



EMPLOYMENT LAW UPDATE

October 2010

WHATS NEW.....

The Agency Workers Regulations come into force on 1 October 2011

WHAT IMPACT CAN AGENCY WORKERS HAVE?

The implementation of the Agency Workers Regulations 2010 ('The Regulations') has now been delayed until 1 October 2011. This has been done to allow businesses and agencies sufficient time to adjust to the significant changes to the regulatory framework. Given the current economic climate a number business may have turned to agency workers to allow for fluctuating patterns of work. It is therefore important to be aware of the obligation so that the situation can be monitored and plans can be made before the introduction of these Regulations.

Scope of the Regulations

The Regulations, seek to cover the following:

"**Workers** with a contract of employment or employment relationship with a **temporary work agency**, who are assigned to a **hirer** to work temporarily under their supervision and direction". The effect of this definition is to exclude those who are genuinely self employed. It is important therefore to explore the definition above further to establish what is actually covered by the Regulations. For example therefore, the following definitions are provided within the Regulations;

A **temporary work agency** is defined as a person engaged in the economic activity of; (i) supplying individuals to work

temporarily for and under the supervision and direction of hirers; or (ii) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers."

An "**agency worker**" is defined as someone who is supplied by a temporary work agency, to work temporarily for and under the supervision and direction of a hirer; The agency worker should have a contract with the temporary work agency which can be a contract of employment with the agency, or any other contract to perform work and services personally for the agency. Therefore those workers who have a contract with the hirer would fall outside the definition of an agency worker.

Finally, a **hirer** is defined as 'a person engaged in economic activity to which individuals are supplied to work temporarily for and under the supervision and direction of that person.

The Right to Equal Treatment

The basic purpose of the legislation is to afford an agency workers the same basic working and employment conditions as they would have been entitled to had they been recruited by a hirer to undertake the same job, other than by using the services of a temporary work agency.

To be entitled to make a claim under the Regulations, an agency worker must have undertaken the same role for the hirer for 12 continuous calendar weeks'. The

chain of service can be broken even where the worker continues to provide services for the hirer. This will occur where a worker starts a new assignment with the same business, but the role he performs is 'substantially different' to those previous roles. You therefore may have taken an agency worker on to perform shunting duties and part way through their service, they are required to undertake a role as a long distance driver. Under the terms of the Regulations, whilst the duty of driving is the same, the duties performed are arguably 'substantially different' and therefore this may break the chain of continuous service.

You should however be aware that anti-avoidance provisions have been put in place to protect the agency workers right by preventing tricks which will in effect stop the agency worker from accruing rights under these Regulations. Effectively the Tribunal will need to consider issues such as; the length of assignment, the number of assignments, the number of new roles performed, the period of breaks between work etc. Should the Tribunal consider the above and believe that changes have been made to simply avoid the effect of the Regulations then they will seek to establish that the agency worker has accrued the rights and are liberty to award an additional £5,000.00 compensation to the agency worker.

Whilst we will have to wait and see practically how this will be applied, the overriding principal is that businesses should proceed with caution as and when the Regulations come into force.

The Regulations also provide for circumstances where the chain of service will not be broken. For instances, periods of sickness absence, statutory time off (i.e. holidays), jury service and a temporary cessation of work or strike actions, will not break the chain of service. It is therefore essential to manage your agency workers to reduce the effect of these Regulations.

The Comparator

Agency workers who intend to bring a claim under these provisions will have to identify the relevant terms to which they believe they are suffering a detriment and will have to show a comparator whether real or hypothetical who has the advantage of the clauses of which they complain.

The Regulations do however provide a defence if you as a business (a hirer) can show an **actual** comparator who is working under the same relevant terms and conditions as the agency worker and those terms and conditions are ordinarily included in comparators' contract. This should provide operators with some comfort that the regulator is not simply thinking of the employee. Whilst there appears to only be one defence to this matter, the 12 week qualifying period may act as a defence to the Regulations. If an agency worker does not acquire the right to bring a claim then this is surely the best defence open to your business. Again, you should be aware of the anti-avoidance regulations discussed above.

Which terms and conditions are covered?

The agency worker is not entitled to equal treatment in respect of all terms and conditions, only "basic working and employment conditions", which include:

- Pay (i.e. – bonuses, commissions, holiday pay, amongst others)
- Duration of working time



- Length of night work
- Rest periods
- Rest breaks
- Annual leave

Consideration therefore needs to be given to establish whether or not the use of agency workers is as practical as previously thought, given the above.

Further protection

In addition to equal treatment and contractual provisions, agency workers will be provided with protection and seek to enforce equal rights in terms of the following;

- Access to employment – the right to be informed of any job vacancies;
- Access to on-site facilities – such facilities include child care and transport;
- Should an agency worker be pregnant they should be permitted reasonable time off for anti-natal classes, albeit any pay for time off should be made by the agency.

Enforcement and remedies

Whilst the Regulations seek to establish the primary relationship as that between the agency and the agency worker, there is nothing in the Regulation to stop the agency worker enforcing against operators. It is inevitable where there a relationship between the operator and the worker that

they may seek to enforce against the operator. This will provide additional cover to the agency worker, should the agency be found not liable. This will result in lengthy and costly litigation and therefore businesses should start planning now to avoid any adverse affect of this legislation.

Should a claim under these regulations be brought, the agency worker will seek compensation and/or a declaration setting out their rights. The Tribunal may also provide a recommendation to the business on how best to remove the adverse implications.

Conclusion

Although the Government has delayed the implementation of these Regulations, businesses need to be aware of the possible consequences of the Regulations and start making arrangements for their implementation now.

Whilst the Regulations seek to establish a primary relationship between the agency and the worker, as the business for whom the worker will carry out duties, operators have responsibilities which, unless complied with, are likely to result in lengthy litigation, incurring costs to the business.

As a result, operators may want to consider how best to effectively manage their business and fluctuating work patterns through the recession, albeit there is approximately 11 months to consider the effect of the Regulations and plan for the future.

For further information, please contact Steven Meyerhoff on 01254 828300 or by email: steven@backhouses.co.uk.

In the Pipeline...

The Qualifying Period for Unfair Dismissal may be increased

It has recently been leaked that the Government are to give consideration to increasing the required service for an employee to bring a claim for unfair dismissal. It should be noted that there has yet to be an official announcement on when this consultation will take and we are therefore at the very early stages of this process.

As the laws stands, an employee is required to have 12 months' continuous service before they are entitled to bring a claim for unfair dismissal. This is subject to any claim that the employee may have for discrimination, whistleblowing, maternity related dismissals, by way of examples only. The effect of these claims is to dispense with the requirement for 12 months' service in order to bring a claim. The employee who successfully brings an employment claim may be entitled to awards up to and in excess of £76,700.00 dependant on circumstances (with a maximum compensatory award of £65,300.00), which can have a huge impact on a business.

Therefore recent reports suggesting that the right to bring a claim for unfair dismissal should be increased to those employees with 24 months' service or more can only act as a boost to employers. It should be noted that claims such as discrimination, (mentioned above) can still be brought by any employee and therefore any employee who can put forward a discrimination claim is not required to have a length of service.



The Agency Workers Regulations provide greater protection to Agency Workers

Whilst the above news will be positive for all employers amidst further decisions made by the Government (for example the increase to the default retirement age) it should be noted that no official announcement has been made as to when this consultation will take place. It is hoped there will be further announcements in due course, and we will attempt to advise you as to the development of this matter in future updates.

AGEING WORKFORCE

A recent survey by the Chartered Management Institute and the Chartered Institute of Personal Development has revealed that just 14 per cent of UK managers consider their organisation well prepared to cope with an ageing workforce. This is despite the impending abolition of the default retirement age and the fact that a third of UK workers will be aged over 50 by 2020. 40 per cent of Respondents also said they had experienced age discrimination at some stage in their careers.

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- Corporate Governance & Companies Act compliance;
- Commercial Contracts - Terms & conditions, Supply agreements etc;
- Agency, distribution and franchise agreements; and
- Commercial Property Services.

CASE BULLETIN



The Employment Appeal Tribunal held that an employer is not able to withdraw a mistaken dismissal

Willoughby v C F Capital PLC

EAT Held that an employer is not able to withdraw mistaken dismissal

This case was brought by an employee Ms Willoughby ('W') who had been employed with C F Capital PLC (CFC) for approximately 18 years. Due to a downturn in business, CFC approached W and confirmed that they were considering redundancy. It was however suggested that one way to avoid making redundancies was for the staff to become self employed. W suggested that she may well be interested in becoming self employed and asked CFC to outline the proposal in writing so that she may give it some further consideration. CFC therefore wrote to W, which contained an agency agreement for her to sign, and stated that by mutual agreement W would become self employed. In addition, the letter also confirmed that her employment would be terminated. W had not in fact mutually agreed to become self employed and contacted CFC in this regard. CFC acknowledged that there had been a

misunderstanding and confirmed to W that she could continue in her role as an employee (which was confirmed in writing at a later date). W rejected this offer and made a Tribunal claim for unfair and wrongful dismissal.

By way of background, the general rule in relation to words of dismissal is that clear, unambiguous words should be taken at face value without any need to investigate the circumstances surrounding the dismissal. There are however 'special circumstances' which apply and can cancel the words of dismissal. It is usual however such circumstances are limited to words spoken in the heat of the moment. The tribunal did however consider the scope of these special circumstances and in the first instance held that dismissal did not take effect, although the Tribunal did confirm that the words of CFC's letter amounted to a dismissal. The reason for this decision was that CFC had spoken to W about becoming self employed and upon receipt of the letter terminating her employment W should have realised that something was wrong and that her dismissal was in error.

W therefore appealed the decision of the Tribunal and the EAT considered whether the Tribunal had erred in their decision. During the course of its judgement, the EAT considered what amounted to a 'special circumstance'. The EAT stated that special circumstances would not include matters where dismissal is by mistake. If mistake amounted to a 'special circumstance' then this would override the general principal that clear, unambiguous words of dismissal should be taken at face value. The test to apply in these circumstances was whether there was anything within the letter which W should have considered as meaning that the dismissal should not be taken at face value. The EAT therefore held that W was entitled to take the wording of the letter at face

value and in effect confirmed her dismissal. The EAT also suggested that the withdrawal of the dismissal was too late as W had taken legal advice and also relayed this advice to CFC before retraction. The EAT therefore held that W had been dismissed.

Conclusion

This case has established that the Tribunal will be reluctant to extend the definition of 'special circumstances' regarding the mistaken dismissals beyond the words spoken in the heat of the moment. In addition it confirms that steps should be taken to retract the mistaken dismissal as soon as possible. It was clarified within the decision that a reasonable time for retraction would be 2 days.

Practically, this may not appear to have a direct day to day impact on your business. However consideration should always be given to words spoken to an employee and those that are detailed in writing. As you will appreciate from the description of the case, it was not the intention of CFC to dismiss W, they simply wanted to avoid making large scale redundancies and felt that they had found a way to do this. Unfortunately carelessness has resulted in the successful claim of W. Carelessness can cause your business a lot of money and in this litigious society, an employee may be quick to take any opportunity presented.

For further information please contact Steven Meyerhoff on 01254828300 or [e-mail steven@backhouses.co.uk](mailto:steven@backhouses.co.uk)

Note: This update does not constitute legal advice. You should not apply this information to any circumstances or facts without obtaining specific legal advice.