

Employment News

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Draft agency worker regulations

The government has published draft regulations to give more protection to agency workers. However, it has put back their introduction to October 2011.

It is anticipated that the new regulations will substantially cut the number of agency workers which businesses use. The regulations to not give agency workers the right not to be unfairly dismissed, but give them rights to equal treatment.

The worker will be entitled to the same basic working and employment conditions as if he had been taken on direct by the business. This covers pay and working time issues: length of night work, rest periods and breaks and annual leave.

But most rights only kick in after 12 continuous weeks (or part weeks) on the assignment. If the worker starts a new assignment with substantially different work, the 12 weeks start running again.

Businesses will not be able to avoid the regulations by breaking the assignment and taking the worker back on later: any break of less than 6 months is ignored for calculating the 12 week period. So are breaks for sickness and family friendly time off.

Turning to comparable pay: the agency worker will be entitled to the same basic pay, bonus, commission and holiday pay which he would have received if taken on direct by the business. But he will not be entitled to the same sick pay, pension, maternity etc pay, redundancy pay, profit share, share options, and performance related bonuses. But paid time off for ante natal will have to be given.

Agency workers will have the right to benefit from work place facilities from day one eg canteens, nurseries, courtesy transport, unless the employer has objective grounds for treating the agency worker differently.

Businesses will be able to discriminate in relation to part of the package available to the agency worker as long as the overall package is as good as for a comparable employee.

Businesses will also have to inform agency workers of any permanent positions which are available.

To get equal treatment, the worker will have to show that the employment benefit he wants applies generally in the workforce. But he will not have to identify an actual flesh and blood person to compare himself with.

The new regulations will not protect workers who are genuinely self employed or who supply themselves through their limited company. But those working through “umbrella companies” will be protected.

The consultation on the draft regulations closes on 11 December.

When does notice end employment?

When an employer gives notice to end employment, it is important for it to know when the employment will end so that it knows when the last day is that salary will be due. It is also important for an employee thinking of bringing an employment tribunal claim because most time limits for bringing claims expire within three months of the end of the employment.

In *Gisda Cfy v Barratt*, the employer dismissed the employee for misconduct by letter sent by recorded delivery on 29 November. However, the employee was away and did not see the letter until 4 December. The Court of Appeal confirmed that the employment ended on 4 December when the dismissal letter was read, not 29 November when the letter was posted, nor 30 November when it should have arrived and been read. The court’s rationale

was that, since it was the employer which ended the employment, it should bear the risk on the issue of when the dismissal took effect.

This case illustrates why it actually makes sense for an employer to dismiss by email which is likely to arrive and be read sooner than a letter. A read receipt can also be requested. Texts are often even quicker but will the employer have a record of the text to keep as evidence? Sending dismissal letters by registered post can backfire because the employee can easily refuse to accept the letter/collect it from the post office.

Employers should be wary of dismissing verbally for two reasons. First, well written employment contracts will say that notice must be given in writing, so a verbal dismissal will not be effective. Secondly, where notice is given in writing, the employer has chance to think properly about whether it is justified and what its reasons are.

Maybe the safest way for an employer to dismiss is to adjourn the dismissal decision meeting to make its decision and ask the employee to wait so that the dismissal letter can be handed over, once it has been composed and typed.

This case had a rather different outcome from previous cases involving employees resigning by fax. In those cases, the resignation was effective when the transmission was complete, even though the fax was sent outside office hours when no-one was there to receive it. It seems to be one rule for employers and another for employees.

Parental leave changes

In July, the European Commission voted to increase parental leave from three to four months. This will take a while to feed through to UK law, but will come in eventually. However, there was no change to the rules which mean that employers do not have to pay employees for parental leave.

The government is due to introduce new regulations to bring in the new right for mothers to transfer up to 6 months maternity leave to the father, plus up to three months SMP. It is intended that this will come into force for parents of babies born from April 2011.

Medical questionnaires

In *Cheltenham Borough Council v Laird*, the Council tried to sue Laird for damages on the basis of what it said was a misleading response to a pre-employment medical questionnaire. The employee did not reveal

that she had a history of recurrent depressive illnesses. She then went sick with depression and was diagnosed as being permanently incapable of undertaking her senior role. The Council sued her for nearly £1 million, most of which was the cost to it of giving her the ill health pension to which she became entitled.

The Court studied the questions which the Council had asked in the questionnaire and the replies which Laird had given. It decided that the questions were so generalised that the answers which Laird had given were acceptable, and she had not been under an obligation to declare her past history of depressive illness because at the time of applying for the job she was in good health.

The moral of this case for employers is that medical questionnaires must be well drafted if they are to do the job for which they are intended. For example, if the questionnaire had asked if she was taking any medication, this would have elicited the information that she was taking anti-depressants. If the questionnaire had asked her to detail all periods of sickness absence in her career lasting a week or more, this would have picked up her previous time off with depression. It would be useful to have a general sweep up question

such as “Is there anything else in your medical history or circumstances which might affect our decision to offer you employment?”

Employers are cautious of medical questionnaires and they need to be, but they should understand why the caution is needed and act to address this rather than watering down questionnaires so that they do not fulfil the job for which they are intended. The two main issues to look out for are:

- Disability discrimination: If the questionnaire reveals a condition which could be a disability, the employer will have to investigate adjustments to accommodate the condition in the work place, and what the actual effect of the condition may be, rather than simply rejecting the applicant
- Data protection: Information about health is sensitive personal data and must be handled with care

Suing an employee for breach of contract

An employer was, however, successful in suing a prospective employee in *Tullett Prebon Group v EI-*

Hajjali. The company are brokers who entered into an agreement with EI-Hajjali for him to begin employment with it. The agreement included a provision that, if he pulled out of joining them, he would have to pay the company 50% of his net basic salary and 50% of his signing payment, which all came to almost £300,000. The clause tried to calculate in advance the loss which the company would suffer if EI-Hajjali failed to join them. When EI-Hajjali did pull out, the company sued him for this sum. He defended the claim on the basis that the provision was an unlawful penalty clause ie it was not a genuine pre-estimate of the company’s losses but a clause designed to deter him from breaking the contract. Therefore, it was unenforceable. The court found for the company: the clause was enforceable.

In practice: It is usual for compromise agreements to include a clause which says that the employee will have to pay back the settlement sum if he breaks any of the terms of the compromise agreement. These clauses may well be penalty clauses and, therefore, unenforceable.

Protection for part-time workers

Most types of discrimination claims require the claimant to find a comparator and say that they were treated

less favourably than the comparator. In sex and race discrimination, the comparator can be a hypothetical person, which makes it easier for claimants to bring their claim than if they have to find an actual colleague treated better than they were.

Does the same apply to claims by part-timers that they were treated less favourably because of their part-time status? In *Carl v University of Sheffield*, the court decided not. The claimant could not use a hypothetical comparator. She had to find an actual comparator who was being more favourably treated than she was.

This makes it particularly difficult for part-time workers to bring claims of discrimination because they have to find a full time worker doing broadly similar work who is being treated more favourably than they are. Otherwise, their case will not get off the ground.

TUPE – changes in working conditions

In 2006, the new Transfer of Undertakings Regulations introduced the right for employees to resign and claim constructive dismissal when there was a substantial change to their working conditions to their material detriment. Previously, there had to be a change to

contract terms (which is not allowed on a TUPE transfer) before employees could resign and claim in this way.

This new provision was tested in *Tapere v South London and Maudsley NHS Trust*. In a TUPE transfer, Maudsley became an employee of a different NHS Trust and was required to change her place of work. She complained that the extra distance from work would disrupt her childcare arrangements.

The court had to consider whether this was a breach of her contract entitling her to resign and claim constructive dismissal and, if it were not, whether it was a substantial change in her working conditions to her detriment which would also give the right to resign.

There was a clause in her contract stating that she could be moved to other locations in the Trust. The court held that this did not allow the change in her workplace to a different trust because it only covered the location of the trust in which she was formerly employed.

In practice: *The same principle would apply to a contract clause which said the employee could be required to work anywhere in the town in which an employer's principle place of business is based: the town would be that of the*

transferring employer and not the new employer.

The court considered whether there was also a material detriment. It was a fact that the employee could get to work at her new place of work in the same time as it took her to get to her old one if she took the motorway. The court decided that the question of whether an employee has suffered a change to their working conditions to their material detriment should be looked at subjectively from the employee's point of view. The employee found the new journey which she would have to take unattractive and so there was a material detriment which also gave her the right to resign.

In practice: *When businesses are taken over, there is often a change of location involved. This case demonstrates that even a contractual right to require a move may not help the employer. Even if there is a contractual right to move the employee, if the employee reasonably thinks that working at the new location is detrimental, he will have the right to resign and claim unfair dismissal.*

For help with any employment law issues, call Jill Kelly on 01235 861919