

## Muscat: Judicial Sensitivity Rather Than Creativity?

Marina Hamilton\*

The decision in the Court of Appeal in *Cable & Wireless plc v Muscat* [2006]<sup>1</sup> has built on the recent decisions in *Dacas v Brook Street Bureau*<sup>2</sup> and *Franks v Reuter*<sup>3</sup> whereby the courts have recognised the necessity to take an inclusive approach to employee status where long term agency workers are concerned. This is, as is stressed in the judgment, fulfilling the intentions of Parliament in the unfair dismissal legislation; however, where issue can be taken with the judgment is the assertion that this is not driven by policy considerations. As will be demonstrated the recent agency worker decisions do finally give weight to the intentions of Parliament but have done so following a very tortuous route of previous policy decisions.

Today's commercial environment, together with favourable judicial decisions, has allowed for the creation of a flexible workforce. Atypical working has become the norm in all establishments hiring labour. Labour is consequently purchased and sold under diverse forms of contractual arrangements. Whether this is to accommodate a dynamic commercial environment which demands a fluid workforce and new family-friendly policies or to avoid some of the statutory protection afforded to employees rather than workers is debateable.

Being an employee is the gateway to some statutory protection.<sup>4</sup> This as we will see as a result of judicial activism has become a higher threshold of eligibility to cross than that of worker.<sup>5</sup> However, ask many of those who fail to have the status of employee on dismissal at the time they entered the contract to hire their labour what they considered their employment status to be, it is unlikely that they would appreciate the subtleties let alone comprehend them. By contrast those setting up arrangements fully understanding and in the knowledge that by having independent contractor status, i.e working under a contract for services, they will gain financially, usually at the expense of the Inland Revenue, can find themselves in spite of all measures taken having employee status thrust upon them.<sup>6</sup> It is hard to escape the conclusion that policy has a very strong role to play in this area of employment law.

Parliament has provided very little legislative assistance in the definition of employee. S230 (1)<sup>7</sup> provides that an employee is: "*an individual who has entered into or works under (or where employment has ceased worked) under a contract of employment.*"

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\*LLB Programme Director, School of Law, University of Hertfordshire.

<sup>1</sup> [2006] EWCA Civ 220.

<sup>2</sup> [2004] EWCA Civ 217.

<sup>3</sup> [2003] EWCA Civ 417.

<sup>4</sup> Unfair dismissal, redundancy, s.1 statement of written terms, guaranteed payments, minimum notice periods and time off for public duties.

<sup>5</sup> Worker being the term used to give inclusive effect to employment rights often deriving from the EC.

<sup>6</sup> *R (on application of Professional Contractors Group Ltd) v Inland Revenue Commissioners* (2001) EWCA Civ 1945.

<sup>7</sup> Employment Rights Act 1996.

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A contract of employment in s.230 (2)<sup>8</sup> is defined as “a contract of service or apprenticeship, whether express or implied and, (if it is express) whether oral or in writing.”

As such, much of the case law in this area has turned on whether or not an individual is working under a contract of service. Whether a worker is working under a contract of service will depend on the interpretation of the contract which they entered into. The common law development in this area has the distinction of creating complexities beyond the notion of being employed or self-employed. Those not self-employed can be divided into those who work under a contract of service and are therefore employees and those who do not who can be referred to as independent contractors. Independent in so far as they are independent of much of employment protection but many lack any other true independence from the person paying for their labour. The question has to be asked as to whether it was truly the intention of Parliament to allow only those falling within an exclusive common law definition of employee as determined by the individual contractual arrangements of the parties to gain the benefits of certain statutory protection. It remains to be seen if current thinking on agency workers employed for a long period of time will provide a solution to certain elements of the workforce finding themselves so easily removed from fundamental employment law protection by individual contractual arrangements.

To return to the assertion that the decision in *Cable and Wireless v Muscat*<sup>9</sup> is not driven by policy is to ignore the development of the tests used in determining employee status and the way in which they reflect the labour markets of their time. Text books dismiss the control test as developed in *Yewens v Noakes*<sup>10</sup> as outdated and anachronistic. Contemporary business models in a technological age recognise that as labour becomes increasingly skilled detailed control of the manner in which the work is carried out is impracticable. However, part of the irreducible minimum which an employee must have is that he is subject to the ultimate or residual control of the employer.<sup>11</sup> So although the common law has abandoned the control test as the sole determination of employee status its role is not completely defunct.

The control test has survived as part of the irreducible minimum required for employee status. This test has therefore had a longer shelf life than the so called integration or economic reality test. In *Stevenson, Jordan & Harrison v Macdonald & Evans*<sup>12</sup> Lord Denning suggested that an individual worked under a contract of service if his work was an integral part of the business. This neatly dealt with criticisms of the control test which had a conceptual difficulty in dealing with a skilled workforce. However, to have such an inclusive definition would hit at employers seeking to have a flexible workforce that they can more or less hire and fire at will to cope with fluctuations in the demand for labour. The same would be true of the economic reality test as used by the courts in *Market Investigations v Minister of Social Security* [1969]<sup>13</sup> and *Airfix Footwear Ltd v Cope* [1978]<sup>14</sup>. In *Market Investigations* the court

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<sup>8</sup> ERA 1996.

<sup>9</sup> [2006] EWCA Civ 220.

<sup>10</sup> (1880) 6 QBD 530.

<sup>11</sup> See post p.3 also *Zuijs v Wirth Bros.* (1955) 93 CLR 561 & *Motorola v Davies* [2001] IRLR 4.

<sup>12</sup> [1952] 1 TLR 101.

<sup>13</sup> [1969] 2 QB 173.

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asserted the less skilled the workforce and the less training they received the less likely it would be that such an individual would be found to be self employed. It is interesting to note that today even if such workers engaged in some market research activities do have employee status they tend to be paid a modest amount per hour with a bonus per hit, i.e. when the cold call or clip board questionnaire converts into a sales appointment or usable data. To some extent therefore the employee assumes some of the business risk.

In the *Airfix* case Mrs Cope was found to be an employee as it was found that the economic reality of the situation was that she was selling her labour power rather than aiming to gain any profit from the carrying on of a business. Sophisticated payment schemes such as bonus, performance related pay, and share option schemes do give some employees a vested interest in the well being and profitability of a company. This is reflective of the modern view of employees as stakeholders involved in a social contract with their employer rather than their having become independent contractors. Being a member of such a scheme will not however, guarantee employment status, it at best is a term of the contract consistent with there being a contract of service.<sup>15</sup> Additionally the current predilection for complex organisational structures, particularly in terms of outsourcing and project working, could accommodate neither the business integration test nor the economic reality test.

In *Cable & Wireless v Muscat*<sup>16</sup> part of the rationale for allowing the implication of a contract between a worker and the end user of his services in a tripartite agency relationship was by relying on part of the judgement in *The Aramis*<sup>17</sup> by Bingham LJ:

“I also agree that no such contract should be implied on the facts of any given case unless it is necessary to do so; necessary that is to say, 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.”

This however, is more a reflection of the justification of the implication of a contractual relationship between the end user in an agency relationship and the worker using basic contractual principles of the implication of terms<sup>18</sup> demanded by factual necessity of the situation than an attempt to reinvent the business integration test or economic reality test. This reliance on a basic contractual doctrine to achieve an end to the uncomfortable situation as found in *Montgomery v Johnson*,<sup>19</sup> whereby it was possible for an agency worker to be neither the employee of the end user/hirer nor the agency, is ironic when viewed along side the judicially contrived irreducible minimum required for achieving employee status.

The definition of employee has been refined and developed into a multiple test, whereby all relevant factors are weighed against one another. The root of this

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<sup>14</sup> [1978] ICR 1210.

<sup>15</sup> *Supra* n.3, para 2.

<sup>16</sup> [2006] EWCA Civ 220.

<sup>17</sup> [1989] 1 Lloyds Rep 213.

<sup>18</sup> *The Moorcock* [1886-90] All ER 530 *Shirlaw v Southern Foundries* [1939] 2 KB 206.

<sup>19</sup> [2001] EWCA Civ 318.

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approach is found in *Ready Mixed Concrete (South East Ltd) v Minister of Pensions and National Insurance*.<sup>20</sup> Decisions following on from *Ready Mixed Concrete* have formulated an irreducible minimum required for employee status. As such there must be personal service, a sufficient degree of control and mutuality of obligation. Having achieved the irreducible minimum which is an absolute requirement of there being a contract of services, employee status will only be present if other provisions of the contract are consistent with their being a contract of service, the so called 'factual matrix'.

In *Express & Echo Publications v Tanton*<sup>21</sup> it was held that if a contract permits the performance of the contractual obligation by another, regardless of what happens in practice unless the provision is a sham then there can not be a contract of service. However, if the choice of substitution is limited then employee status may still be possible as in *McFarlane v Glasgow City Council*,<sup>22</sup> where the ability to delegate was limited to a council list of aerobic teachers. It is interesting to note that in *Muscat v Cable & Wireless*<sup>23</sup> the contract between the agency used by Cable & Wireless to deal with those it considered to be independent contractors and the workers did contain a substitution clause which allowed for the provision of suitably qualified substitutes subject to the approval of the client (C&W). This provision was not relied on in the appeal.

Case law has continued to require that for employee status to be present the employer must have a sufficient degree of control over the employee in order for a contract of service to exist.<sup>24</sup> This has proven problematic for agency workers in particular who may be under the control of the agency for the purposes of receiving remuneration and administration of PAYE, but are given their day to day orders by the end user/hirer as to their activities, with whom they may not have an express contract. *Motorolla v Davidson*<sup>25</sup> suggested that in such arrangements it did not matter that control was shared as long as the alleged employer had sufficient control. As such depending on the other elements of the irreducible minimum being present and the construction of the contract itself, the factual matrix, it is feasible that either the agency or the end user/hirer of the worker could be the employer rather than a finding that a worker is nobody's employee as in *Montgomery*<sup>26</sup>

Finally the irreducible minimum required for a contract of service to exist is that of mutuality of obligation. This concept goes beyond the basic contractual principle of a promise for a promise, on a basic level the promise to pay in return for the promise to work, to a commitment to ongoing relations. It has become a two-tiered concept, firstly that a contract must exist and secondly that that contract must involve an obligation to offer and accept work. The application of this concept has been particularly damaging to casual workers as demonstrated by both *O'Kelly v Trusthouse Forte plc*<sup>27</sup> and *Carmichael v National Power*.<sup>28</sup> To prevent such workers

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<sup>20</sup> [1968] 2 QB 497.

<sup>21</sup> [1999] IRLR 367.

<sup>22</sup> [2001] IRLR 7.

<sup>23</sup> [2006] EWCA Civ 220.

<sup>24</sup> *Supra* n.2.

<sup>25</sup> [2001] IRLR 4.

<sup>26</sup> [2001] EWCA Civ 318 .

<sup>27</sup> [1984] QB 90.

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gaining employees status is consistent with an exclusive policy on employment rights but can not be justified as consistent with general principles of contract law. Its justification has to lie in the maintenance of a flexible workforce available to satisfy supply and demand. *Carmichael* goes further and states that employee status did exist in each period of engagement but no global contract could be read between engagements to achieve continuity of employment as no mutuality of obligation existed in these periods. Such a denial of mutuality of obligation in both of the above circumstances is to strike a blow at the probably most economically vulnerable in the market place. However, such a policy is consistent with attitudes to those workers who are not integral to the employer's business.<sup>29</sup>

Perhaps a sea change in attitude is on the horizon as can be demonstrated not just by current developments with regards to agency workers but also by the decision in *Cornwall County Council v Prater*.<sup>30</sup> In *Prater* the claimant worked as part of a home tutor service used by the local authority to educate children who could not attend school. The tutor was always asked if she was willing to take a pupil and always had the option to refuse. Such a potential to refuse work even if as in the case of O' Kelly the result would be the offer of less work defeated the second tier of the concept of the mutuality of obligation in so far as there must be a commitment to ongoing relations. Cases such as *Carmichael*<sup>31</sup> and *Clark v Oxford Health Authority*<sup>32</sup> were distinguished in *Prater*<sup>33</sup> as when she did agree to take on work the duration would be for as long as was necessary, in one case the same child was tutored for five years. As such mutuality of obligation existed beyond the individual assignments as her assignments were much more open ended than those of *Carmichael*<sup>34</sup> and *Clark*.<sup>35</sup> Mrs Prater was successful in her claim and her status of employee provided the necessary gateway to give her continuity of employment from 1988. The periods between assignments were found to be temporary cessations of work as defined by s.212 ERA 1996, the EAT resolutely refused to allow Mrs Prater's argument that she worked under a global contract. Again here we are finding that the tribunal is unwilling to allow employers to escape liability for employees where there has been a long history of consistent working.

Ironically in the recent agency cases such as *Muscat*<sup>36</sup> the stumbling block with regard to mutuality of obligation has been in the first tier of the concept, in the sense that there may well be an intention to have an ongoing relationship but no express contractual relationship existed. The court's willingness to imply a contract into the relationship between end user/hirer and the worker where express contracts only exist

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<sup>28</sup> [2000] IRLR 43.

<sup>29</sup> Atkinson in *Manpower Strategies for Flexible Organisations* (1984) *Personnel Management* 28 reiterated his theory of firm whereby core group workers with firm specific skills would receive high quality working conditions and employment rights, the peripheral worker with less firm specific skills would often be hired on fixed term or part time contracts, and external groups of workers would be utilised but not employed by the firm e.g. the self employed or those hired through agencies.

<sup>30</sup> [2006] EWCA Civ 102.

<sup>31</sup> [2000] IRLR 43.

<sup>32</sup> [1998] IRLR 125.

<sup>33</sup> [2006] EWCA Civ 102.

<sup>34</sup> [2000] IRLR 43.

<sup>35</sup> [1998] IRLR 125.

<sup>36</sup> [2006] EWCA Civ 220 see also *Dacas* [2004] EWCA Civ 217 & *Franks* [2003] EWCA Civ 417.

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between the agency and the worker and the end user/hirer and the agency has demonstrated that indeed the courts are fulfilling the will of Parliament under s.230 (2).<sup>37</sup> The true impetus for such action surely has to be the increased use of agency workers not just to fill temporary gaps in the labour pool of the enterprise but as a long term solution to human resource issues.

*Cable & Wireless v Muscat*<sup>38</sup> is the first decision to follow up on the reasoning in *Dacas and Reuters*<sup>39</sup> and deal with the potential inequities created by cases such as *Montgomery v Johnson*.<sup>40</sup> Mrs Johnson was found to be neither the employee of the end hirer of her labour nor the employee of the agency in spite of having worked for the same location for the same client through the same agency for two years. It is these longer, open ended relationships that were proving to be unsatisfactory. Legislation still failed to address the issue directly in the Conduct of Employment Agencies and Employment Regulations 2003 which came into force on 6<sup>th</sup> April 2004. The Regulations provide that a contract exists between the agency and the worker, but whether that contract is a contract of service or not is still dependent on the case law. The Secretary of State has the power under s.23 ERA 1999 to bring certain categories of employees within such protection; as yet no such action has been taken. It is still the courts that are driving policy in this area despite assertions to the contrary in *Muscat*.<sup>41</sup>

*Dacas v Brook Street Bureau*<sup>42</sup> followed the reasoning in *Montgomery* in finding that an agency could not be the employer if there was an absence of mutuality of obligation or a lack of a sufficient degree of control as that precluded the existence of a contract of service. If the agency was not the employer then could the end user/hirer of the worker be deemed to employ the worker under a contract of service? Mrs *Dacas* had worked exclusively for Wandsworth Borough Council for six years. She was dismissed by the council after swearing at a visitor. She claimed unfair dismissal but then found herself in difficulty as to whom she should bring the claim against. With regard to the agency, Brook Street there was a lack of mutuality of obligation between the two and as such there was no contract of service subsisting between the two. Brook Street had no obligation to provide work nor did Mrs *Dacas* have any obligation to accept it. Brook Street also had some residual control for Mrs *Dacas*' activities but it was the hirer who gave the day to day orders and of course ultimately disposed of her services. Brook Street also had a clause in their contract that the contract with the agency would not give rise to a contract of employment. The intentions of the parties can be indicative of the relationship but is not always conclusive.<sup>43</sup>

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<sup>37</sup> ERA 1996 "a contract of service or apprenticeship, whether express or implied and, (if it is express) whether oral or in writing."

<sup>38</sup> [2006] EWCA Civ 220 see also *Dacas* [2004] EWCA Civ 217.

& *Franks* [2003] EWCA Civ 417.

<sup>39</sup> *Supra* n.36.

<sup>40</sup> [2001] EWCA Civ 318.

<sup>41</sup> [2006] EWCA Civ 220, para 53.

<sup>42</sup> [2004] IRLR 358.

<sup>43</sup> *Ferguson v Dawson* [1976] 3 All ER 817 cp *Massey v Crown Life Insurance Co.* [1978] 1 WLR 676.

However, in *Stevedoring and Haulage Services v Fuller*<sup>44</sup> it was held that it was not possible to imply a contract of employment where the parties had expressly agreed that there would be no such contract. As such it will always be difficult to establish that a contract of employment exists between the agency and the worker. Unfortunately by the time the issue had arrived in the Court of Appeal Mrs Dacas had dropped the council from the claim and as such the comments were made obiter. The court indicated it would have been willing to imply a contract between the hirer and the worker, but not to create an umbrella contract which would open the door for claims in *Carmichael* and *Clark*<sup>45</sup> scenarios. Such a contract could be implied as indicated in *Franks v Reuters*<sup>46</sup> where: “Dealings between the parties over a period of years as distinct from days or months typical of casual work are capable of generating an implied contractual relationship.” Following *Dacas* in *Astbury v Gist*<sup>47</sup> there is a positive obligation on the court or tribunal to investigate whether or not an implied contract exists between a hirer and a worker. It is further suggested that an ET should join parties to any action to ensure that the claimant has a proper remedy.

*Cable & Wireless v Muscat*<sup>48</sup> has finally brought a rational solution to the problem of agency workers who are not truly temporary or peripheral in their place of work. It is again the courts that are providing solutions to socio economic difficulties encountered by the encouragement of the creation of a flexible workforce going where Parliament fears to tread too heavily. The ‘Success at Work’ policy published by the current administration promises to protect vulnerable workers and identify ways to simplify employment legislation. However, the author feels that politicians are unlikely to upset the status quo when the courts are managing so admirably to balance the competing factors of management prerogative and access to employment rights of the atypical workforce. To that extent Lady Jane Smith is right in that the decision in *Muscat* has been decided according to established law, however, it is only by the judicial creativity of previous decisions that finally the balance between the economic needs of business to be able to make good use of the flexible labour market and the needs to prevent the choice of employment model to dictate access to basic employment protection has been achieved. For a long time the courts have given decisions in favour of there being a contract of service where issues of health and safety have been concerned<sup>49</sup> as matter of policy. The repercussions of the decision in *Muscat* must be that employers will take their dealings with employees sourced otherwise than directly as still being subject to additional employment protection and care will still have to be taken in their relationships with them. Therefore commercially the decision to employ through an agency on a long term basis may relieve an administrative burden and the costs could be justifiable on those grounds. Businesses using agencies may well insist on a redrafting of the contractual arrangements to either have the responsibility for the worker as employee jointly or severally or indeed to insist on some form of indemnity or increased involvement from the agencies.

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<sup>44</sup> [2001] IRLR 627.

<sup>45</sup> [2000] IRLR 43, [1998] IRLR 125.

<sup>46</sup> [2003] EWCA Civ 417.

<sup>47</sup> [2005] WL 1104109.

<sup>48</sup> [2006] EWCA Civ 220.

<sup>49</sup> *Lane v Shire Roofing* [1995] IRLR 493. *Ferguson v Dawson* [1976] 3 All ER 817.

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The decisions in both *Muscat*<sup>50</sup> and *Prater*<sup>51</sup> demonstrate the Courts' appreciation of the complex models of employment that are available to employers. It also demonstrates a sophisticated appreciation of the intentions of Parliament to create a flexible labour market capable of encouraging economic growth and by necessity sacrificing some workers employment rights whilst not allowing an abuse of such mechanisms to take place. As such the exclusive term of employee may find its impact increasingly limited to only those truly transient employment placements filling either temporary holes or increases in demand.

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<sup>50</sup> [2006] ECWA Civ 220.

<sup>51</sup> [2006] EWCA Civ 102.

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