Employment Watch

Employment Law Update
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Kingsley Napley

New protections for Agency Workers from 1 October 2011

How will they affect you?

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New protections for Agency Workers

The Agency Workers Regulations 2010 ("the Regulations") are due to come into force on 1 October 2011. They give agency workers important new rights and will have a significant impact in practice because there are an estimated 1.3 million agency workers in the UK, and the UK economy depends on agency workers to a much greater extent than most other European economies. The Government estimate that the average annual cost of the new Regulations to the private and public sectors will be around £1.9 billion.

In May the Government published official guidance on the Regulations for agencies and employers. Whilst the guidance does not have direct legal effect it will be referred to in test cases and is intended to assist agencies and employers with compliance.

The basic purpose of the Regulations is to give agency workers the right to the same basic working and employment conditions, as if they had been recruited directly by the hiring employer, rather than engaged through an agency. They don't address the complex issue of the employment status of agency workers though - recent cases have clarified that agency workers will rarely benefit from an implied employment contract and it is unlikely these regulations will change that position.

Basic working and employment conditions are defined as being terms and conditions dealing with pay, most aspects of working time, and annual leave. "Pay" is defined to include any fee, bonus, commission, holiday pay, overtime pay, shift allowances, and unsocial hours payments. However, not all *bonuses* are included: bonuses that are directly linked to individual performance will be covered; but bonuses that are used to encourage loyalty or reward long-term service, such as profit share or share or option schemes, will not. Employers will need to introduce more rigorous systems for monitoring the performance of their agency workers.

There are various exceptions from the definition of "basic" conditions to which agency workers will be entitled: for example occupational sick pay, occupational pension schemes, enhanced redundancy payments, and enhanced maternity, paternity and adoption leave payments are excluded. There is no reference in the Regulations to benefits such as health insurance.

There will be a qualifying period of 12 weeks in the same post before the agency worker is entitled to equality of treatment with comparable employees of the hiring employer. There are detailed rules surrounding the accrual of the necessary 12 week qualifying period – it will not always be the case that someone has to work for a 12 week period in one position without a break to qualify. For example, short breaks of less than 6 weeks will merely suspend accrual of the qualifying period, as will breaks for sickness absence of up to 28 weeks and on statutory family friendly leave.

The Regulations include anti-avoidance provisions. Tribunals will be able to award penalty compensation of up to £5,000 per agency worker if they find employers have deliberately used artificial schemes to try to prevent their agency workers from acquiring the new rights, for example by rotating them between different jobs.

Some of the new rights are not subject to the 12 week qualifying period. For example, the Regulations require the end users of agency workers to give them information about relevant vacant posts in their organisation. Similarly, a right to equal access to things like canteens, child care facilities and transport services will also kick in from the start. The Government guidance indicates that "transport services" should be interpreted restrictively, and will not include things like season ticket loans and company car allowances which are more properly part of a longer-term relationship.

There will be a range of potential employment tribunal claims under the Regulations. Agency workers will be able to claim breach of the right to equal treatment. If there is a failure to provide the same basic employment conditions to agency workers as comparable permanent ones, then unlimited compensation can be awarded. Agency workers will also be able to claim breach of a right not to be subjected to a detriment on prescribed grounds, for example for making allegations or asserting rights under the Regulations. Terminating a contract for a prescribed reason such as asserting the right to equal treatment is likely to amount to a detriment, so this will mean there will be strong victimisation protection for agency workers who assert their rights. Depending on the circumstances, liability for claims can rest with the agency, the hiring company, or both parties.

Employers who use agency workers, as well as agencies themselves, need to review their arrangements for compliance with the Regulations. The relevant documents will typically need amendment. There are also practical issues to consider, such as the need to ensure agency workers are informed about permanent vacancies, for improved monitoring and record keeping, staff training and so on. In addition, agencies and employers will need to be much more pro-active about sharing relevant information between them.

Andreas White, Partner

Can an employer ever reduce its employees' pay without being sued?

This is a question we are often asked. There was a series of cases in 1980s and 1990s which was generally thought to have clarified the position. If a company is facing serious financial difficulties *(perhaps not so serious that the only way of saving the business would be by reducing pay, but very serious nonetheless)*, then, subject to an employer following the correct procedure, it can be possible to insist upon a salary reduction. If the employees refuse, then their existing contracts of employment may be brought to an end, and they can be offered fresh terms matching the old, save for salary, which is at the reduced level.

So we thought the position was relatively settled. However in a case before the Manchester Employment Tribunal, an employee won his case against an employer who had insisted upon a pay reduction of 5%. The Claimant was one of only two employees holding out against the proposed variation. When his contract was brought to an end, the Tribunal held the dismissal to be unfair. In doing so, it seemed to misunderstand completely the leading case on the test as to how serious the situation has to be, before an employer can reasonably insist upon a salary reduction.

However, the Employment Appeal Tribunal, in a decision released this July, has overturned the original judgment and set the matter straight. It confirmed there is no necessity for the employer to show that the financial situation was so desperate that the only way of saving the business was to enforce a pay reduction. It is also not for the Tribunal to assess whether or not an **employee** is reasonable or otherwise in choosing to reject the reduction. Rather it is for the Tribunal to assess whether the **employer** acted reasonably in seeking the variation. By way of illustration, it may be perfectly possible for an employee to act reasonably in declining to accept a reduction (for example, because of his personal financial circumstances) but for an employer, nonetheless, to act reasonably in insisting that he does (accept the variation). A Tribunal may take into account the effect of the reduction on the employee, but that does not mean that the ultimate test is one of reasonableness so far as the employee is concerned.

This therefore means that in practice, where reasonable it is still open to an employer to call upon its workforce to accept a reduction in pay. The Tribunal will, however, look to see that in doing so it is in accordance with equity, and in that respect one important factor may be whether **management**, as well as the employees, have been asked (and have agreed) to take a cut.

One good way of showing that an employer has acted reasonably, as the writer used to his advantage in winning a case before the Manchester Employment Tribunal some years ago, is to commission an independent report from a firm of accountants as to the financial plight in which the business finds itself, and to test, through that report, how a reduction in pay might seek to resolve those difficulties. A Tribunal is then unlikely to want to go behind that independent analysis.

Given the continuing depth of the current recession, this is something that may have to be borne in mind by companies that are continuing to find trading conditions difficult, and are looking to revise their costs structure, as a means of avoiding having to let people go.

Richard Fox, Head of Employment

Employment Tribunal statistics – **age discrimination claims on the rise**

Statistics relating to the Employment Tribunals have recently been released for the year 2010 to 2011. The statistics provide a snap shot of the types of cases and awards that have taken place in the Employment Tribunals during this period. They also present the reality of claims and awards rather than the sometimes misleading focus that can be presented in the media.

What do the statistics tell us?

- There was a reduction of 8% in the number of claims lodged as compared with 2009-2010, but as the figures represent an increase of 44% from 2008-2009, Employment Tribunals are still very busy;
- The rate of disposal of claims has increased by 9%, so Employment Tribunals are getting through the cases at an increasing rate, but they are not keeping pace with the number of claims (as compared to 2008-2009);
- 39% of claims related to unfair dismissal, breach of contract and redundancy;
- 32% of claims were withdrawn and 29% settled via ACAS. Therefore almost two thirds were disposed of without proceeding to a full hearing; and
- 12% of claims were successful at hearing.

Discrimination claims

- Sex discrimination remains the leading grounds of discrimination claimed by some way (more than double the number of disability discrimination claims which are the second greatest number of discrimination claims);
- The number of age discrimination claims is steadily increasing and will soon represent the second greatest number of discrimination claims if current trends continue; and
- The number of religious discrimination claims remains very low. It would seem they seem to attract a disproportionate level of press attention.

Trends

The statistics are still skewed by the large number of working time and equal pay cases, which arise from particular actions, however, many claims involve an allegation of discrimination. Such claims tend to be more complicated and Employment Tribunals have a reluctance to adopt robust case management. Given the low success rates of claims, perhaps this reluctance is not justifiable?

Age discrimination claims are only likely to increase with the abolition of the Default Retirement Age, and it is very likely that they will soon rival sex discrimination claims as the largest form of discrimination claim before the tribunal.

Jennifer Bartlett, Associate

Dress codes and hairstyles – **could your policy be discriminatory?**

In a well publicised decision relevant to all employers with dress codes, the High Court ruled in the case of *SG v St Gregory's Catholic Science College*, that a blanket, unwavering, policy of not allowing a "cornrows" hairstyle on male pupils, with no exceptions, could be considered indirect race discrimination, which could be justified if the ban were a proportionate means of achieving a legitimate aim, but was not on the facts of the case. However, it was not considered sex discrimination.

The court heard evidence that there are people of African-Caribbean decent who regard the cutting of their hair to be wrong for cultural reasons. On that basis, they need their hair to be kept in cornrows. So the African-Caribbean ethnic group could be rendered at a disproportionate disadvantage by a complete ban on cornrows. The school's arguments that a blanket policy could be justified (they said cornrows were a strong indicator of gang membership) were rejected as disproportionate.

However, the policy was not regarded as sex discrimination. The judge looked back to the Court of Appeal's 1996 decision in *Smith v Safeway* [1996] ICR 868, where the Court of Appeal held that an employment tribunal was entitled to decide, on the facts, that an employer's appearance code, which required male employees' hair not to be below collar-length, was not discriminatory. Based on that case's guidance that rules concerning appearance that enforce common standards of smartness will not be discriminatory, the court found that although the school's policy allowed effectively cornrows for girls, this did not amount to unlawful sex discrimination, even though boys were not allowed them.

This case follows the principles on dress codes and personal appearance set out in *Eweida v British Airways plc* that hit the headlines in 2009 and 2010. In order for a claim for indirect discrimination to succeed, a blanket provision relating to dress must negatively impact a specific group sharing the claimant's "protected characteristic" (i.e. sex, age, disability, sexual orientation, race, age, religion or belief) before being allowed to proceed.

In the *Eweida* case, the claimant argued that Christians would be disproportionately negatively impacted by British Airways' total ban on jewellery on customer facing staff because it meant that they would not be able to wear a crucifix. Ms Eweida failed in her case because she couldn't show that it was a requirement of Christianity that adherents had to display such a public display of their faith. In the *St Gregory's* case, however, the claimant successfully showed that Afro-Caribbean people could be disproportionately impacted by a blanket ban on cornrows. Furthermore, the school failed to justify their blanket ban as a proportionate means of achieving a legitimate aim – the school only allowed conservative hairstyles for boys amid concerns that other styles could encourage a "gang culture".

Employers should look again at their polices just to check that any dress, uniform and grooming requirements that they may have do not have a similar impact on a group sharing a protected characteristic and, if it does, that the employer can justify it as a proportionate means of achieving a legitimate aim. For example, a ban on facial hair for food hygiene reasons could well be justifiable despite many religious groups requiring their male adherents to wear beards, but a similar ban on call-centre operators would probably not be.

Martin Pratt, Senior Solicitor

Sex and the City – the risks of workplace affairs

A recent survey has been reported as saying that 72% of those bankers surveyed have had at least one affair and that 87% of affairs are with a work colleague. Of course, it is hard to get reliable answers to questions about this sort of thing, but this does suggest that the recent revelation of an alleged affair between Sir Fred Goodwin with "a senior colleague", whose identity is still protected by super-injunction, is not an isolated incident.

Workplace relationships have always been a problem for employers with their potential where the manager is involved to upset team dynamics amid accusations of favouritism and to produce serious tensions and even claims for discrimination when they come to an end (which, according to the survey, is after an average of 21 days for male and 136 days for female bankers – am I missing something here or are there some inconsistencies in these results?).

Employers often have rules either prohibiting relationships altogether or, more usually, requiring them to be declared so that action can be taken. Typically this involves ensuring the employees do not work together, particularly if one has been managing the other. This can be easier said than done in small organisations or where the employees have very specialised skills.

The Financial Services Autority (FSA) is apparently investigating any link between Sir Fred Goodwin's alleged affair and the collapse of RBS. There were probably other things going on (overpaying for ABN Amro, the credit crunch, the near collapse of the financial system…), but it is worth remembering that in FSA regulated businesses there can be particular concerns about this kind of relationship.

In a world where different parts of an organisation are divided by Chinese walls, where the back office is supposed to monitor the activities of traders, and where compliance officers need to act with a certain degree of independence to perform their role properly, any undisclosed relationship which enables one employee to exercise excessive influence over another can raise very serious risk issues. This is the case whether or not there has been any breach of the seven statements of principle against which the FSA judges the behaviour of approved persons set out in the FSA Handbook.

Adrian Crawford, Partner

Could your IT Consultants really be your **Employees** after all?

Many IT consultants work under HMRC's IR35 rules that are designed to prevent independent contractors (usually IT contractors), who would otherwise be liable for income tax and National Insurance Contributions (NICs), avoiding them in favour of the lower rates of tax available if they work through the intermediary of their own personal service company (PSC). Normally, a PSC arrangement means that the worker can pay him or herself dividends from shares owned in the PSC, which are not liable to NICs. On that basis, the worker pays less in NICs than a regular employee. Although corporation tax is payable on the profits of the PSC (after expenses) such an arrangement will nevertheless normally mean a big income tax and NIC saving to the worker.

In *E C R Consulting Limited v HMRC*, decided in May, the First-Tier Tribunal sided with an IT contractor against the HMRC's IR35 assessment that the worker was, for all intents and purposes, actually an employee, rather than an independent contractor, and so should have to pay income tax and NI at employee rates. To do this, HMRC created a "notional contract" between the IT Contractor and the end-user that, it said, fulfilled the tests of an employment contract rather than a consultancy arrangement e.g. the end-user had control over what and how the work was performed and the right of the worker to provide a substitute to do their work was qualified and not unfettered. The tribunal disagreed. Interestingly, it said that the notional contract had a valid "substitution clause", saying that even though it was a qualified substitution clause (the end-user had to approve the substitute – the worker could not unilaterally decide to send someone else over), the clause was enough to stop the individual being regarded as an employee.

The finding that a qualified substitution clause might not indicate employment is the real surprise in this decision. As recently as 2008, the High Court, in *Dragonfly Consultancy Limited v HMRC*, had said that a contract must give the worker an unqualified right to provide a substitute to be a genuine consultancy arrangement rather than disguised employment. Dragonfly's contractual substitution clause read –

"the company has the right to substitute a suitable qualified representative of the company [to] provide the services. The company further shall not disengage the services of the consultant or terminate or consent to the termination of the services of the consultant or provide a substitute consultant during the assignment except with the prior written consent of [the client]".

The underlined words proved fatal to Dragonfly. Under the contract's terms the client could veto the consultant's substitute so, the High Court said, this wasn't a genuine substitution clause and the consultant was, in fact, an employee for tax purposes.

Surprisingly, though, the First-Tier Tribunal in the ERC Consulting case seemingly did not agree with the High Court's analysis (despite the *Dragonfly* case being a High court decision and therefore binding on it) and that found a qualified substitution clause could be enough to show that (amongst other indicators) there was no employment relationship. That makes the ECR Consulting decision extremely puzzling.

It is therefore hard to draw firm principles from ERC Consulting. The judgement is very fact specific. Further, given the Tribunal's somewhat radical departure from the High Court's decision in Dragonfly on the point of "qualified substitution", we can expect HMRC to appeal. These cases, and others like it, reinforce how hard it can be for companies to precisely determine who is and who is not an employee. This is particularly true in the world of IT Contractors where such contractors can, inadvertently, meld into the workforce. It is relatively easy to state the indicators of an employment relationship, with the statutory protection and tax implications that entails, but hard to pin them down in practice.

Although it can mean them paying higher rates of tax, this uncertainty can also help IT workers, engaged on "consultancy" arrangements, to bring employment law based claims against the end-user of their services, or even their agencies. Such workers could take their "new" status to Employment Tribunals in order to benefit from unfair dismissal rights that only benefit genuine employees. Often, the view of the Employment Tribunal on the question of "who is an employee?" is, like HMRC's, similar to the classic definition of en elephant – if it is grey, has four legs and a trunk, then it's an elephant, whatever you choose to call it. Similarly, if the relationship looks like employment (e.g. access to benefits, contractual terms, control by management, compliance with handbooks, right of substitution etc.), then it will be regarded as employment, even where contractually labelled as a consultancy arrangement. On that basis, we recommend having your IR35 arrangements thoroughly health-checked before relying on them to protect you from either the taxman or the Employment Tribunal.

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