

The Recruitment Industry: Current Legal Issues

Conditional refund of permanent placement fees

Employment agencies will be reassured by the recent judgment in the case of *Euro London Appointments Ltd v Claessens International Ltd (2006)*. In this case, a client challenged an agency contract clause whereby partial refunds in respect of the agency's fee for placement of permanent staff, where the candidate left within 12 weeks of commencement of employment, was conditional upon the client having paid the agency's fee within 7 days. The client alleged that the clause was a penalty and was therefore void in law. The Court of Appeal found that the clause was not a penalty, but a condition precedent to exercising the right to a refund and therefore binding, meaning that the client was not entitled to a refund as the fee had not been paid in time.

Rolled up holiday pay

The debate regarding the method by which temporary workers are paid for holidays rolls on. The most recent decision in this long-running saga was taken by the European Court of Justice on 16 March 2006 in the conjoined cases of *Caulfield v Marshalls Clay Products Limited* (now Hanson Clay Products), *Clarke v Frank Staddon Limited* and *Robinson-Steele v RD Retail Services Limited*.

The relevant findings in these cases included the following:

1. The purpose of the requirement that workers should receive payment for annual leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work; i.e. to receive their normal remuneration for a period of rest.
2. The Directive upon which the Working Time Regulations 1998 are

based is designed to safeguard health and safety, i.e. to ensure that workers obtain minimum periods of rest.

3. The minimum period of annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated as this defeats the health and safety purpose of the Regulations. Rolled up holiday pay can mean that the minimum period of paid annual leave is, in effect, replaced by an allowance in lieu. Therefore, paying holiday pay by the rolled up method is unlawful.

4. However, the Regulations do permit payments made in respect of annual leave entitlement by the rolled up method to be set off against entitlement to payment for a specific period during which the worker actually takes leave, provided that these payments are made transparently and comprehensibly, i.e. clearly as an addition to payment for work done.

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Key Services

Contractual

Drafting terms of business and terms of engagement;
Advising, drafting and negotiating 'one-off' client contracts

Regulatory

Advising on the impact of employment agencies and related legislation, and new developments

Employment

Drafting contracts of employment;
Advising on termination and unfair dismissal claims;
Enforcement of restrictive covenants;
Dealing with TUPE

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Therefore the position is that a worker can be paid in advance, by means of the rolled up method of payment, in respect of holiday which he or she intends to take in the future, provided that:

- ◆ the worker is paid in full for holiday entitlement taken, to the extent required by the Working Time Regulations 1998, taking into account advance payments made by the rolled up method, and
- ◆ that it is made clear to the worker by the employment business, in their contract and in their payslips as to how the advance payments are calculated and what they amount to.

Employment Status of Temporary Workers

The employment status of temporary workers has for many years been an uncertain area with much case law being generated as to whether the worker is an employee of the employment business or an employee of the client (i.e. the end-user). The recent trend seems to indicate that the client may be deemed to be the employer of the temporary worker under an "implied" contract of employment (although obviously this depends on the

particular facts of the case). Cases which have expressed this view are *Dacas v Brook Street Bureau (2004)*, *RNLI v Bushaway (2005)* and *Cable & Wireless v Muscat (2006)*.

Employment businesses can take steps to reduce the risk that an implied contract of employment exists, for example:

- ◆ Ensure your contract with the temporary workers excludes mutuality of obligation and advises the worker that they are engaged on a contract for services (not a contract of service or employment);
- ◆ Advise your clients:
 - To avoid assignments which endure for more than 50 weeks;
 - To exert minimal control over, and in particular to avoid appraising or disciplining, temporary workers; and
 - To minimise integration into the workforce. For example, temps should not be provided with training or invited to attend business and social events in common with employees.

It should also be noted that even though the employment status of a temporary worker is unclear for the purposes of unfair dismissal claims, the worker may still be deemed to be

an employee for other purposes. For example a client or an employment business can be vicariously liable for the unlawful actions of a temporary worker engaged by them: *Hawley v Luminar Leisure Limited (2006)* and *Viasystems (Tyneside) Limited v Thermal Transfer (Northern) Limited (2005)*.

Whilst temporary workers may not be able to establish rights as an employee in most cases, they may still benefit from a variety of statutory employment rights that are applicable to "workers" rather than employees in the legal sense. It is unlawful to discriminate against contract workers on grounds of race, sex, disability, religion or belief, or sexual orientation, irrespective of whether they are an employee or worker of the client or the employment business. A contract worker for these purposes is defined as an individual working for a "principal" i.e. the client, who is "employed not by the principal but by another person who supplies them under a contract made with the principal." Both the client and the employment business could be liable for discrimination claims brought by temporary workers. Temporary workers are entitled to receive the national minimum wage and the benefits of the Working Time Regulations 1998, which governs

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matters such as hours of work, rest breaks and paid annual leave entitlement. Temporary workers also have the protection of whistle-blowing legislation. If a temporary worker is an "employed earner" for NIC purposes, they are also treated as an employee for the purposes of statutory sick pay, maternity pay, paternity pay and adoption pay. This does not necessarily mean that they are entitled to maternity, paternity or adoption leave as these rights are guaranteed to employees only, as defined by the Employment Rights Act 1996.

For some time, the government has been considering whether to clarify the employment status of temporary workers by legislation. On 30 March 2006, the DTI announced the results of its review in a strategy paper entitled "Success at Work". It concluded that there should be no extension of rights for temporary workers as there was an appropriate balance already in place between worker protection and labour market flexibility.

The Conduct of Employment Agencies and Employment Businesses Regulations 2003

2 years have now passed since the commencement of the Conduct Regulations. Readers will recall that

the Regulations placed new legal requirements on employment agencies and businesses which included the following:

The requirement to enter into written terms of business with clients or terms of engagement with candidates (both permanent and temporary) before providing services to them. The Regulations prescribe the following basic minimum of information that must be included:

- ◆ The requirement to seek, verify and disclose specific information about candidates to clients, for the protection of the client.
- ◆ The requirement to seek and disclose information from the client about the client and the vacancy that it wishes to fill, for the protection of the candidate.
- ◆ Restrictions on the circumstances in which a recruitment company can charge a temp to temp, temp to perm or temp to third party transfer fee.

We advised our clients that the introduction of the Regulations was a good opportunity to review their standard contract with both client and candidate and to improve business practice with regard to information gathering, so that a better and more efficient service could be delivered. If you have not

yet done so and would like to, please do contact us.

The Draft Agency Workers Directive

First proposed by the European Commission in 2002, this draft Directive sought to establish a general principle of non-discrimination against temporary workers, to improve and harmonise working conditions for temporary workers throughout the EU and to make it easier for temps to become permanent employees. According to the Commission's research, temporary workers generally receive less pay and benefits than their permanently employed equivalents. However, the Directive encountered considerable resistance during consultation and as a result, on 27 September 2005, the Commission announced plans to reconsider the draft Directive so it is unlikely that this piece of legislation will be finalised any time soon.

Gangmasters (Licensing) Act 2004

Following the Morecombe Bay cockle pickers incident and in response to reports of illegal workers being used as cheap labour, without payment of minimum wage or proper health and safety provisions, the Gangmasters (Licensing) Act 2004

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This guide is for general information and interest only and should not be relied upon as providing specific legal advice. In relation to any particular matter, readers are advised to seek advice.

Further information

If you would like further information about the issues raised in this newsletter, or any aspect of employment law and the recruitment industry, please do not hesitate to contact Helen Wyatt, Head of Employment hwyatt@gdlaw.co.uk or any other member of Goodman Derrick's employment team.

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was introduced. The Act came into full effect on 6 April 2006.

The Act stipulates that parties who supply workers to clients for the purposes of agricultural work, gathering shellfish or processing or packaging shellfish, fish or products derived from fish or shellfish or any produce derived from agricultural work ("gangmasters") may only do so under the authority of a licence granted by the Gangmasters Licensing Authority. Applications for such licences could be made from 6 April 2006. It will be an offence to supply workers without a licence from 1 October 2006 and an offence for a labour user or client to use an unlicensed gangmaster from 1 December 2006. There is a slightly different timetable for shellfish gathering commencing in October 2006.