

employment law

Legal Q&A... agency workers

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With BMW's recent sacking of 850 agency workers at its Oxford plant, the ongoing debate about the use of agency workers in the UK has been grabbing the headlines. While businesses argue that agency workers are necessary to absorb changes in demand without dismissing employees, agency workers have less protection and tend to receive lower pay and fewer benefits of employment than the full-time staff they work alongside.

Q What is an agency worker?

A An individual engaged by an employment agency to perform work for the agency's clients. The worker has a contract with the agency, but not with any client for whom they work.

Q What rights do agency workers have?

A An agency worker's rights are determined by their status (ie employee, worker or self-employed individual) and determining status is notoriously difficult. While agency workers who are not employees benefit from some protection – for example, in relation to discrimination, national minimum wage and the Working Time Regulations – they do not have the right not to be unfairly dismissed, to receive a redundancy payment, or to receive statutory minimum notice of termination. Agency workers at BMW were sacked with an hour's notice, presumably on the basis that BMW considered that the workers were not their employees and could not bring these types of claim.

Q When is an agency worker an employee?

A An agency worker could be an employee of the agency or of the client or of neither – in which case, they could be a worker or self-employed. Unsurprisingly, there has been considerable litigation by agency workers seeking to establish that they were employed by the agency or the

client to benefit from an employee's rights.

In the most recent relevant case of *James v Greenwich Council*, the Employment Appeal Tribunal (EAT) stated that it will be rare for a worker to be an employee of the agency, because the agency does not have day-to-day control of the worker, does not gain direct benefit of the work being done, and because there is no obligation on the agency to find work for the worker or on the worker to accept it.

The EAT in *James* also stated that a contract of employment between an agency worker and the client will only be implied where it is necessary to do so.

In determining whether such a contract is necessary, a number of factors should be considered, including how the contract is performed, whether the client is paying for work done by the worker or for services of the agency, and whether the client can insist on a particular worker being provided. It is important to note that the passage of time by itself does not establish any mutual obligations between a worker and a client.

The case of *James* has made it more difficult for agency workers to argue that they are the employees of agencies or clients, with the result that redundancy payments remain to be secured by agency workers.

Q What protection will agency workers have in the future?

A On 5 December 2008, the European Directive on Temporary Agency Work was passed with the aim of providing increased protection for agency workers. The UK government now has until 5 December 2011 to implement the directive, although the unions have been pushing for early implementation, particularly following the BMW sackings.

The directive provides that the "basic working



DRIVEN OUT... Agency staff don't have the right not to be unfairly dismissed, to receive a redundancy payment, or to statutory minimum notice of termination.

and employment conditions" of temporary agency workers shall be at least those of an employee in the same undertaking occupying the same job. While there are likely to be arguments as to who the appropriate comparator is, the directive does clarify that basic working and employment conditions means conditions relating to the duration of working time, overtime, breaks, rests, night work holidays and public holidays, and pay.

Q Will the BMW sackings change anything?

A The most likely consequence is that the directive is implemented by the government well before 5 December 2011.

However, as the directive does not give the agency workers any protection in terms of unfair dismissal, notice period or the right to a redundancy payment, actions such as those taken by BMW in relation to agency workers are likely to remain lawful.

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personneltoday.com/49496.article

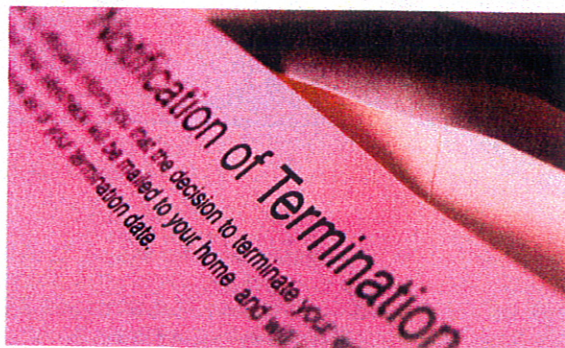
Agency Workers Directive passed in Europe
personneltoday.com/48073.article

Weekly dilemma... old and new dispute resolution procedures

I have heard that on 6 April, the statutory dispute resolution procedures will change. I may need to dismiss an employee towards the end of March or beginning of April. Would we have to put these new procedures into effect, or stick with the Employment Act 2002 (Dispute Resolution)? Could the employee in question, should he become aware of the changes, ask for his case to be stayed until after 6 April?

A You are right that the statutory dispute resolution procedures under the Employment Act 2008 will be repealed on 5 April 2009. They will be replaced by a new Acas Code of Practice on Discipline and Grievance Procedures. The code provides for non-compulsory uplifts and reductions to tribunal awards. Under the code, tribunals are entitled to order an uplift of up to 25% where the employer is responsible for a failure to follow the code, and a reduction of 25% where the employee is responsible for a failure.

Major changes in employment law are often accompanied by transitional provisions dealing



with cases that, for example, are ongoing when the changes take effect. In this case, the transitional provisions confirm that the 'old' three-stage disciplinary procedure will apply in cases where, on or before 5 April 2009, an employer has done one or more of the following: disciplined or dismissed an employee; sent an employee a step-one letter; or held a step-two meeting.

DISPUTES AND DISMISSALS... New dispute resolution procedures will come into effect in April.

The step-one letter is the document in which the employer is required to "set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee".

Therefore, if you want to make sure your case is dealt with under the 'old' three-stage disciplinary procedure, you can do this by sending the employee the step-one letter in good time prior to the date that the law changes.

Provided you have done so, if the employee requests a stay of the other stages of disciplinary procedure until on or after 6 April 2009, and you agree, this will make no difference – the 'old' three-stage disciplinary procedure will continue to apply.

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