council because there was no express or implied contractual relationship between her and the Council. Her only express contractual relationship was with the employment agency, as she recognised when she changed agencies rather then employers in order to obtain a higher wage. The Council's only express contractual relationship was also with the agency. There were no grounds for treating the express contracts as other than genuine contracts.

42. The ET was not perverse in holding that it was unnecessary to imply a third contract between Ms James and the Council. What Ms James did and what the Council did were fully explained in this case by the express contracts into which she and the Council had entered with the employment agency. The Council provided work to Ms James for several years, but the ET found that it was not under any implied obligation to do so. The mere passage of time did not generate a legal obligation on the part of the Council to provide her with work any more than it generated a legal obligation on her to do the work. The provision of work by the Council, its payments to the employment agency and the performance of work by Ms James were all explained in this case by their respective express contracts with the employment agency, so that it was not necessary to imply the existence of another contract in order to give business reality to the relationship between the parties.

43. In brief, the circumstances in which the Council received and paid for work done by Ms James for the Council and the facts about the working relationship between them did not lead irresistibly to the result that they were only explicable by the necessary existence of a contract of service between them.

44. In my judgment, the ET made no self misdirection of law in rejecting Ms James' claim to be an employee of the Council. She might have thought that she was an employee, even though she had a contract with an agency and changed agencies. She might have appeared to others to be an employee, having been paid for doing work for the Council over a number of years. She could hardly be described as a "temporary worker." However, on proper legal analysis applied to the uncontested facts, it was not necessary to imply a contract of service between the parties and the ET made no error of law in rejecting her claim to the status of a Council employee.

45. I add that I agree with the EAT that in this case the question of the presence of the irreducible minimum of mutual obligations, which was addressed by the ET and by Mr Jonathan Cohen on behalf of the Council in his skeleton argument, was not the essential point. The mutuality point is important in deciding whether a contract, which has been concluded between the parties, is a contract of employment or some other kind of contract. In this case, on the findings of fact by the ET about the arrangements, how they operated in practice, about the work done by Ms James and the conduct of the Council, there was no contract at all between Ms James and the Council: there was no express contract and there were insufficient grounds for requiring the implication of a contract.

**The state of the authorities**

46. The citations to the court on agency workers provide a welcome opportunity to make a few comments on the state of the authorities. I agree with Mr Cohen that there is no significant difference between

the law stated and applied in the decisions of this court and in those of the EAT. It is apparently thought in some quarters that they are in conflict. I do not think so. As for the judgment of the EAT in this case I agree with it. I have been unable to find conflict in any of the other cases.

47. **Dacas** was the first case in this court to confront head on the question whether a contract of service with the end user could be implied in the tripartite setting of an agency worker under contract with an agency, which also has a contract with the end user. I agree with Mr Cohen that there was no appeal before the Court of Appeal in that case against the decision of the ET that the claimant was not an employee of the end user. I also agree with him that the majority judgments raised the possibility, which had not been considered by the ET in that case when holding that the claimant was not an employee of the agency or of the end user, whether a contract of service might by necessary inference be found to exist with the end user. I did not expand on the possibilities, let alone decide the implied contract issue, in the absence of the relevant findings of fact. **Dacas** is not authority for the proposition that the implication of a contract of service between the end user and the worker in a tripartite agency situation is inevitable in a long term agency worker situation. It only pointed to it as a possibility, the outcome depending on the facts found by the ET in the particular case. I would add that, having regard to the nature and constitution of the proceedings before the Court of Appeal in that case, it was not the most suitable occasion for offering more detailed guidance on the circumstances in which a contract of service could be implied.

48. **Muscat** was a case in which a contract of service was implied, but it was not a tripartite agency case. Its importance is in the extent of approval given to the legal analysis in the majority judgments in **Dacas** and in the guidance given on the applicable legal principles, in particular emphasis on the requirement that the implication of a contract of service must be necessary to give effect to the business reality of a relationship between the worker and the end user.

49. The decision of the House of Lords in **Carmichael v. National Power** [1999] ICR 1226 was cited by Mr Cohen for the proposition that, for a contract of service to exist, mutuality of obligation must be found. The ET found that there was no such mutuality of obligation between Ms James, who was under no obligation to the Council to do work for it, and the Council, which was under no obligation to Ms James to provide her with work and therefore no employment relationship between them. Mr Cohen accepted that in **Carmichael** the issue was different from the tripartite agency worker cases. No employment agency was involved. There was a direct express contract between the workers and the user of their services and the dispute was whether or not it was a contract of service or whether they were casual workers working under a contract of another kind, there being periods in the relationship when no work was being performed or paid for. In the agency worker cases the issue is whether a third contract exists at all between the worker and the end user. The relevant question in such cases is whether it is necessary, in the tripartite setting, to imply mutual contractual obligations between the end user to provide the worker with work and the worker to perform the work for the end user.

50. The EAT added observations (paragraphs 53 to 61) which are intended to assist tribunals in the task of deciding whether a contract of employment with the end user should be implied. ETs would be well advised to follow the guidance given by the EAT, which I would expressly approve.

51. In conclusion, the question whether an "agency worker" is an employee of an end user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements. Just as it is wrong to regard all "agency workers" as self-

employed temporary workers outside the protection of the 1996 Act, the recent authorities do not entitle all "agency workers" to argue successfully that they should all be treated as employees in disguise. As illustrated in the authorities there is a wide spectrum of factual situations. Labels are not a substitute for legal analysis of the evidence. In many cases agency workers will fall outside the scope of the protection of the 1996 Act because neither the workers nor the end users were in any kind of express contractual relationship with each other and it is not necessary to imply one in order to explain the work undertaken by the worker for the end user.

52. I have already expressed my agreement with the EAT that, in this case, the mutuality of obligation approach in the **Carmichael** case and adopted by the ET in this case is not particularly helpful. As I have explained the issue in **Carmichael,** which was not a tripartite situation, was whether there was an overarching employment contract or a series of contracts that were not contracts of employment. This case presents a tripartite situation with two express contracts, which are not contracts of employment, (1) between Ms James and the agency and (2) between the agency and the Council. The issue here is whether, having regard to the way in which the parties have conducted themselves, it is necessary to imply (3) a contract of employment between Ms James as worker and the Council as the end user.

**Result**

53. I would dismiss the appeal. It is impossible to say that the decision of the ET that Ms James was not an employee of the Council was arrived at by applying the wrong legal test or that the conclusion reached, on applying the correct test, was perverse.

**Post script**

54. I would add two final comments.

55. First, as an appeal from the decision of an ET only lies on a question of law, my view is that, in general, it would be very unusual for an appeal to the EAT or to this court to have a real prospect of success if the ET's conclusion that a contract of employment with the end user should, or should not, be implied, has been reached by applying the correct test of necessity, as explained by Elias J in the judgment of the EAT and in the judgments of this court in this and other cases.

56. Secondly, some litigants and their advisers and representatives appear to have unrealistic expectations about what courts and tribunals can legitimately do to remedy their grievance that the statutory right not to be unfairly dismissed was confined by Parliament to workers who have a contract of service with the respondent. (cf the anti-discrimination legislation in which statutory protection expressly extends to agency workers). Through their decisions adjudicating on legal disputes courts and tribunals are builders in the law. They are not architects of economic and social policy. As they must operate within the legal architecture created by others, they cannot confer the right not to be unfairly dismissed on a worker who is without a contract of employment.

57. The courts and tribunals are fully aware of the current controversy about the absence of job protection for agency workers, who do not have an express or implied contract of employment. While this appeal and this judgment were pending articles appeared in the newspapers under such headlines as "The slow death of the Real Job is pulling society apart", "Agency Workers could get full-time rights" and "Temps may get full work rights under EU Law." A Private Members' Bill was introduced to reform

the law. It was doomed to failure for lack of support from the Government and failed to get a reading. There is no current government proposal to introduce legislation giving agency workers similar rights to those enjoyed by employees. There are negotiations about the possible regulation of agency workers through the medium of an EC Directive to member states on agency/temporary workers.

58. The courts and tribunals are also well aware of the nature of the arguments for and against a change in the law, but it is not for them to express views about a change or to initiate change. This is a matter of controversial social and economic policy for debate in and decision by Parliament informed by discussions between the interested parties- the Department for Business and Enterprise, the TUC, the CBI and other employers' organisations and the European institutions and governments of member states. The questions for discussion, negotiation and decision are not legal questions susceptible to adjudication or appropriate for comment by a court or tribunal. The questions are outside their province and competence.

59. On the one hand, there are arguments for a flexible labour market in the interests of a competitive economy and of full employment. There is a real need to hire temporary workers from agencies at short notice for extra busy periods or special projects. If this is made less attractive or more costly, job losses may follow and more work may added to the burden borne by long term employees.

60. On the other hand, a significant move in the direction of the casualisation of labour and the growth of a two tier workforce, one tier enjoying significant statutory protection, the other tier in a legal no man's land being neither employed nor self employed, vulnerable, but enjoying little or no protection, may create social injustice and a festering sense of grievance which would not be satisfactory in the interests of an efficient workforce, a competitive economy, a healthy society or anything else. There is, however, nothing to prevent wise employers from recognising that their long term interests may be better served by treating their entire workforce in a responsible and considerate way than by insisting on the strict letter of the law.

61. Policy decisions have to be taken by others about what changes (if any) to make, what rights to confer on whom, what qualifying periods to set and so on. The increasing amounts of money, time and effort spent on litigating this issue in tribunals and on appeals might in some cases be invested more productively in making representations to and through bodies which can pursue the debate on policy or even reform the law.

**Lord Justice Thomas:**

62. I agree. The real issue before the ET was whether, given the contract between Ms James and Greenwich Nursing Agency and then BS Agency under which her services were provided to the Council, it was necessary to imply a contract of service between the Council and Ms James. The ET applied the correct test and came to a conclusion on the facts to which it was entitled. The decision was not perverse and the EAT was entirely correct in dismissing the appeal.

63. Parliament has provided in Part X of the Employment Rights Act 1996 that various rights, including the right to protection against unfair dismissal, depend on whether a person is employed under a contract of service, express or implied. That question is to be determined by the application of ordinary principles of law. Accordingly those who need the services of persons to work in their business can within that legal regime enter into arrangements with others to provide the services of persons without those persons becoming their employees, unless on ordinary principles of law it is

necessary, on the test in *The Aramis,* to imply a contract of employment between the individual providing the services and the person receiving the benefit of them. They have, in essence, the freedom to contract in these respects within the ordinary principles of law.

64. There are plainly arguments of social and economic policy as to whether the present position under Part X is one that should be maintained, particularly where the individual renders services to the same person for a significant period of time. The arguments go both ways. It is the function of the courts to apply the clear legal regime under Part X; it is for those who legislate to determine by examination of the social and economic arguments whether there should be any change. Unless and until they do so, Employment Tribunals must continue to apply the principles of the law of contract (as set out so clearly in the judgments of Mummery LJ and the President of the EAT in this case) to an analysis of the specific facts of each case.

**Lord Justice Lloyd:**

65. I agree with both judgments.

---