

Agency Workers and the 'Necessity' Test

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Alstom, the French engineering giant currently in the news as being under investigation by the Serious Fraud Office for allegedly distributing corrupt payments to secure contracts, featured in a recent case in the Court of Appeal (Tilson v Alstom Transport). The case dealt with the application of the 'necessity' test for implying a contract of employment between an agency worker and the end-user business where the worker is fully integrated in the organisation.

Mr Tilson, who occupied a managerial position as a technical engineer for Alstom Transport, had twice rejected Alstom's invitation to become an employee and continued to work as a contractor, under a somewhat complex, quadripartite arrangement whereby he was paid by Silversun Solutions Ltd., less a 3 per cent service charge. There was no formal written contract regarding this arrangement. Silversun provided Mr Tilson's services to Morson Human Resources Ltd. under a contract which contained a clause stating that neither Morson nor Alstom was entitled to 'seek to exercise any supervision, direction or control' over Mr Tilson. Finally, there was a general contract between Alstom and Morson under which Morson undertook to provide a wide range of services to Alstom, including the provision of individual workers, but there was no specific documentation relating to Mr Tilson's assignment.

The Court of Appeal found that the parties concerned would have acted in exactly the same way if there had been no contract of employment. A significant degree of integration of a worker into an organisation is not inconsistent with the existence of an agency relationship and is a factor of very little weight when considering whether or not a contract of service exists. Just because someone looks and acts like an employee does not automatically mean that they are an employee. The fact that Mr Tilson had to apply to his line

manager before taking annual leave was not sufficient to justify the implication of a contract of employment.

The Court also found that Alstom had at no time given any contractual undertaking that it would not seek to control Mr Tilson's activities. Whilst the degree of control that existed was inconsistent with the clause in the contract between Morson and Silversun, Alstom was not a party to that contract and there was no evidence that it was not consistent with the conduct of or any undertaking given by Alstom, and Mr Tilson had chosen to work under those conditions.

Lastly, Mr Tilson's refusal of the offer to become an employee of Alstom illustrated that there was no contract in place and was a powerful factor militating against such implication.