

January Newsletter from Russell Personnel & Training

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1. Temporary troubles

The aim of the Agency Workers Directive is to enable temporary workers to enjoy the same working conditions and benefits as those employed on a permanent basis. The Directive will give equal rights to agency workers (including maternity rights) and require them to be engaged on the same terms and conditions as permanent workers after a minimum period. This could be from the first day of employment.

The Directive is a continuation of the policy of creating parity for all "atypical" workers (as has been implemented for part-time workers).

Since it was first proposed in 2002, fundamental disagreements have prevented its adoption. The UK has raised a number of objections because the Directive would significantly impact on the internal labour market. More than 3% of the UK workforce is estimated to be supplied by agencies on a temporary basis. In implementing reform, the Directive will make it more costly to employ agency workers.

In early December last year EU ministers met to discuss the amended proposal to the Agency Workers Directive. No agreement was reached and the debate was postponed. It is likely to be considered again later this year and the UK Government will be under pressure from other member states and from unions to agree to the proposals.

The key issue appears to be possible exemptions from the principle of equal treatment for temporary workers and, in particular, the maximum length of assignments to which any such exemption will apply.

The UK is currently enjoying a brief reprieve, but it seems likely that change is in the air for employers using temporary workers and the agency businesses themselves.

Actions for employers

Employers can help to prepare themselves by:

- Establishing where and how temporary agency workers are used.
- Considering whether their business uses casual temps to cover busy periods, or are they doing higher value work?
- Planning for the worst-case scenario. Calculating costs if agency workers got the same pay and benefits from day one or after only six weeks.
- Considering how they would cover the work required if their organisation stopped using temps? Can potential extra costs be absorbed by savings elsewhere?
- Checking whether agencies will pass on sudden cost increases, and how quickly (and at what penalty) can the contract be terminated if necessary.

2 Employment update

Increase in statutory rates announced

Higher limits for unfair dismissal awards will apply to unfair dismissal claims on or after 1st February 2008. The maximum compensatory award for unfair dismissal claims will increase from 60,600 pounds to £63,000.

A statutory week's pay, which is relevant to calculating statutory redundancy pay and the basic award in unfair dismissal cases, will increase from £310 to £330.

The new rates for statutory sick pay and statutory maternity, paternity and adoption pay have also been announced and these will take effect from 6 April 2008. Statutory sick pay will increase from £72.55 to £75.40 per week. Statutory maternity, paternity and adoption pay will increase from £112.75 to £117.18 per week. In both cases, the weekly earnings threshold for entitlement will increase from £87 to £90.

Information security in SMEs

The Data Protection Act 1998 requires all organisations to have appropriate security to protect personal information against unlawful or unauthorised use or disclosure, and accidental loss, destruction or damage.

The Information Commissioner's Office has recently issued a good practice note, intended to alert small and medium sized organisations to the security measures they should have in place to protect the personal information they hold. More information can be found on the Information Commissioner's website (www.ico.gov.uk).

Genuine but mistaken belief can be a fair reason for SOSR dismissal

An employer's genuine but mistaken belief that continuing to employ a foreign national would contravene a statutory enactment could be grounds to show that a subsequent dismissal is for "some other substantial reason" (SOSR) and therefore fair.

Under the Asylum and Immigration Act 1996, it is an offence to employ a person without permission to enter or remain in the UK. If an employee, granted permission for a limited period, applies for an extension before expiry, permission continues until the request has been dealt with.

Ms Klusova, a Russian national, had worked for Hounslow Council since November 2000. When her leave to remain expired, the Council was wrongly told by the Home Office that she was an over-stayer. Ms Klusova told her employer that she had applied for an extension but did not produce satisfactory evidence. The Council dismissed her without following the statutory dismissal procedure, arguing that because her continuing employment would contravene a duty or restriction imposed by law, it did not have to do so.

Ms Klusova brought an unfair dismissal claim which was eventually heard by the Court of Appeal.

The Court accepted that Ms Klusova was not working illegally. It also accepted that the Council genuinely believed Ms Klusova's continued employment would breach a legal restriction. The fact that it had failed to consult her about its concerns and had not followed relevant guidance did not alter that outcome. The Council had made enquiries with the Home Office and received information that suggested it could not continue to employ her.

This genuine but mistaken belief amounted to a potentially fair reason for an SOSR dismissal.

However, employers should note that in this case the dismissal was unfair because the council had not followed the minimum statutory dismissal procedures. *Klusova v London Borough of Hounslow [2007]*

Disclaimer: The notes above are for guidance only and professional advice should be sought where appropriate.

3 Last word

Win sum, lose sum

An agency worker walks into the agency who have placed him with a local company and says "What are you playing at? You've paid me £200 less than we agreed upon."

The agency manager replies "Well that's true. But what about the £200 we overpaid by mistake last month. You didn't mention that."

The worker replies, "Yeah, I can live with the occasional mistake but when you make a habit of it I think I need to raise it as a concern."

Thanks for taking the time to read this. Your feedback and comments are much appreciated.

Kate

Kate Russell is a public speaker, human resource consultant, author and trainer specialising in employment law for managers.

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