EMPLOYMENT LAW UPDATE

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Agency Regulations 2010: Are You Ready?

The Agency Worker Regulations 2010 come into force on 1 October 2010. The new Regulations will give greater rights to agency workers.

What will the impact be for the employer?

The aim of the Regulations is to provide basic working and employment conditions for temporary agency workers and it is important that employers are fully aware of the consequences of the Regulations, and liability for failing to comply.

The Regulations will apply to agency workers who are supplied to a company to do temporary work through a temporary work agency.

The Regulations could have a significant impact on the use of temporary agency workers in the future.

The protection provided by the Regulations is divided into two categories:

- Rights which apply to all temporary agency workers, regardless of their length of service (Day One Rights)
- Rights which only apply once a temporary agency worker has completed 12 weeks' service with a company (The Right to Equal Treatment).

Day One rights which will apply to all temporary agency workers

- *Access to employment vacancies*

  All temporary agency workers will have the right to be told of any relevant vacancies within the company where they are working and to be given the same opportunities as the company's workers to find permanent employment at the company.

Agency Regulations 2010:

Are You Ready?

- *Access to on-site facilities and amenities*

  All temporary agency workers will also have the right to equal access to on-site collective facilities and amenities (unless the company can objectively justify the unfavourable treatment). This will include, in particular, access to canteens staff rooms, work place crèches and transport services and car parking (although not car allowances/season ticket loans).

The Right to Equal Treatment - Rights acquired on completion of 12 week's service

Once a temporary agency worker has completed 12 weeks' service with a company they will become entitled to the same basic terms and conditions as they would have been if they had been recruited directly by the company to do the same job.

Importantly, the Regulations specify that this right will include equal treatment in relation to the following terms: pay, overtime and shift allowances, bonuses linked to individual performance (e.g. commission linked to individual sales), annual leave and pay, vouchers or stamps with monetary value (e.g. transport vouchers) which are not linked to a salary sacrifice scheme.

However, financial participation schemes, including share, occupational pension and sick pay schemes and pay related rights linked to longer-term rewards (e.g. contractual notice pay, redundancy pay, certain benefits in kind and bonuses which are not linked to individual performance) have been expressly excluded from the right to equal treatment.

How to calculate 12 weeks' service

To take into account the often irregular working patterns of temporary agency workers, the Regulations provide that the following events will not break a temporary agency worker's period of service:

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Agency Regulations 2010:

Are You Ready?

- Breaks between or during assignments in the same role of not more than 6 weeks. This will allow workers to accrue 12 weeks' service via several assignments in the same role at the same company. For example, a temporary worker who works for a company for 10 weeks, then has a 5 week gap before working another period of 2 weeks for the same company, will gain 12 weeks' service for the purposes of the Regulations.

- Absences for one of a number of specified reasons, for example sickness or maternity leave.

- A slight change to the temporary agency worker's role. The Regulations provide that continuity will only be broken where the work/duties that make up the new role are substantially different from the old role.

Planning for the Future

It is important that employers that use temporary agency workers are aware of the impact of the Regulations and take steps now to prepare for the change from 1 October 2011.

Current arrangements regarding access to amenities and facilities should be reviewed and procedures put in place to communicate relevant information to temporary agency workers. If it is envisaged that temporary agency workers may accrue 12 weeks' service, employers should also be looking to review and agree mechanisms to communicate information regarding terms and conditions to agencies to ensure that, where required, temporary agency workers receive no less favourable terms.

The qualifying period is not retrospective, so existing temporary agency workers will have to wait 12 weeks from 1 October 2011 before they can rely on the additional rights.

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Agency Regulations 2010:

Are You Ready?

Under the Regulations, there is nothing to prevent a company from choosing not to engage temporary agency workers beyond the 12 week qualifying period or for all assignments to be set at 11 weeks. However, the Regulations contain specific anti-avoidance provisions in order to prevent abuse of the system, such as where a company tries to rotate temporary agency workers between jobs to avoid the right to equal treatment.

The anti-avoidance provisions say that if a temporary agency worker can demonstrate that they would have accrued 12 weeks' service but for the use of different agencies/roles and that the structure of the assignments suggest these have been deliberately designed to deprive the worker of their entitlements, they will be treated as qualifying. Penalties of up to £5,000 may be imposed on organisations which fall foul of the anti-avoidance provisions.

Liability for breach of the rights under the Regulations and Penalty

The hiring company is solely responsible for any breaches of the "day one rights" as these are in the sole control of and can only be provided by them.

In terms of the agency worker being provided with "basic working and employment conditions" equal to those of the hiring company's permanent staff, liability can rest either with the employer or the agency depending on the extent of each party's responsibility. As an agency is responsible for providing the worker with comparable conditions, it will usually be liable for any breach. However the hiring company may be responsible if it has failed to provide the agency with details of the relevant terms.

A temporary agency worker can bring a claim through the employment tribunal against the agency and/or hiring company as appropriate for a declaration of their rights and for compensation. While there is a minimum payment of compensation of two weeks' pay, there is no maximum limit on the amount that can be awarded.

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Agency Regulations 2010:

Are You Ready?

Are you ready?

In order to comply with the Regulations, employers should act now to ensure that

- Any agencies are provided with up to date information on terms and conditions of employment with effect 1 October 2011 so that the agency can ensure that the agency workers receive equal terms.

- Ensure that all agency workers are given access to all staff facilities and information on any job vacancies.

For further information on the Regulations please contact the employment team on 0208 549 5186 or employment@howell-jones.com.

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Key Developments

The Bribery Act 2010

The Bribery Act 2010 came into force on 1 July 2011. The Act has introduced a new strict liability corporate offence of failing to prevent bribery by individuals acting on behalf of an organisation. There is only one defence open to employers - to show that they have "adequate procedures" in place to prevent bribery and corruption.

Default Retirement Age

In May 2011 the Employment Appeal Tribunal held that a notice to retire an employee when he reached the default retirement age given prior to 6 April 2011 was not valid because it did not expressly set out the employee's right to request to work beyond retirement as set out in paragraph 5 of Schedule 6 to the Employment Equality (Age) Regulations 2006. (Bailey v R & R Plant Peterborough Ltd UKEAT/0370/10). This decision has raised alarm to practitioners and employers alike. The employer is appealing the decision, however the implications for employers in the meantime are likely to be far-reaching.

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Legislation currently on hold or under review

Equality Act – Third-party Harassment

In March 2011 the Government announced that it intended to consult on removing the third-party harassment provisions in the Equality Act 2010. These provisions currently require employers to take reasonable steps to protect employees from third-party harassment. The Government considers this obligation to be unworkable for employers and intends to consult on its removal. Further news is awaited.

Sickness Absence

In February 2011 the Government announced a review of workplace sickness absence and the Government's national director for health and work, and the Director General of the British Chambers of Commerce have been appointed to head up the review of ways in which the current sickness absence regime could be changed to end the "sick-note culture" and reduce associated costs. There have been rumours in the press that the government is even considering a reduction to the 28 week statutory sick pay period however no formal announcement has been made in this respect. We will keep you informed on developments.

European Proposals for Maternity Leave

Under current legislation, women on maternity leave are entitled to statutory maternity pay at the rate of 90% of their normal weekly earnings for the first 6 weeks of their maternity leave. After this time they are entitled to 33 weeks pay at the current rate of £128.73. In October 2010 the European Parliament voted to amend European legislation so that women would be entitled to a minimum of 20 weeks maternity leave during which they would be entitled to receive their full salary. This proposal understandably received strong opposition from the European Community and the proposals have been put on hold for now.

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Government Consultations and Proposals For Employment Law

Employment Tribunal Reform

In January 2011, the Department of Business, Innovation and Skills launched a consultation on wide-ranging reforms to the employment tribunal system. The Consultation set out a number of proposals, many of which are aimed at encouraging early resolution of disputes without a hearing, speeding up the tribunal system, reducing the cost to taxpayers, and boosting economic growth.

The proposals include:

- Raising the qualifying period for unfair dismissal from one to two years.
- Introducing compulsory pre-claim Acas conciliation.
- Charging claimants a fee to bring a claim.
- Support for "Calderbank"-style settlement offers.
- Wider powers to strike out a claim or order payment of a deposit.
- Raising the limit on costs awards from £10,000 to £20,000.
- Employers who lose at tribunal to pay a fine of up to £5,000 to the Exchequer.

The consultation closed on 20 April 2011 and we will provide an update on the outcome in due course once the results have been published.

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Case Update: References
McKie v Swindon College
[2011] EWHC 469 (QB)

The High Court has found an ex-employer liable to one of its former employees in the tort of negligent misstatement for careless, fallacious comments it made about him in an e-mail to his then employer, which led to his dismissal.

The ex-employer realised that its e-mail might have an impact on the employee's employment, so the damage caused was eminently foreseeable. Further, as the ex-employer was purportedly communicating information arising from its employment relationship with the employee, there was sufficient proximity between the parties for a duty of care to arise even though six years had passed since their relationship had ended. It was fair, just and reasonable to impose a duty of care on the ex-employer in the circumstances.

Case law has already established that an employer which provides a reference owes the employee in question a duty to take reasonable care in the preparation of the reference.

This case illustrates that such a duty can also arise in respect of former employees in a non-reference situation.

Facts

Mr McKie worked for Swindon College from 1995 to 2002, when he left to work for Bath City College. Swindon College gave him an excellent reference. He moved to Bristol City College in 2007 and to the University of Bath in May 2008, where he became director of studies.

The University of Bath oversees degree courses at further education colleges, including Swindon College. Mr McKie's new job involved his liaising with and visiting those colleges. On 5 June 2008, the HR director at Swindon College, sent an e-mail to the University of Bath, stating:

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"We would be unable to accept Rob McKie on our premises or delivering to our students... we had very real safeguarding concerns for our students and there were serious staff relationship problems during his employment at this college. No formal action was taken against Mr McKie because he had left our employment before this was instigated. I understand that similar issues arose at the City of Bath College."

Owing to this e-mail, the University of Bath dismissed Mr McKie. Mr McKie sued Swindon College in the tort of negligent misstatement.

Decision

The High Court upheld Mr McKie's claim.

Having heard the evidence, including that of several of Mr McKie's former colleagues, the judge found:

While at Swindon College, Mr McKie was a "well-regarded, highly respected member of staff... an exemplary professional". The evidence Mr McKie put forward suggested that the contents of Swindon College's e-mail were "largely fallacious and untrue".

The author of the e-mail had no personal knowledge of Mr McKie as they had not worked together. Mr Rowe wrote the e-mail following comments made to him by a colleague. The Court found that this evidence "in no way" justified the contents of the e-mail.

The procedure adopted at Swindon College in respect of the e-mail "can be described as slapdash, sloppy, failing to comply with any sort of minimum standards of fairness". For the HR director to dismiss the contents of Mr McKie's personnel file (which recorded promotions and indicated no complaints) as of no great relevance seemed "just plain wrong".

Case Update: References
McKie v Swindon College
[2011] EWHC 469 (QB)

Given Mr Rowe's acceptance that it was "blindingly obvious" that the comments in the e-mail would have an impact on Mr McKie's employment situation with the University of Bath, Swindon College should have gone through a formal process before sending the e-mail.

Comment

An employer who provides a reference for an employee owes that employee a duty to take reasonable care in the drafting of that reference. The High Court however has now extended that duty by ruling that an ex-employer owed a duty of care to an ex-employee in a non-reference situation.

This case demonstrates the care that must be taken when sending communications about former employees which employers know, or ought to know, would be damaging to the ex-employee's current employment or career.

The judge in this case also expressed the view that, in dismissing Mr McKie, the University of Bath had acted unfairly commenting that, at the very least, the university should have enquired further about the alleged problems that Swindon College had experienced. Mr McKie however did not have the requisite continuous service to bring an unfair dismissal claim in an employment tribunal. Employers who rely on information provided from a former employer to dismiss an employee should also beware a possible claim and take advice before terminating employment.

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Can we help?

For further information on the issues raised in this newsletter or to obtain further assistance, please contact our employment team on:

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