

Temporary Workers - are they a temporary solution?

The news that Royal Mail has recruited 30,000 temporary workers to deal with the backlog caused by the industrial action taken by CWU members and Christmas mail, has focused attention on temporary workers. Royal Mail routinely recruits up to 15,000 temporary workers over the pre-Christmas period but has increased the numbers and recruited earlier than usual.

Temporary contracts allow a large degree of flexibility to both parties and often allow an employer to take on staff only for the periods when they are needed, such as the Christmas period, without the commitment that is part of recruiting a permanent employee. Temporary workers are generally recruited either through a recruitment agency or on temporary contracts entered into directly. This does not mean though that these individuals, who are not genuinely self-employed, do not have rights either as workers or employees.

Agency Workers

The rights of agency workers have been in the news recently with consultation on the Temporary Agency Workers Directive earlier this year. On 15 October 2009, the Government published the draft Agency Workers Regulations 2010. The Directive will increase the rights of agency workers and after 12 weeks they will be entitled to equal treatment to employed staff in many areas (for a more detailed explanation of the proposed rights see June's Newsletter).

Temporary Contracts

Temporary staff may also be recruited by the business directly either on a fixed-term contract or as casual workers. Often there will be an employment status rather than worker status, even though the relationship is more casual than a permanent arrangement.

A fixed-term contract of employment is one which ends either on a given date, the completion of a particular task, or the happening, or not, of a particular event (other than retirement). Again this gives an employer a degree of flexibility but where there is an employment relationship the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations will apply.

A gap between successive fixed-term contracts does not necessarily break continuity or prevent there being a renewal of the contract. The Regulations also provide for employees who have been employed for four or more years on a series of successive fixed term contracts to be automatically deemed to be permanent employees unless the continued use of a fixed term contract can be objectively justified.

The term 'casual worker' does not have a special legal meaning but is used to describe individuals who are used in businesses where the need for workers is not constant. They may have a zero hours contract where the employer does not guarantee to provide work and only pays for work that is actually done. The arrangement has a large degree of flexibility and can be of benefit in industries where demand fluctuates seasonally such as agriculture or tourism. Despite the flexibility of the arrangement where a regular pattern develops, the casual worker may be able to show that a global or 'umbrella contract' exists during periods when they are not working. If it can be established that there is such a contract in place, then there will be a contract of employment over all weeks in which the global or umbrella contract existed. This can give an employee continuity of employment for that time.

Case Study

Autoclenz v Belcher and others , Court of Appeal

The issue of 'sham contracts' and the employment status of individuals who describe themselves as 'self-employed' but are in reality workers or employees was considered in this recent case.

Background

Autoclenz had a contract with British Car Auctions (BCA) to valet cars. Mr Belcher and his colleagues responded to an advertisement from Autoclenz for self-employed valeters and valeted cars on a piecework basis at a site run by BCA. They wore site overalls, having previously worn Autoclenz's overalls. Autoclenz provided them with all their cleaning products and arranged group insurance cover for which it deducted a fixed amount from their weekly invoices. The arrangement was reviewed by HM Revenue & Customs in 2004 and they were at the time satisfied that the individuals were self-employed.

In November 2007, Mr Belcher and his colleagues brought a claim to an Employment Tribunal seeking a declaration that they were employees and an order for payment of the National Minimum Wage and holiday pay under the Working Time Regulations. The Tribunal found them to be employees. This decision was appealed to the Employment Appeal Tribunal which found them to be workers rather than employees. Both parties appealed the decision; Autoclenz appealed against the decision that they were workers and Mr Belcher and his colleagues on the decision that they were not employees.

Decision

The Court of Appeal found that they were employees despite clear contractual terms stating that they were engaged on a subcontract basis, could provide a substitute to carry out the valeting on their behalf and that there was no requirement for them to provide their services on any particular occasion or for Autoclenz to engage their services.

Guidance was given on how the issue of employment/self employment should be considered by Employment Tribunals. The fact that a contractual term, such as substitution, was not actually exercised did not automatically mean it was not genuine but the Tribunal should try to discover 'the actual legal obligations of the parties.' This would include looking at the written terms but also how the parties conducted themselves in practice and what their expectations were.

Comment

Employment Tribunals often have to consider the employment status of Claimants who have entered into a contract purporting to be self employed but who subsequently wish to argue that they are employees or workers (to claim statutory rights). This decision is in line with previous decisions and confirms that where there is a dispute as to the status of the contractual terms the Tribunal should look at the parties conduct and what had been agreed.

It is interesting that in this case it was commented that the fact that an individual had enjoyed the tax benefits of self-employed status for many years should not prevent them from claiming to be employees or workers.

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