

Temporary Staff Times

A newsletter brought to you by the OGC

APRIL 2007

For those in the public sector who use temporary agency staff

Welcome to our first edition of the 'Temporary Staff Times', a newsletter from the OGC's Temporary Labour Category team. We want to keep you informed of the latest news, events and collaborative deals related to temporary staff.

If you find this issue of Temporary Staff Times helpful, or have ideas on how it could be improved, please let us know. And if you need assistance with taking control of your agency staff spend, don't hesitate to get in touch. We're here to help you!

How to contact us

Email: tempstaff@ogc.gsi.gov.uk
Phone: 0845 000 4999.

DTI consultation: Increase in Holiday Entitlement

The DTI has just closed a second phase of consultation to change the amount of holidays to which all workers are entitled. Currently, there are 20 days paid holiday per year per worker (pro-rata for part-timers), which is inclusive of bank holidays, i.e. there is no statutory right to take time off work, with or without pay on bank holidays. However, many companies, and certainly the public sector, allow employees to take paid bank holidays in addition to their paid holidays, so that for some workers, they receive a total of 28 days holiday while others receive only the 20 days paid holiday. The proposals address this inequality.

Agency workers in the public sector currently receive just the 20 days holiday and bank holidays are unpaid, unless the workers take them as part of their annual leave entitlement. When an agency bills its clients in advance for the holiday pay (called the Working Time Regulations charge), it charges 8.33% of the worker pay rate so that holiday entitlement is invoiced to the client while the worker is working and not while they are on leave.

The DTI proposal is to increase the statutory minimum holiday entitlement from 20 working days to 28 working days rather than provide a legal entitlement to time off work on bank holidays with the increase phased in from October 2007. The proposal is to increase holiday to 24 days in October 2007, and 28 days in October 2008. Therefore what is now an 8.33% charge for applying the WTR will rise to 10.17% in October 2007 and 12.07% in October 2008 if the proposals are approved. More information can be found here: <http://www.dti.gov.uk/consultations/pa/ge36462.html>

Latest Case Law: James v Greenwich

What happens when an agency worker sues, claiming employment rights? In this latest case, decided in December 2006 by the Employment Appeal Tribunal, Ms. James was an agency worker supplied to the London Borough of Greenwich, working in their Asylum Seekers' Team. She

started in September 2001 and switched agencies in 2003 to get a better pay rate. Ms. James had her holidays approved by the agency, not the council, and when she was off sick, the agency sent a replacement. She sued for unfair dismissal and lost at the Employment Tribunal – even though she had worked as an agency worker at the London Borough of Greenwich for 5 years.

The Employment Tribunal concluded that because there was no obligation upon Ms James to provide services to the Council and no obligation on the Council to provide Ms James with work, there was an absence of what they described as the "irreducible minimum necessary to create a contract of service" or employment relationship between them. In reaching this decision the Tribunal was particularly influenced by the fact that Ms James was not entitled to sick pay or holiday pay from the Council and that when she was sick, her agency simply replaced her with another agency worker. At appeal, the Employment Appeals Tribunal upheld the original Tribunal's decision and made the further observation that the mere passage of time is not sufficient to give rise to an employment relationship between an agency worker and the "end-user" employer (in this case the Council). The EAT went on to state that the key issue in determining whether such a relationship exists in agency cases is whether the agency arrangement is genuine and accurately represents the relationship between the parties.

What does this mean for you as a public sector user of agency staff? Firstly, the question of whether an agency worker would be considered to be a de facto employee is complex and decided by the Tribunals on a case-by-case basis, and rests on the Tribunals' determination of such factors as whether there is "mutuality of obligation" between the worker and the public sector user (i.e. whether the worker is obliged to provide his/her services to the public sector body and the public sector body is obliged to provide the worker with work) – and whether the agency arrangement is genuine. In the latest case law, the courts note that they potentially see agency workers as de facto employees of the end user when the contracts in place do not reflect reality, as in *Cable & Wireless vs. Muscat*, where the contracts were super-imposed on what was essentially an employer-employee relationship.

The EAT's decision makes it clear that the fact that an agency worker may have worked for a public sector user for a long time does not of itself mean that the agency worker will be deemed to be a de facto employee; other factors must exist, particularly mutuality of obligation. As with any case, the facts in each situation would need to be considered in reaching a view. To read the case law, go to http://www.bailii.org/uk/cases/UKCAT/2006/0006_06_1812.html.

ILLEGAL: Rolled-up holiday pay!

Rolled-up holiday pay is the practice of paying workers in advance of holiday being taken. In some market sectors, such as teaching, it is not currently uncommon to have agencies compensate agency workers while they are working for their eventual holidays, instead of working for a time, and then getting paid for holiday while they were on leave. This would lead to the situation where agencies would not bill a separate charge for holiday pay, but effectively "roll" it into the worker pay rate.

The European Court of Justice, however, has ruled the practice of rolled-up holiday pay to be unlawful in the case of *Robinson-Steele v R.D. Retail Services and others*, ECJ 16 March 2006, commenting that the

entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogation. However, the ECJ also ruled that provided an employer has made it completely plain that additions to regular pay are being made on account of holiday pay and are clearly identified and recognised as such by the employer, they can be set-off against holiday pay at the time that the leave is taken.

All workers should have 20 days off pro-rata per working year (those who work half a year, for example, would only receive 10 days holiday). Please note that current industry practice is for agency workers to have bank holidays unpaid, although they can choose to take these days as part of their leave entitlement; this will change if the current proposals from the DTI are ratified.

The 20 days pro-rata can be calculated as 8.33% of the worker pay rate when splitting out the various elements of the agency invoice. This should be no different for agency supply teachers who are also entitled to 20 days paid holiday pro-rata. The guidance from the DTI is found here: www.dti.gov.uk/employment/employment-legislation/employment-guidance/page28979.html#paid_annual.

New collaborative contract available: ESPO's Vendor Neutral deal with Comensura

A group of 14 East Midland councils have joined together in a collaborative exercise to engage Comensura to provide a vendor neutral managed service for all 14 authorities for a minimum of three years. The contract is open to **all** public service bodies in the UK.

For public sector bodies that would like to learn more about this vendor neutral framework contract and the steps needed to be taken in order to participate, contact Lisa Tutt at ESPO (l.tutt@espo.org or by phone at 0116 265 7933).

Now available: Admin and Clerical contract from the Home Office

The Home Office has just awarded collaborative framework agreements for temporary admin and clerical staff, which are open to all public sector organisations to use. The agreements offer both master vendor services and access to a number of pre-qualified agencies.

For more information, email us at tempstaff@ogc.gsi.gov.uk.

Education Survey delivers results

In partnership with DfES, the OGC is pleased to announce the results of a survey of DfES quality accredited London providers of temporary workers in education, including supply teachers, classroom assistants and special needs personnel. Schools who use the agencies from the survey will be assured that arrangements are fit for purpose, and that they will receive a service that is focused on quality, safety, and value for money.

London-wide recruitment agencies were asked to provide financial information about their current services for school temporary staffing requirements, as well as qualitative information about their organisation and how they delivered services. To read more, go to http://www.dfes.gov.uk/cpp/sourcing_schools_09.shtml

We need you!

Have you been successful in reducing your demand for agency staff? Please contact us. We are writing case studies of those in the public sector who have challenged the need for temporary staff in an effort to showcase best practice.