IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 159/09
5115993

BETWEEN	MALCOLM JAMES McDONALD Applicant	
AND	ONTRACK INFRASTRUCTURE LIMITED First Respondent	
	ALLIED WORK FORCE LIMITED Second Respondent	

Member of Authority:	Helen Doyle
Representatives:	Tony Bamford and Rebecca Frost, Counsel for Applicant
	Peter Chemis and Sumin Ahn Counsel for first Respondent
	Gilliam Service and Emily Moore, Counsel for second Respondent
Investigation Meeting:	2 June 2009 at Nelson
Submissions received:	2 July and 2 September 2009 from Applicant 14 July 2009 and on day from first Respondent 13 July 2009 from second Respondent
Determination:	22 September 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Malcolm McDonald approached Allied Work Force Ltd (Allied) at its Nelson branch office in or about September 2006. Allied is a service-focus labour hire company specialising in providing individuals on a casual basis to clients to cover temporary work requirements.

[2] Mr McDonald was provided by Allied with an application form, information regarding security checks and general induction, health and safety crew information pack, IRD taxation form, a work skills questionnaire and an individual employment agreement as part of a standard information pack. He filled in an application form and signed an individual casual employment agreement with Allied some time prior to 28 September 2006. The individual employment agreement signed by Mr McDonald could not be found but Mr McDonald accepted, that the terms and conditions he was employed under, were those set out in the individual employment agreement that was attached to his statement of problem.

[3] Mr McDonald's first assignment whilst employed by Allied was for an eight hour shift with Fonterra on 28 September 2006. Mr McDonald was placed in a number of limited term assignments by Allied with different clients until March 2007.

[4] In March 2007 Mr McDonald was placed by Allied with Ontrack Infrastructure Limited (Ontrack) as a trainee track worker repairing the railway track as part of a spot re-sleeper gang. The gang was at the material times headed by David Beck from Ontrack.

[5] Mr McDonald had discussed the pay rate that he would receive with Ontrack with the manager of Allied in Nelson. He was told that the work would be of a full time nature although, as he recalled, Allied was not sure of the precise hours and he later confirmed those with Mr Beck.

[6] On 8 November 2007 Mr McDonald's role with Ontrack ended and he went back to Allied and accepted assignments on 15 and 16 November 2007. Mr McDonald did not perform further assignments. He was told that the reason his role was ending at Ontrack was because the company was introducing a digger operator.

[7] Mr McDonald says that he was unjustifiably dismissed from Ontrack on 8 November 2007. He wants reinstatement to his previous position with Ontrack, compensation for hurt and humiliation, three months loss of wages, payment of outstanding holiday pay and costs.

[8] Ontrack says in its statement of problem lodged on 13 May 2008 that at no time did it employ Mr McDonald. Ontrack say that it utilises the employees' of Allied in order to provide human resources for projects or temporary spikes in work demand although wherever possible it employs most of its work force.

[9] Ontrack asked the Authority to strike out the first respondent on the basis that Mr McDonald was utilised between March and November 2007 and was at all times an employee of Allied.

[10] Allied says in its statement in reply lodged on 19 May 2008 that it has a employment relationship with Mr McDonald and that the Authority should strike out the first respondent as there has never been an employment relationship between Ontrack and Mr McDonald. Further Allied says that in the individual employment agreement that Mr McDonald signed at the commencement of his employment he had no grounds to expect ongoing work from Ontrack and has no basis for the claim of unjustified dismissal.

The investigation process

[11] There was initial delay between the lodging of the statement of problem in February 2008 and the lodging and serving of statements of reply in May 2008. The parties had not attended mediation.

[12] Mr Bamford advised by letter dated 23 June 2008 that Mr McDonald did not accept Ontrack and Allied's positions in terms of the nature of the employment relationship and that he considered the real nature was the relationship between him and Ontrack was likely one of employment. He did not consent to an application to strike out Ontrack as first respondent and wanted the Authority to make a direction for mediation.

[13] The parties initially agreed following a telephone conference with the Authority that if there could be an agreed statement of facts the issue as to the identity of the employer could be determined on the papers. No agreement could be reached as to the statement of facts and the matter was duly set down in March 2009 to deal with the issue about who Mr McDonald's employer was and the substantive matter with respect to the grievance.

[14] In late January 2009 Ontrack was committed to attending mediation but there had been problem in arranging a mediation date before the date set for the investigation meeting. On that basis, although reluctantly, Mr Bamford agreed to an adjournment provided the Authority could provide dates in or about May 2009. The parties attended mediation but the matter did not resolve and an agreement on an investigation meeting date in early June was reached.

[15] Statements of evidence and lists of authorities were provided prior to the meeting. The parties recognised that there was an important issue of law in terms of the triangular relationship between Mr McDonald, Ontrack and Allied but were happy for the Authority to investigate and determine the matter.

[16] The Authority heard evidence from Mr McDonald and from the leading hand on the Ontrack gang at the material time, Peter Nukanuka.

[17] On behalf of Ontrack the Authority heard evidence from Geoffrey Hayward who is employed by Ontrack as the National Resources Manager and as part of that role oversees the operation of all the national track machine gangs including the spot re-sleeper gang where Mr McDonald was placed.

[18] On behalf of Allied the Authority heard evidence from Michael Huddleston, who is currently the Chief Executive Officer of Allied but was not employed at the time of Mr McDonald's placement with Ontrack. Mr Huddleston said in his evidence that he had investigated the relevant documentation and that the Allied management team from Nelson that was employed by Allied at the time Mr McDonald was engaged by the company, is no longer employed by Allied.

The issues

[19] Mr McDonald does not claim that Ontrack and Allied were his joint employers. Mr McDonald accepts that there were express contractual arrangements in place between him and Allied and between Ontrack and Allied. He accepts that the arrangement between Ontrack and Allied for the supply of temporary workers is not a sham.

[20] The issues the Authority is required to determine are:

(i) Was Mr McDonald an employee of Allied or was he an employee of Ontrack?

- Does s.6 of the Employment Relations Act 2000 and the real nature test apply in the circumstances?

- Should an employment agreement with Ontrack be implied in the circumstances?

(ii) Was Mr McDonald unjustifiably dismissed from his employment?

- If Mr McDonald was unjustifiably dismissed from his employment, then what remedies should be awarded; and
- are there issues with respect to holiday pay?

Was Mr McDonald an employee of Allied or was he an employee of Ontrack?

[21] There is no real disputes about the facts. Throughout the placement with Ontrack; Allied:

- Selected and offered Mr McDonald the placement.
- Paid Mr McDonald's wages weekly. The time worked by Mr McDonald was recorded on Ontrack stationery and signed by Mr McDonald. The timesheet was then forwarded to Ontrack's Head Office where on the basis of hours worked on the timesheet a purchase order was created and forwarded to Allied. Allied invoiced Ontrack for payments made to Mr McDonald on a weekly basis with payment required by the 20th of the month. Allied was obliged to pay Mr McDonald regardless of whether payment was made by Ontrack.
- Provided Mr McDonald with a payslip.
- Paid holiday pay as a component of Mr McDonald's weekly wages.
- Deducted and paid PAYE from Mr McDonald's gross earnings.
- Aside from payment of wages and provision of pay slips did not have communication with Mr McDonald for the eight month period he was at Ontrack.

[22] Throughout the placement with Ontrack, Mr McDonald:

- Worked a work pattern 10 days on and 4 days off between 90-100 hours per week.
- Was provided with training by Ontrack to undertake his role as trainee track worker.

- Was under the control of Ontrack while he undertook his work with the company which was in the context of a gang working remotely and not at one permanent location.

- Was supplied with equipment in terms of work clothing, tools, vehicles and protective gear.

- At the suggestion of his supervisor, David Beck, obtained qualifications by way of Heavy Traffic Licence and wheels, tracks and rollers endorsements.

- Was given a booklet which was a new in-house Ontrack publication that was stated to be published solely for Ontrack management and staff during a group meeting.

- Was advised of the termination of his placement by his supervisor, David Beck, although the evidence was that communication about that had taken place between Mr Hayward and the then Branch Manager of Allied, who had said that it was all right for Ontrack to advise Mr McDonald directly about the end of his placement.

- Was paid by Ontrack directly an overnight tax free allowance paid to enable the travelling gang members to pay for accommodation, food and incidentals.

- Took no sick leave during the placement with Ontrack. Mr Hayward said that he would have expected Mr McDonald to advise Mr Beck if he was unable to work due to sickness. The employment agreement with Allied provided that Mr McDonald was to advise Allied if he was unavailable for work to enable a replacement to be arranged. Mr McDonald said that given the locations at which he operated, that would have been difficult.

- There was no evidence that Mr McDonald had sustained any injuries during his placement with Ontrack. Allied was an accredited employer in the ACC Partnership Programme and was responsible for first week payments and rehabilitation in terms of any work injury claims.

Section 6 of the Employment Relations Act 2000

[23] Mr Chemis and Ms Service submit that the real nature test in s.6 to determine who the employer is, is not relevant in the case of the tripartite arrangement of temporary agency employment and placement with an end user given the clear express contractual arrangement between the parties.

[24] Mr Chemis and Ms Service did address s.6 in their submissions in the event that the Authority applied the real nature test. Ms Service also referred the Authority to a statement from the Federal Court of Australia in *Wilton & Cumberland v. Coal & Allied Operations Pty Ltd* [2007] FCA 725 which she submits supports the submission from Allied that while it may be possible to apply the real nature test, it is not directly relevant to the issue of employer identity. The Court observed in *Wilton* that the issue, which was the same as in this matter, as to whether the employer was the labour placement company or client, is one step removed from the issue as to status as employee or independent contractor. The Court said at para. 26 of its judgment:

> *… Nevertheless as I have also foreshadowed, the jurisprudence emerging from cases involving directly the issue as to whether an entity conducting a business retained a particular person as an employee, or else engaged that person as an independent contractor, contain judicial **dicta** which may assist the resolution of those issues so arising in the present context.*

[25] Mr Bamford submits that the issue of whether the employment is under a contract of service or a contract for service is not the only issue countenanced by s.6 and that it would hardly turn the world one degree to inquire into the relationship between Mr McDonald and Ontrack and Allied as to whether Mr McDonald was employed under a contract of service with Ontrack. Given that s.6 is relied on in the applicant's submissions, it is appropriate that I apply the test under that section.

[26] I accept Mr Chemis and Ms Service's submissions that I must take into account in applying the traditional tests of intention, control, integration and the fundamental test the express contractual arrangements between the parties. That is not a departure from the requirement under s.6 in ascertaining the intention to consider any written contracts and the commercial environment. Given the particular situation between the parties, all of the traditional tests may not be straight forward to apply.

Mr McDonald's contract with Allied

[27] Mr McDonald had an individual employment agreement with Allied. The words Individual Employment Agreement at the top of the agreement are followed by (Casual Staff). I have summarised the relevant parts of the employment agreement below:

- Clause 1.2 provides that Allied is a labour hire company which employs Mr McDonald as a casual employee to work on assignments for third parties (clients).

- Clause 1.2.1 provides the period of employment shall be determined by the requirements of Allied and shall be advised as and when work will be required to be performed. Such period of engagement shall be as determined by each individual assignment and ongoing work is not an entitlement.

- Clause 1.2.2 provides Mr McDonald may be employed for the length of the job or for the day, which ever comes first and nothing contained in the agreement either express or implied means that any obligation exists for any employment beyond the period of each individual assignment.

- Clause 1.2.4 provides that if Mr McDonald takes employment with any client of Allied within four months of his last assignment with that client and without written consent of the employer he is to pay a placement fee.

- Clause 1.5 provides that the period of engagement shall be the length of the assignment or the day which ever comes first and he may be asked to re engage the next day.

- Clause 2.2 set out Mr McDonald's obligations towards Allied.

- Clause 2.2.1 provides that Mr McDonald is not obliged to accept any assignment offered and clause 2.2.2 that Allied is not obliged to offer any assignment work.

- Clause 2.2.3 provides that on acceptance of an assignment Mr McDonald agrees to report to work at the hours stipulated by Allied and to undertake any work as directed by Allied and in all respects was required to comply with the directions, responsibilities and policies given and made by Allied and to diligently and faithfully serve Allied and its interests to the best of his ability.

- Clause 2.2.4 provides that Mr McDonald if involved in a work related accident is required to report this immediately to Allied unless his condition prevents him doing so.

- Clause 2.2.5 provides that due to the nature of the employment the length of an assignment may be reduced without notice. Mr McDonald was obliged to contact Allied immediately for assistance where he had difficulty in an assignment under clause 2.3.4 and if he had concerns about safety on site under clause 2.2.7.

- Clause 2.3 sets out the obligations of Mr McDonald towards the client. Under clause 2.3.1 Mr McDonald agreed to report to work punctually at all times and under clause 2.3.2 to undertake to meet the operational needs of the client, including the timing of breaks. Mr McDonald was obliged under clause 2.3.3 to work in a safe manner at all times and agreed to abide by all health and safety policies and procedures as outlined to him for each and every assignment and where required wear and use all safety equipment and protective clothing provided by the client.

- Clause 2.3.4 required Mr McDonald if involved in a work related accident to immediately report this to the client.

- Clause 4.2 provides that Mr McDonald's wages would be paid weekly, no later than Thursday but under clause 4.2.1 he agreed that no wages would be paid to him unless he presented to Allied a time sheet, or client letterhead complete with the hours worked and signed by the client, no later than 10am on Tuesday each week.

- Clause 4.4 provides that in the event that Mr McDonald is not available for dispatch then he agreed he would be replaced and would inform Allied about this.

- Clause 5 provided that Mr McDonald is to be granted annual holidays in accordance with the Holidays Act 2003.

- Clause 6.1 of the contract provides that Mr McDonald agrees to wear any clothing required from time to time on an assignment and clause 6.1.1 provided that clothing shall be provided by the client or Allied.

The contract between Allied and Ontrack

[28] Ontrack say the terms and conditions of its relationship with Allied at material times was those set out in Allied's proposal to Ontrack for the supply of casual labour dated 25 May 2006 (the Supplier Agreement) which Ontrack accepted with the terms and conditions to become effective from 1 July 2006 onwards by letter dated 6 June 2006 from Commercial Manager of Ontrack, Chris Durno to the National Sales Manger of Allied, Mark Douglas. Allied says that at the material times the terms of business between it and Ontrack was those attached to Mr Haywards statement of evidence as document 2 and that the supplier proposal was not the basis of the terms of business with Ontrack at the material times.

[29] I accept the terms of business attached to Mr Huddleston's statement of evidence are likely to have been the relevant commercial agreement at the material times, although I have considered the supplier proposal when directed to it in submissions. I accept Mr Chemis' submission that give or take some minor details, that contractual arrangement between Ontrack and Allied for the supply of labour are clear.

[30] Specifically the terms of business between Allied and Ontrack provide:

- Clause 1 provides that Allied is referred to as the *supplier* and its client as the *hirer*. The member of the Allied Work Force is referred to as the *temporary worker*. The terms of business set out represent the entirety of the agreement between the supplier and the hirer.

- Clause 2 provides that engagement of the temporary worker by the hirer shall be deemed an acceptance by the hirer of the terms of business.

- Clause 3 provides that the hirer shall pay the supplier hourly rate for the temporary worker and any other agreed expenses.

- Clause 4 provides that the temporary worker shall be under the direction and control of the hirer from the time of commencement of duties for the duration of the engagement and the hirer is responsible for all acts, errors and omissions of the temporary worker. The hirer is required to ensure compliance of all statutory requirements relating to the temporary

worker except where they are expressed to be the responsibility of the supplier under the terms of business.

- Clause 6 provides that the temporary worker supplied by the supplier to carry out the work shall at all times be an employee of the supplier and not of the hirer and the supplier shall pay all wages required by law to be paid by a supplier in respect of such persons and shall make all appropriate deductions from their wages in respect of PAYE and other contributions.

- Clause 7 provides that the site supervision is the responsibility of the hirer and that the hirer warrants the inclusion of the temporary worker in all of the hirer's workplace health monitoring programmes.

- Clause 9 of the terms of business provides that to discourage the poaching of workers, should the hirer employ the temporary worker within a period of four months from the last introduction by the supplier, the hirer shall be liable to pay the supplier a penalty fee equal to 300 hours hire of a temporary worker.

[31] I find that the intention of the parties in terms of the express contractual arrangements between them was that Mr McDonald was to be employed by Allied as a casual employee to work on assignments for third parties (clients). It is not intended in terms of the express contractual arrangements between Ontrack and Allied that Mr McDonald have an employment relationship or become an employee of Ontrack on placement with that company..

[32] I have considered whether that intention as set out in the express contractual arrangements was displaced by later conduct so that it was intended Mr McDonald become, in terms of s.6, a person employed by Ontrack under a contract of service. I accept Ms Service's submission that there was no evidence of Mr McDonald's employment terminating with Allied in the usual way that an employment relationship may end. Allied continued to pay his wages. There was no evidence of an express offer from Ontrack of permanent employment and no evidence that Mr McDonald accepted such an offer. There was no evidence of any mutual agreement between Ontrack and Mr McDonald that he be employed by that company instead of Allied.

[33] Mr Bamford submits that there was a significant departure from the express contractual arrangement that Mr McDonald had with Allied so that Mr McDonald could no longer be classified as casual. He submits that Allied abandoned its role as Mr McDonald's employer.

[34] Mr Bamford refers to the Employment Authority determination in *Yukich v. Allied Work Force Far North Ltd* AA3/08 (Member Dumbleton). That case concerned the placement of an Allied employee with a client for a period of seven months. There was an identical employment agreement between Mr Yukich and Allied to that between Mr McDonald and Allied. It was not argued in that case, however, that Mr Yukich was ever an employee of the client of Allied where he was placed. It was found that the relationship between Allied and Mr Yukich was not that contemplated by the employment agreement and that the original terms of the agreement were varied by Allied.

[35] I do not find that that case assists Mr McDonald applying the test under s.6 to find the real nature of his relationship with Ontrack. That matter was argued on a different basis to that put forward on Mr McDonald's behalf in this case, and the decision reflects that.

[36] Mr Bamford relies on the recent Employment Court decision of *Jinkinson v. Oceania Gold (NZ) Ltd* 13/08/09, CC9/09 Judge Couch. Again, that decision whilst relevant in terms of determining the nature of a relationship and whether it is permanent or casual, does not assist in determining whether or not there is a contract of service between Ontrack and Mr McDonald.

[37] Mr Bamford submits that in support of a contract of service with Ontrack, there was a representation made to Mr McDonald that the work at Ontrack was of an ongoing nature and reliance was placed on the training undertaken by Mr McDonald and the additional skills obtained in terms of the licences. There is some reliance placed on the ability for Ontrack to offer permanent employment within the express contractual arrangement it had with Allied and there was the ability for Mr McDoanld to become a permanent employee. There is no evidence steps of that nature were ever taken by Ontrack and indeed the evidence from Ontrack is that they were never intended to be taken. There is no evidence that Mr McDonald advised Allied that he was a permanent employee of Ontrack and he accepted further assignment for two days with a client of Allied after the end of his placement with Ontrack.

[38] There was no dispute that there were some departures from the normal way the contractual arrangements would be expected to operate between Mr McDonald and Allied and Ontrack and Allied. The payment to Mr McDonald directly from Ontrack of his overnight allowance was one. This would normally be paid through Allied who would then pay Mr McDonald and invoice Ontrack with a margin for its fee. I accept Ms Service's submission that this allowance was not governed by any specific provision in the employment agreement between Allied and Mr McDonald which focused under remuneration on wages. The overnight allowance was a tax free payment. Even though this payment may be unusual, I do not find it on its own displaces the express intention of the parties that Mr McDonald not be an employee of Ontrack.

[39] Mr Huddleston on behalf of Allied did accept that Allied was remiss in terms of the lack of contact that it had with Mr McDonald throughout his placement with Ontrack. I accept Mr Huddleston's view that one explanation for this could mean that the parties had no issues or at least that Allied thought that to be the case. Mr McDonald did have some difficulties at Ontrack in terms of his relationship with some other employees. I am not satisfied, however, that this lack of contact is sufficient to indicate a change in terms of the express intentions of the parties. The contractual arrangements between Ontrcak and Allied delegated the control from Allied to Ontrack after initial placement of Mr McDonald and Mr McDonald had obligations in his employment agreement to meet the operational needs of Ontrack which could include undertaking training and if he wanted upskilling.

[40] I am not satisfied that the express intention as set out in the contractual arrangement was displaced so that it can be found that under s.6 of the Employment Relations Act 2000 that Mr McDonald was employed under a contract of service with Ontrack.

[41] Section 6 does require the Authority to consider other matters and not to treat the way the parties describe the relationship as determining the matter. I have placed weight, given the nature of this case, on the express contractual arrangements but I will also consider the other tests.

Control test

[42] In considering whether a person is an employee or an independent contractor the relevance of control is obvious. The more control there is the more likely the test would favour an employment relationship. In this case, however, Mr McDonald is not seeking to establish anything other than an employment relationship and it is clear from the express contractual arrangements between Allied and Ontrack that Mr McDonald would be under the direction and control of Ontrack from the time of his commencement of duties for the duration of the engagement.

[43] In Mr McDonald's agreement with Allied he agreed to meet the operational needs of Ontrack. I am not satisfied that this test favours an employment relationship between Ontrack and Mr McDonald.

Integration test

[44] The integration test requires the Authority to consider whether Mr McDonald was part and parcel of Ontrack, although it is not necessary to consider whether he was independent because it was never envisaged he would be.

[45] The evidence supports that Mr McDonald worked alongside other Ontrack employees and undertook the same work that others did in the gang. Indeed it would have appeared in all likelihood to an outsider that Mr McDonald was no different from any other Ontrack employee. Mr McDonald did not receive ongoing contact from Allied and the nature of the work meant he lived away from a permanent base whilst he undertook the railway track maintenance.

[46] It is accepted that Mr McDonald for the time he was with Ontrack was effectively integrated into the organisation, but I do not find that is inconsistent with the express contractual arrangements between the parties and how they were intended to work in practice so as to find that Mr McDonald at a point in time entered into a contract of service with Ontrack.

Fundamental test

[47] This is a test that considers whether an employee is in business on his own account and such things as supply of equipment, ability to hire others and financial risks are considered. In terms of this test Mr McDonald was supplied with equipment

from Ontrack but otherwise there are difficulties in terms of applying this test. In his employment agreement Mr McDonald agreed to wear the client's clothing and presumably used the equipment to undertake the operational needs of the client and that is not inconsistent with the express contractual arrangements.

[48] In conclusion, I am not satisfied under s.6 of the Employment Relations Act 2000 that applying this test enables a conclusion to be reached that Mr McDonald was an employee of Ontrack under a contract of service. I am not satisfied that the real nature of the relationship was other than that expressed in the contractual arrangements that Mr McDonald was employed by Allied.

Should an employment agreement with Ontrack be implied in the circumstances?

[49] In the absence of an express contract of employment, written or oral, a number of Australian and English decisions have considered whether a contract of service should be implied between the person placed by an employment agency and the client. Ms Service submits that under New Zealand employment law an employment relationship either exists, or it does not exist and it is not a mater of implication.

[50] It does not seem that implication of an employment relationship in terms of the English cases has been the subject and/or focus of an employment case in New Zealand. I consider that the English law on implication is arguably relevant and I shall have regard to it. I am also mindful as a result of Mr Chemis submission of the Employment Relations Amendment Bill (No 3) 2008 which was introduced to Parliament on 9 September 2008, to the extent that I accept Mr Chemis submission that it is implicit in the Bill that triangular arrangements are lawful, with an aim of the Bill to strengthen the position of employees in a triangular employment relationship.

[51] Whether a contract is to be implied is a question of fact. The approach to be taken was confirmed in the recent United Kingdom judgment of *James v. London Borough of Greenwich* [2008] EWCA CIV35 (CA) at para 23:

> *… 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 Lloyds 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."*

[52] Ms James had a temporary worker agreement with an employment agency which found her a position as a housing worker with the Council in September 2001. It was conceded by the Council that whilst undertaking work for it Ms James was subjected to a degree of control consistent with a contract of employment. The Council arranged all her instructions, working orders and her working conditions. It provided the materials used in her work and organised the procedures with her. She wore a staff badge with the Council logo. In September 2003 Ms James changed agencies and received a better hourly rate. The agency assumed responsibility for the payment of remuneration and payment of statutory deductions and contributions.

[53] In September 2004 after a period of absence through sickness, Ms James returned to work at the Council to find another agency worker had arrived to cover her shift. Ms James had a meeting with the manager from the Agency and a trade union representative but after that she did not undertake any further work for the Council.

[54] The Employment Tribunal found that Ms James was not an employee of the Council for the three year period she was placed there. The Employment Appeal Tribunal upheld the decision of the Employment Tribunal.

[55] The English Court of Appeal upheld the finding of the Employment Tribunal, and said in para.41 that:

> *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 than 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 contract as other than a genuine contract.*

[56] Lord Justice Mummery referred in *James* to the Court of Appeal decision in *Brook Street Bureau (UK) Ltd v. Dacas* [2004] EWCA CIV217. Dacas raised the possibility, depending on the facts found in a particular case, that a contract of service could be implied between the end user and the worker in a tripartite agency situation. Lord Justice Mummery in para.47 of *James* said:

> *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 had a contract with the end user. … Dacas is not authority for the proposition that the implication of a contract of service between an end user and the worker in a tripartite agency situation is inevitable in a long term agency worker situation. It only pointed to that as a possibility, the outcome depending on the facts found by the ET in the particular case. …*

[57] The decision in *James* was applied by the Employment Appeal Tribunal in *East Living Ltd v. Sridhar* [2008] UKEAT 0476/07/0411, where the correct approach was set out at para.23 of that judgment:

> *That is that one should ask firstly whether or not the express contractual arrangements put in place at the outset adequately explain the actual relationship of the three parties involved at that stage. Then, secondly, if they do, ask whether or not any subsequent words or conduct of the parties have changed matters. Then thirdly, if they have (or if the answer at the first stage was in the negative), ask whether or not in the light of those changes, it is necessary to imply a contract of employment, taking into account at that stage of the irreducible minimum mutuality of obligation that is required for there to be a contract.*

[58] In terms of the Australian decisions, I accept Mr Chemis' and Ms Service's submission that the decision of the Federal Court of Australia in *Damevski v. Giudice* [2003] 202 ALR 494 is distinguishable from Mr McDonald's case because in that case the cleaner, who was initially employed, was persuaded to resign and contract his services through a labour hire agency. After that occurred the relationship functioned in the same way and Mr Damevski never had any direct dealing with the agency and no written or oral agreement with the agency. It was found in that case that the change did not terminate the pre-existing contract of employment.

[59] The decision of *Wilton* although there are some differences with the current situation favours the respondents' view of the relationship.

[60] I find that applying *James* and the approach as set out in *East Living Ltd* the relationship between Mr McDonald and Ontrack is adequately explained by the express contractual arrangements between Mr McDonald and Allied and the commercial arrangements between Allied and Ontrack. I am not satisfied that any subsequent words or conduct with Ontrack or Allied changed the express

arrangements as they existed. I do not find it necessary to imply an agreement of employment between Mr McDonald and Ontrack.

[61] I find in conclusion that Mr McDonald was employed by Allied Work Force Limited.

Was Mr McDonald unjustifiably dismissed from his employment?

[62] The focus of the problem and the investigation in the Authority was whether Mr McDonald was employed by Ontrack. The issue now, having found that Ontrack was not Mr McDonald's employer, is whether he was unjustifiably dismissed by Allied when his placement with Ontrack ended.

[63] I accept that Mr McDonald's placement with Ontrack could not be seen as casual as contemplated by the employment agreement with Allied. As a result of the way this matter has been argued and my findings, I am not satisfied that Allied dismissed Mr McDonald from Ontrack. In reaching that finding I have not reached the same conclusion as that reached by the Authority in *Yukich*. That is because I have reached a different view to the finding in paragraph 29 of that determination. The Authority found that Mr Yukich's employment did not end because it was casual in nature and that his employment was not casual but continuous, although not necessarily permanent. The Authority concluded that Mr Yukich was dismissed by Allied from his placement with the client. I have not found Mr McDonald was employed by Ontrack. Ontrack did not terminate his employment, it ended its commercial arrangement with Allied for his placement. I find that the placement with Ontrack ended as contemplated by terms of business between Ontrack and Allied. It was most unfortunate that Allied did not advise Mr McDonald of this directly but that does not make that ending of the placement a dismissal by Allied. Mr McDonald had no entitlement to ongoing work with Ontrack and Allied had no control over when that placement may end.

[64] There is an issue as to whether the employment agreement between Mr McDonald and Allied was varied or indeed as put forward by Mr Bamford, relying on *Jinkinson*, by virtue of the placement with Ontrack for an extended period rescinded and replaced with an agreement with Allied for ongoing employment.

[65] Mr McDonald was not obliged to accept further assignments from Allied and Allied was not obliged to provide further assignments to Mr McDonald. There was no

guarantee of ongoing work with a client. Mr McDonald accepted a further two day assignment with Allied after his placement with Ontrack ended. I am not satisfied that Allied was obliged, because of the eight month placement with Ontrack to provide Mr McDonald with work on an ongoing basis, or indeed that Mr McDonald was obliged to accept such work. This case is distinguishable from *Jinkinson* for that reason. What I find Allied was obliged to do was to provide Mr McDonald during the placement with Ontrack with the statutory entitlements that reflected that placement or assignment could not be seen as casual.

[66] In conclusion I am not satisfied that Mr McDonald was unjustifiably dismissed from Allied and he does not have a personal grievance.

[67] Mr McDonald received holiday pay as part of his weekly pay for his work with Ontrack from Allied. I do not find that in terms of his placement with Ontrack that was appropriate under section 28 of the Holiday Act 2003 because his work whilst placed with Ontrack could not be described as intermittent or irregular from the beginning of that placement. Further there was no written agreement of Mr McDonald to payment in that way in the individual employment agreement.

[68] I order Allied Work Force Limited to pay to Mr McDonald under s 23 (2) of the Holidays Act 2003 8% of Mr McDonald's gross earning from the time of his placement with Ontrack because he has not been paid in accordance with s28 for reasons described above.

Costs

[69] I reserve the issue of costs. It seemed to me that this could be seen as a test case or the parties may be able to resolve the issue of costs in discussions. Failing which the first and second respondents should lodge and serve costs submissions by 14 October 2009 and the applicant by 4 November 2009.

Helen Doyle

Member of the Employment Relations Authority