

Arbeid for bemanningsbyråer og vikaransattes kontraktsforhold

Gjesteforelesning

ved

Arbeidsrettsgruppen, Institutt for privatrett

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The regulation of temporary agency work in English law

onsdag 16. mars 2011 kl. 10.15, med etterfølgende diskusjon inntil kl. 12.00

i rom 571, Domus Nova (“trekantbygningen”), St. Olavs plass 5.

Forelesningen vil både gå inn på Bemanningsdirektivet (2008/104/EF) og diskutere den kontraktsmessige situasjonen for ansatte i bemanningsbyråer.

Det blir åpent for spørsmål og diskusjon etter forelesningen.

Dr. Anne Davies er Reader in Public Law ved Brasenose College, University of Oxford. Hennes forskning er konsentrert om arbeidsrett og europarett. Hun har en rekke fremragende publikasjoner på disse områdene, bl.a. boken *Perspectives on Labour Law* (2. utg. 2009, Cambridge UP) og artikler om rettsutviklingen på området utstasjonering av arbeidstagere, arbeidskamprettigheter og rettskonflikter.

THE REGULATION OF TEMPORARY AGENCY WORK IN THE UK

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1. THE REGULATION OF EMPLOYMENT AGENCIES IN THE UK

Employment Agencies Act 1973; Conduct of Employment Agencies and Employment Businesses Regulations 2003

Fees may not be charged

No system of licensing (with sectoral exceptions)

Employment Agency Standards Inspectorate

2. THE EMPLOYMENT STATUS OF AGENCY WORKERS

a) as regards the agency

James v Greenwich LBC [2008] EWCA Civ 35, [2008] IRLR 302 (CA)

Evans v Parasol [2010] EWCA Civ 866; [2011] ICR 37 (possible implied contract with an intermediate agency)

The sham doctrine

b) as regards the end user

The position in equality law:

Equality Act 2010, s. 41:

- (1) A principal must not discriminate against a contract worker—
 - (a) as to the terms on which the principal allows the worker to do the work;
 - (b) by not allowing the worker to do, or to continue to do, the work;
 - (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
 - (d) by subjecting the worker to any other detriment....

- (5) A “principal” is a person who makes work available for an individual who is—
 - (a) employed by another person, and
 - (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

- (7) A “contract worker” is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

Harrods v Remick [1998] ICR 156

But cf. *Muschett v HM Prison Service* [2010] EWCA Civ 25 [2010] IRLR 451

The position in employment law more generally:

James v Greenwich LBC [2008] EWCA Civ 35, [2008] IRLR 302

Alstom Transport v Tilson [2010] EWCA Civ 1308; [2011] IRLR 169

3. THE REGULATION OF AGENCY WORK AT EU LEVEL

The CBI/TUC agreement of 20 May 2008

Directive 2008/104/EC on temporary agency work

The Agency Workers Regulations 2010 (SI 2010/93), in force 1 October 2011

Personal scope

A matter for the Member State, Article 3

Applies to individuals who are employees or workers of the agency, r. 3

Qualifying period

Entitlement to equal treatment in basic working conditions applies on completion of a qualifying period: 'the agency worker must work in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments', r. 7(2)

Article 5(5), measures to prevent abuse of the qualifying period:

A six-week gap is required to break continuity, r. 7(8)(a)

Other provisions on breaks in continuity, r. 7(8)

Anti-avoidance provisions in r. 9

The qualifying period – r. 9

'(3) This paragraph applies when an agency worker has—

(a) completed two or more assignments with a hirer (H),

(b) completed at least one assignment with H and one or more earlier assignments with hirers connected to H, or

(c) worked in more than two roles during an assignment with H, and on at least two occasions has worked in a role that was not the "same role" as the previous role within the meaning of regulation 7(3).

(4) This paragraph applies where—

(a) the most likely explanation for the structure of the assignment, or assignments, mentioned in paragraph (3) is that H, or the temporary work agency supplying the agency worker to H, or, where applicable, H and one or more hirers connected to H, intended to prevent the agency worker from being entitled to, or from continuing to be entitled to, the rights conferred by regulation 5; and

(b) the agency worker would be entitled to, or would continue to be entitled to, the rights conferred by regulation 5 in relation to H, but for that structure.’

Equal treatment in basic working conditions

Defined in r. 6(1) as:

- ‘(a) pay;
- (b) the duration of working time;
- (c) night work;
- (d) rest periods;
- (e) rest breaks; and
- (f) annual leave.’

r. 5(1) ‘... an agency worker (A) shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer—

- (a) other than by using the services of a temporary work agency; and
- (b) at the time the qualifying period commenced’

r. 5(3) ‘Paragraph (1) shall be deemed to have been complied with where—

- (a) an agency worker is working under the same relevant terms and conditions as an employee who is a comparable employee, and
- (b) the relevant terms and conditions of that comparable employee are terms and conditions ordinarily included in the contracts of employees, who are comparable employees of the hirer, whether by collective agreement or otherwise.’

Enforcement

Enforcement – r. 14

‘(3) A temporary work agency shall not be liable for a breach of regulation 5 where it is established that the temporary work agency—

- (a) obtained, or has taken reasonable steps to obtain, relevant information from the hirer about the basic working and employment conditions in force in the hirer;
- (b) where it has received such information, has acted reasonably in determining what the agency worker’s basic working and employment conditions should be at the end of the qualifying period and during the period after that until, in accordance with regulation 8, the agency worker ceases to be entitled to the rights conferred by regulation 5; and
- (c) ensured that where it has responsibility for applying those basic working and employment conditions to the agency worker, that agency worker has been treated in accordance with the determination described in sub-paragraph (b),

and to the extent that the temporary work agency is not liable under this provision, the hirer shall be liable.’

Agency worker’s right to request information, r. 16

Possible minimum award of two weeks’ pay for breach of r. 5 (equal treatment)

Additional award of up to £5000 for breach of r. 9 (anti-avoidance)

4. CONCLUDING THOUGHTS

Personal scope – a missed opportunity?

Enforcement issues

The qualifying period