

# Employment eNews: Christmas 2011

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## Jurisdiction

Case law this year has confirmed tribunals increasing willingness to hear cases involving employment outside the UK. These include:

- unfair dismissal and sex discrimination claims brought by British citizens married to armed forces personnel and working at NATO schools in Holland and Belgium;
- unfair dismissal claims from teachers employed by a UK Government department and working in European schools;
- race and age discrimination claims of cabin crew resident in Hong Kong but who travelled between Hong Kong and London for work.

## Agency Worker Regulations

On 1 October 2011, the Agency Workers Regulations 2010 (**Regulations**) finally came into force. The Regulations will impact upon all businesses using agency workers. The impact will be both logistical and financial. Careful thought needs to be given to how such workers fit into your staff structures and planning requirements. We know you will be bombarded with information about the Regulations from a variety of sources, but we felt it may be useful to quickly answer below some common questions likely to arise for employers.

### Do the Regulations identify who are classified as agency workers?

Yes. An agency worker is a worker supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer. Genuine self-employed workers, such as a sub-contractor's staff or consultants, are not covered by the Regulations.

### So if my business uses agency workers what will the impact be?

You will be classed as the "hirer", the impact will be that any agency workers you hire may be entitled to "the same basic working and employment conditions" as if they were doing the same job as your comparable permanent employees.

Some limited basic conditions, such as access to facilities and amenities (e.g. staff canteen or workplace nursery) and being advised of permanent vacancies will need to be available to agency workers from the first day of their assignment.

However, other **basic working conditions and entitlements** (see below), only kick in when an agency worker has undertaken the same role (in one or more assignment) with the business for 12 continuous calendar weeks.

Complex provisions apply as to what amounts to continuous employment for the purposes of the Regulations. These are designed to try and stop the application of the Regulations being avoided. Starting a new assignment is likely to break continuity of employment provided that the assignment is "substantively different" to the previous assignment. Having a break during an assignment of no more than 6 calendar weeks for any reason or having a break during an assignment of up to 28 weeks for sick leave will cause the qualifying continuity clock to 'pause'. The continuity clock will carry on running where a worker takes maternity, adoption or paternity leave. This area is likely to be a key concern for employers who regularly use agency temps and if you do so, we will happily help you identify any potential issues.

### What are "basic working and employment conditions"?

Equal treatment in respect of **basic working and employment conditions** includes pay, duration of working time, rest periods, rest breaks and annual leave.

The Guidance from the Department of Business, Innovation and Skills (**BIS**) states that pay excludes benefits such as occupational sick pay schemes, enhanced maternity or redundancy payments, advances in pay (e.g. for season ticket loans) and benefits which require certain qualifying periods of service to have accrued.

### What if my business chooses to ignore the Regulations and the rights of agency workers?

Agency workers will be entitled to ask the agency and/or hirer for a written statement if they believe their right to equal treatment has been breached. If a response is not provided then a tribunal is entitled to draw adverse inferences.

Agency workers will be able to bring claims in the employment tribunal against the agency and/or hirer for failure to afford them equal treatment. A minimum of 2 weeks' pay may be awarded by a Tribunal.

There is no maximum cap on any compensation which may be awarded which will be assessed on a "just and equitable" basis.

Where an employment tribunal determines that attempts have been made to avoid the Regulations, a tribunal can order additional compensation of up to £5,000.

### **So what does my business need to do now if it uses agency workers?**

We advise you undertake a detailed review of all agency arrangements. Strategic decisions need to be made about future use of agency workers (including whether there are any viable alternatives) and how possible added costs will be managed. Some things to ask yourself include:

- What drives the business need for agency staff for long periods and is any flexibility that presents outweighed by the costs of providing equivalent basic working and employment conditions after 12 weeks?
- Is it cheaper and is there less risk in appointing employees on a short fixed term contract rather than using a temporary worker for the same period?

The increased legislation in this area means that it is vital to put in place a mechanism to keep track of workers so that the qualifying period can be correctly calculated. Also, you should think carefully about who any comparator is likely to be and if necessary create skills matrices for each of the roles that agency workers and employees are required to carry out to enable a proper comparison.

You should also review the arrangements with the agencies you use. So as not to incur any liability under the Regulations it is in the interests of both the agency and the hirer to ensure the other party is meeting its obligations, for example to ask for and provide information about an assignment. If you have not already done so, you may wish to renegotiate contracts ensuring the liability for failing to meet respective obligations is clear. If you use agency temps infrequently, next time you engage any workers it will pay to read the small print of any new agreements carefully to ensure that you do not agree to pick up any liability that you are not otherwise required to under the Regulations. It may also be worth comparing the rates for temporary workers against the fees for an agency finding you someone to be taken on as an employee on a fixed term contract as this may ultimately be cheaper.

## **Pay Cuts**

The case of *Garside and Laycock v Booth* in the EAT clarified that when considering dismissal (for some other substantial fair reason) connected to the refusal to accept a pay cut the key issue is whether or not it was reasonable for the employer to dismiss not whether it was reasonable for the employee to accept a lesser salary.

## **Drivers without a licence**

In *Wincanton plc v Atkinson*, the EAT confirmed it was reasonable to dismiss employees based on what might have been not just what happened. Potential damage (in this case the potential consequences of not having up to date HGV licences) was sufficient to justify dismissal if it was still in the band of 'reasonable responses'.

## **Immigration status**

In *Kurumuth v NHS Trust North Middlesex University Hospital*, the Trust was found by the EAT to have fairly dismissed an employee who, upon investigation, it genuinely believed no longer had the right to work in the UK. This was considered fair, only after due care was taken in the investigation and attempts were made to check the individual's status.

## **Personality fall outs**

In *Ezsias v North Glamorgan NHS Trust*, it was concluded by the Trust that there had been an irretrievable break down in the working relationship between Mr Ezsias and his colleagues. Mr Ezsias was regarded as a large cause of that break down and the EAT confirmed that Mr Ezsias's dismissal for some other substantial fair reason was reasonable. This case also noted that disciplinary procedures are not needed to be followed in the same way that they would be for misconduct cases. This was not a misconduct case.

## **Legal representations**

In *Puri v Bradford Teaching Hospitals*, the High Court found that Article 6 of the European Convention on Human Rights (right to a fair trial) was not breached by the disciplinary panel not allowing Mr Puri to be legally represented because the panel would not be able to conclude any decision which would then prevent Mr Puri from practising in his profession. This case is being appealed.

## **Dismissal dates**

In *Wang v University of Keele*, it was confirmed by the EAT that unless a contract provides otherwise contractual notice (whether oral or written) runs from the day after notice is given. This obviously has significance when, for example, a potential claimant is considering the final day in which they must bring an Employment Tribunal claim.

## **Capability dismissals**

The case of *DB Schenker Rail (UK) Limited v Doolan* reminds employers that in a dismissal by reason of capability the test which is applicable in such a context remains the Burchell test, i.e. whether the employer held a genuine belief that the employee was incapable of doing the job they were employed to do, whether that reason was reached after reasonable investigation and whether the employer had reasonable grounds for concluding as it did. This case also confirmed that a higher standard of investigation was not required for medical cases in comparison to, for example, misconduct cases. What was crucial was that the employer conducted a reasonable investigation into the medical picture. It also concluded that the decision to dismiss was a managerial not a medical one.

Separately in *Pacey v Caterpillar Logistics Services UK Limited*, an employment tribunal upheld an unfair dismissal claim in which the employee was dismissed on grounds of misconduct and falsely

claiming sick pay. The tribunal criticised the employer for relying on video footage which allegedly showed what the employee was capable of without obtaining clear medical evidence. The tribunal acknowledged that the employee seemed able to do many things on the footage but only appropriately qualified individuals would be able to assess whether the employee had been injured enough to keep him off work or whether what he was doing was in fact therapeutic. Quite clearly, the Doolan reasonable investigation requirement had not been met.

### **Holiday pay and sickness absence**

In *Fraser v Southwest London St George's Mental Health Trust*, the EAT held that an employee on long-term sick leave must request annual leave in accordance with Regulation 15 of the Working Time Regulations 1998 to be entitled to payment for it. The EAT considered this conclusion to be compatible with European law and stated that an employer had no obligation to inform the employee of the fact that they should "use it or lose it". Note, however, the case of *Larner* below.

How long or whether holiday entitlement for workers on long-term sick leave should be carried over remains uncertain despite the recent ECJ decision in *KHS AG v Schulte*. In this case the ECJ held that a collective agreement in Germany providing that all untaken holiday would be lost within 15 months after the end of the relevant leave year did not infringe the Working Time Directive. Its reasoning was that there must come a time when one of the purposes of the leave (i.e. to give the employee a break from work) can no longer be met. This gives a little clarity but the ECJ's reference to the carry-over period needing to be "substantially larger than the reference period in respect of which the leave is granted" remain uncertain. Hopefully, the current review of the Working Time Regulations will give more clarity next year.

### **Sikh, Muslim and ageing employees**

In *Cherfi v G4S Security Services Limited*, the EAT found an employer's refusal to grant a Muslim worker time off on Friday lunchtimes to join his congregation for prayers was not indirect religious discrimination. There was an objectively justifiable requirement for security guards to remain on site as a proportionate means of achieving a legitimate aim and G4S offered to make a number of adjustments which the employee turned down.

In *Dhinsa v Serco and another*, the tribunal found that not allowing a Amritdhari Sikh prison officer to wear a ceremonial dagger (a kirpan) whilst on duty was a proportionate means of achieving a legitimate aim, namely security within a prison. Again, the employer undertook significant considerations to see if any adjustments could be made as part of the process.

For ageing employees there is no longer a statutory retirement age which employers can rely on to dismiss unless the employer can show a retirement age is a proportionate means of achieving a legitimate aim. In this regard, watch out for the appeal in *Seldon v Clarkson Wright and Jakes*. This is the appeal against the Court of Appeal's decision to uphold a tribunal's conclusion that a rule requiring partners in a firm of solicitors to retire at 65 was a proportionate means of achieving the legitimate aims of workforce planning and providing associates with promotion opportunities.

### **References**

The Court of Appeal case of *Jackson v Liverpool City Council* has confirmed that a reference can be lawful (i.e. not negligent in its preparation) even if the reference appears unfair to the employee. A reference given for Mr Jackson was good but noted there were uninvestigated record keeping issues. This led to Mr Jackson being out of work for a year but it was found the reference was still true and accurate. Meanwhile, in *McKie v Swindon College*, the High Court ruled that a negligent statement made in an email could cause financial loss to the individual (despite it being 6 years after the individual worked for the College) and being given outside the College's normal reference processes. Therefore a duty of care was owed by the College to the individual and the College was liable for the actions of its staff member.

## Pension Adviser

From 1 October 2012, new law will be phased in requiring all employers to automatically enrol eligible "jobholders" in a pension scheme. Employers will be able to use their own existing occupational or personal schemes provided they meet certain qualifying requirements. Otherwise, they will have to enrol jobholders in a qualifying scheme or in NEST, a central scheme to be established by the Government. The rules introduce a staging process by when employers will need to enrol their staff. Employers with 50,000 or more staff start the ball rolling in October 2012. with the last enrolment date for the smallest employers being September 2016. The new provisions are the biggest changes for pensions law in a generation and introduce significant obligations and challenges for all employers. It is best to cost out the obligations and plan early.

## Tribunal reform

We now know there is an intention on the part of the Government to introduce fees for the lodging of employment tribunal claims. It is understood a sliding scale of fees is being contemplated, with those on the lowest pay levels being exempt from paying fees at all. A Ministry of Justice update for September 2011 also seems to suggest that tribunal fees will ultimately be introduced in December 2013, contrary to earlier reports that they would be introduced in April 2013.

The Government has also confirmed employees will also need two years' continuous service to bring an unfair dismissal claim as of 6 April 2012. We expect more detail in relation to both reforms in the New Year. The transitional arrangements will be important to establish which employees are affected and when.

## Key appeals

We have picked out some of the more significant cases going to appeal (at varying stages of the appeal courts) this year.

**Collective consultation – (*United States of America v Nolan – European Court of Justice*)** When does an employer's obligation to consult collectively kick in? Is it when it proposes to make a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies or only when the employer has made that strategic decision and is proposing consequential redundancies? Currently the position is slightly different for public and private sector arrangements. Hopefully, Nolan may address this.

**Right to manifest religion or belief – (*Ladele and McFarlane v UK and Eweida and Chaplin v UK – European Court of Human Rights*)** When does Article 9 of the European Convention of Human Rights provide protection for employees' rights to manifest their religion or belief? Was the Convention breached where employees were disciplined for refusing to carry out civil partnership ceremonies/provide psycho-sexual counselling to same-sex couples (contrary to religious beliefs) and when an employee was restricted from visibly wearing a cross or crucifix at work?

**Discrimination – (*X v Mid Sussex Citizens Advice Bureau and Others – Supreme Court*)** Can a volunteer pursue claims against an organisation she volunteered for under the Disability Discrimination Act 1995?

**Holidays – (*NHS Leeds v Larner – Court of Appeal*)** Can a worker, who had been on sick leave for an entire leave year and had not taken any holiday during that period, be entitled to a payment in respect of that year's unused statutory holiday entitlement on the termination of her employment? (Note the Fraser case above) which for the moment at least seemed to have brought some certainty to the situation until Schulte came along. Larner is likely to be the first UK appellate court consideration of what Schulte means for us in the UK.