

# Temporary headaches

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Temps, contractors, casuals, consultants, agency workers – whatever you call them, it is clear that the flexible workforce is on the increase. One estimate puts the number at around one million workers. The advantages to an employer of using agency staff instead of taking on a permanent employee are manifold. As well as avoiding exposure to employment tribunal claims such as unfair dismissal and redundancy, the employer reduces fixed costs and can keep the headline figure of employed staff low. This will make a business more attractive to potential buyers and encourages financial analysts to rate it as more efficient than may actually be the case. Some business divisions and public sector organisations are instructed to keep the numbers of permanent staff within certain limits but can flex this by using agency staff instead. However, recent case law in the Court of Appeal may make the use of such staff less attractive in future.

The usual agency contract is formed between the worker and the agency. It provides that the worker is under the direction and control of the client (or “end-user”), but will be paid by the agency. Normally the contract expressly states that the relationship between the worker and the agency is not a contract of employment. The

agency contracts with the end-user to supply the worker’s services and there is no direct contract between the end-user and the worker. In this kind of tripartite relationship, where does this leave the worker?

It used to be thought that it left him or her between a rock and a hard place – that the worker was neither the employee of the agency (because the contract expressly states this, and because the agency does not control the worker’s day-to-day activities) nor of the end-user (because the worker would have no contract at all with the end-user). In *Montgomery v Johnson Underwood* (2001), where an agency worker had been employed by the same client for over two years and sued both the client and the agency for unfair dismissal, Buckley LJ quoted the director of the agency as saying, “Temps are not employed by the clients nor by us. We are not allowed to treat them as self-employed. I do not know what their status is. No one in the agency business knows the answer. They’re in limbo.” It seems that agency workers have been rescued from this limbo by the Court of Appeal. The change began in 2003, in *Franks v Reuters Ltd*, where the claimant had been supplied by an agency to work for Reuters and the arrangement had gone on continuously for six years. The Court of Appeal remitted the case

to the employment tribunal, holding that it should have considered the possibility of there being an implied contract of employment between the claimant and the end-user. This was followed soon after by *Dacas v Brook Street Bureau* (2004), the unfair dismissal claim of a cleaner who was supplied by BSB to Wandsworth Council, where she worked for four years before being sacked. She originally claimed unfair dismissal against BSB and Wandsworth Council, but her claim against Wandsworth had been dropped by the time the case reached the Court of Appeal. The Court confirmed that she could not claim to be the agency’s employee, but they also said that she could well have had a claim against Wandsworth through an implied contract of service.

Neither of these cases was actually authority for saying that agency workers were employees of the end-user – the case was remitted in *Franks* and the remarks in *Dacas* were obiter. However, in a judgment handed down on 9 March 2006 the Court of Appeal has gone the further step. In *Cable & Wireless Ltd v Muscat* they have upheld an employment tribunal’s decision that an agency worker was the employee of the end-user through an implied contract of employment. Essentially, they held that the tribunal had properly

considered all the evidence, including the conduct of the parties as well as the express agreements, and had made no error of law. Importantly, the Court of Appeal felt that provided the end-user was actually paying the worker’s wages, it made no difference that the payment was made indirectly (through the agency) rather than directly to the worker.

As frequently happens when a court says something new, the Court of Appeal was anxious to emphasise that this does not mean that all agency workers are automatically employees of the end-user. Some may be considered to be genuine independent contractors. But in

practice, this must make it highly likely that most agency workers will be regarded as the end-user’s employees, with all the attendant statutory employment protection rights. If so, the focus will shift to the simple question of whether or not they have sufficient continuity of employment for whatever right they wish to claim. Companies who frequently use agency workers may need to be advised to think very carefully about their strategy in future.

## References

*Montgomery v Johnson Underwood Ltd* [2001] IRLR 269

*Franks v Reuters Ltd* [2003] IRLR 423  
*Dacas v Brook Street Bureau* [2004] ICR 1437  
*Cable & Wireless plc v Muscat* [2006] EWCA Civ 220

## BIOGRAPHIES

Gwyneth Pitt, Pamela Sellman and Michael Wynn are from Kingston Law School at Kingston University. Gwyneth is Professor of Law and is currently working on a new edition of her textbook, *Employment Law*. Pamela is a Senior Lecturer in Employment Law. Michael is a Principal Lecturer in Law and Co-Director of the Unit for Employment Law and Policy.

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## Employment Law - Termination of Solicitor's Training Contracts

A recent decision by an employment tribunal to award an applicant compensation for breach of contract would, I suspect, be met with a welcomed sigh of relief by many trainee solicitors, especially

those who might at present be feeling a little vulnerable at their current training establishment.

In the case of *Uche v Sumal Creasey & Co. Solicitors*<sup>1</sup>, an employment tribunal found that the

respondent solicitors had breached their trainee solicitor's contract of employment by their purporting to dismiss her under their standard terms of employment she had (continued overleaf)

(continued from previous page) entered into ("Respondent's Contract") before entering into her Law Society approved form solicitor training contract ("Training Contract").

Many trainee solicitors enter into contracts of employment with their training establishments before their being offered training contracts. In such cases, the terms, nay, the contracts, governing such relationships should be undisputed. The problem however that arose in Uche was the solicitor-respondents claimed to have the right to dismiss their solicitor-trainee in accordance with the Respondent's Contract whilst the applicant argued that any such termination must be in accordance with the Training Contract.

Uche began when, on 9 April 2002, the respondent made her a written offer that stated, among other things, "I write to confirm an offer of articles with us on the basis of the agreement enclosed herewith". The agreement enclosed was the Respondent's Contract. This included, among other things, a provision for notice, which read, "the [applicant] is initially engaged for a probationary period which will last for six (6) calendar months, unless the [respondent] in its absolute discretion extends this probationary period. In all cases the probationary period will be deemed to continue until satisfactory completion of the same has been confirmed by the [respondent] to the [applicant] in writing. During the aforesaid probationary period either the [respondent] or the [applicant] may terminate the [Respondent's Contract] upon one week's written notice to the other."

The Respondent's Contract also provided a disciplinary procedure including dismissal without notice for issues classed as 'serious misconduct'. The list of issues of serious misconduct did not include the issue for which the applicant was subsequently dismissed, but did say that the list was not exhaustive or exclusive and offences of a similar nature would be dealt with under the procedure.

The applicant accepted the offer on those terms. On 10 June 2002, she started working for the respondent. On that day the Training Contract was entered into between her and the respondent. It referred to the "date of commencement and fixed term", saying, "this contract begins on 10 June 2002 and continues for two years, subject to the provisions for earlier termination".

The Training Contract included a term that the applicant was employed by the respondent under the terms of the Respondent's Contract, but if there was any conflict between those terms and the Training Contract then the terms of the Training Contract would prevail. The termination clause provided that the Training Contract may be terminated by (a) agreement between the respondent and the applicant, or (b) the Law Society, (i) with or without an application for that purpose by either party, or (ii) following an application by the respondent in the event of poor performance by the applicant.

The Law Society rules provided that an application may be made to it to determine a training contract, which will then be adjudicated upon by it. If the parties agree to a mutual cancellation of a training contract, they should complete a cancellation of training contract in form TC3, in which, the principal of the solicitor firm certifies that the trainee has satisfactorily served during the period of training and is of suitable character to become a solicitor. This form is also used where a trainee solicitor wishes to transfer the training contract.

On 6 September 2002, the respondent gave the applicant one week's notice to terminate her employment, relying, they said, on the terms of the Respondent's Contract. On 23 October 2002, the applicant, having taken advice from the Law Society, informed the respondent that she had been advised that the Training Contract could not be cancelled except by agreement or following adjudication and she, therefore, sent the TC3 form to be completed. No reply was made to that letter.

At a preliminary hearing in the case of *J Lymbury T/A John Lymbury & Co v J. McCrery*<sup>2</sup>, HHJ Peter Clark said, "the purpose of a Training Contract is two-fold; to provide training to the would be solicitor and to create a fixed term contract of employment." With Lymbury in mind and realising the significance of the case before him, at the preliminary hearing of Uche, the Chairman sitting alone ordered, among other things, the assistance of, "some senior person from the Law Society".

Written evidence was provided by the Law Society, and its view was if there is a conflict between a contract of employment and a Law Society contract – the Training Contract – then the terms of the training contract prevailed.

The Law Society's view was that

a dual system of contracts operated, whereby a trainee solicitor entered into a training contract with an individual solicitor and that contract runs concurrently with a contract of employment between the trainee solicitor and the firm of solicitors. Its view was that the contract of employment with the firm of solicitors governs the terms of employment unless a conflict arises with the terms of its – the Law Society's – training contract, in which case the training contract and not the terms of employment would prevail. That was in accordance with the statutory regulations and the Training Contract itself entered into by both parties in Uche's case.

The employment tribunal accepted that the system previously referred to as articles and now known as traineeship for qualification as a solicitor involved a system of dual contracts of employment and training. This is to govern the overall relationship, which is essentially one of training or apprenticeship. Accordingly, it found the term of the Training Contract for a fixed two year term with limited provision for termination, which is a feature of any apprenticeship type of relationship, to be inconsistent with the terms of a probationary period terminable on one week's notice. The two year fixed term and the provision for termination in the Training Contract, therefore, prevailed and governed the contract of employment, because they were in conflict with the terms in the Respondent's Contract. It followed that the termination on the grounds of performance given by the notice on 6 September 2002 was a breach of contract/the Training Contract.

The tribunal concluded that in a case where the applicant's performance was considered not to be up to standard, under the contract between the parties, that is a matter which must first be referred to the Law Society. Therefore, it would seem that should either party to a training contract wish to terminate it for whatever purpose it should seek to do so either with the other's consent or, failing which, with the blessing of the Law Society. There appears to be little or no room for any unilateral termination by either party to such agreements.

**Ryan Clement, head of Conference Chambers in Harrow.**

<sup>1</sup>Case No. 1902130/2002

<sup>2</sup>EAT/217/98

## Book Review: Stamp Duty Land Tax (Second Edition) by Michael Tomas

It seems like only yesterday that we strolled into Bush House, clutching our sheath of conveyances and cheques, to face the embattled faces and muscled stamping arms of the processing staff in the Stamp Office – can so much time have already passed that we already have the benefit of the second edition of the SDLT Law Practitioner Series Guide? Well, two years have already passed since SDLT was applied in practice, and many difficulties, both real and apparent have been identified. Until SDLT was introduced, stamp duty was according the author "something of an afterthought" Now SDLT is a priority.

Time is not only our enemy, but that of such a volume, which, post Budget, is now out of date in relation to certain values and figures.

However, this is a small price to pay for such a well written and laid out, easy to follow commentary and guide which is recommended as an essential reference tool for every

property practitioner. The second edition has been prompted in part by the major changes in the SDLT code such as the new regimes for leases and partnerships. Other changes of significance include the abolition of disadvantages area relief for commercial property and new restrictions on group relief. Although there is yet to be reported the first case on SDLT, the House of Lords has given new guidance on the Ramsay principle and this and its implications are discussed. In addition, the new disclosure rules apply from 1st August 2005 and Mr Thomas has considered the impact and extent of these.

The book sets out the law and then follows with a commentary of how the law will apply in practice. The input of members of the accountancy group KPMG has enabled the author to adopt a clear and intelligible style which is well demonstrated in Chapter 9. This discusses compliance and is

particularly strong setting out in clear language the situations in which there is a duty to deliver a return and going on to discuss each in more detail.

The footnotes of this edition are also a particularly key area and Appendix 1 contains a useful checklist containing key questions that need to be considered in case there is an SDLT consequence.

Practitioners would do well to read the Chapter on structuring transactions and tax planning which is thought provoking and highlights many areas of significance worthy of consideration.

How long will it be I wonder before the Third Edition of this excellent reference book becomes an essential?

**Maralyn Hutchinson  
Partner  
Kagan Moss and Co.  
Middlesex Law Society**

**CAMBRIDGE**

### Stamp Duty Land Tax Second edition

**Michael Tomas**  
Counsel to the Editor David Coy QC

*Stamp Duty Land Tax is fully updated and deals with the many changes that have been made since the introduction of SDLT. It gives a detailed discussion of the legislation and goes forward suggesting interpretations and planning opportunities. This book will appeal to property lawyers, the specialists, and anyone involved in land transactions.*

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**John M. Hayes**

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