

SUMMER 2005

People

The FFW Employment Review

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1 Summary

Since we sent out our Spring newsletter in February, the government has published its proposed amendments to the Transfer of Undertakings (Protection of Employment) Regulations 1981. We take a look, and highlight the major changes.

In the past, we have mentioned the age equality legislation which is coming into force on 1 October 2006. Many of our clients are beginning to prepare for the legislation, by updating their policies, and training their managers. Although doing this work now might appear a bit premature, bear in mind the 'continuing act' concept in discrimination cases. This means that someone can complain of age discrimination that has taken place long before the legislation comes into force, provided they can show that the discrimination was an act, or one of a series of acts, that continued into October 2006. It would be hard for an employer to defend itself against such a claim if it could not show that it had taken steps to prepare for the age equality legislation; it would have to convince the tribunal that any discrimination had stopped by 30 September 2006.

Recent cases

We look at several important recent cases in the following articles. However, here are some additional summaries that deserve space.

Electronic submission

There are two directly contradictory decisions, both by the Employment Appeals Tribunal, on the issue of submitting an application to tribunal electronically. The first is *Tyne and Wear Autistic Society v Smith* [2005]. In this case, S presented his claim electronically 3 days before the 3-month time limit expired, using facilities provided on the Employment Tribunals Service website. On submitting his application, the message came back 'Thank you. Receipt of your application will be confirmed by the tribunal dealing with your case. If you do not receive an acknowledgement of your submitted application within one working day, please telephone the relevant office'.

S did not receive an acknowledgement. When he later contacted the tribunal office, they could find no trace of his application. He immediately sent another application which was received by the tribunal office, but by this point, he was 16 days out of time.

The service provided on the Tribunals Service site is not operated directly by the Tribunals Service, but hosted by a commercial email service, which should transfer electronically transmitted applications to the Employment Tribunals Service.

The EAT confirmed that S's original application had reached the host in time, and therefore it had been presented in time.

Compare this with *Mossman v Bray Management Ltd* [2004] where M's representative sent the application electronically on the last day before time expired. Upon later investigation, the tribunal office said that there was no record of the claim. The employment tribunal held that the claim had not been presented in time because the form had not been received in paper or electronic form, within the time limit. The EAT upheld that decision, and referred to wording on the electronic form that it is users' responsibility to ensure that the claim is received within the time limit, and that there is no guarantee that the tribunal would receive it on the same day.

So that's clear, then! The obvious conclusion has to be that ET1s (and ET3s) should be submitted well within the time limit, where possible, and that confirmation of receipt should be sought from the relevant tribunal office, in enough time to file a copy if need be.

Hinton v University of East London

Hinton is a case that has attracted a great deal of attention, dealing with agreements compromising a termination of employment.

Dr Hinton signed a compromise agreement with his employers which in general terms settled 'all outstanding claims which [he] has or may have arising out of or in connection with or as a consequence of his employment and/or the termination of his employment...'. Following this general clause, a list of 11 particular claims were set out as having been compromised.

On several occasions before signing the agreement, Dr Hinton complained in correspondence with his employers that he had suffered detrimental treatment for having made a protected disclosure under the Public Interest Disclosure Act 1998. However, the list of compromised claims did not expressly include such a claim. When Dr Hinton later pursued such a claim, his employers argued that he was not entitled to do so, being bound by the general clause quoted above.

The Court of Appeal disagreed. It referred to one of the conditions which must be met for a compromise agreement to be valid, which is that it must compromise



actual proceedings, and held that the general clause did not do so, and therefore did not prevent Dr Hinton from bringing his claim.

The Court said that as a matter of good practice, compromise agreements should spell out in brief legal and factual terms the particular proceedings to be compromised, and added that it is not good practice to list 'every form of employment right known to the law'.

As far as this last point is concerned, our view is that although a standard agreement should not be used with a 'one size fits all' attitude, as appears to have been the case in *Hinton*, it is pragmatic to attempt, in a compromise agreement, to cover off all possible claims. We also recommend that employers using standard compromise agreements should have them reviewed regularly.

Dattani v Chief Constable of West Mercia Police

In race discrimination claims, as indeed in several other discrimination claims, if the claimant establishes a basic case of discrimination, the onus is on the employer to prove that discrimination did not occur. In other words, the employer needs to prove a negative – never easy to do.

Before making an application to tribunal, a potential claimant can, in accordance with statutory procedure, send the employer a questionnaire which typically asks for information about the employer's policies, and in race claims, race-related statistical information. Answers given to such questionnaires can help a claimant to decide whether or not to bring proceedings. Whilst the employer is not obliged to reply, a tribunal is entitled to draw an inference of discrimination from such failure, or from an evasive or equivocal reply.

In *Dattani* it was held that this entitlement extends beyond statutory questionnaires and applies to an employer who either fails to respond, or responds evasively when asked a direct question in writing by an aggrieved person, whether or not the question is asked under the statutory procedure. In *Dattani*, the tribunal was entitled to draw adverse inferences from incorrect information in the notice of appearance, further and better particulars, and a written explanation.

Employers should bear this case in mind whenever responding to an employee's written questions, where that employee is pursuing a grievance.

Majrowski v Guy's and St Thomas's NHS Trust

Majrowski establishes that employers can be held vicariously liable under the Protection from Harassment Act 1997 for their employees' acts of harassment of third parties. In this case, an employer was held to be vicariously liable for a claim of bullying and harassment brought by an employee against a colleague.

Note that the time limit for bringing this sort of claim is much longer than the normal tribunal time limit - it is 6 years where the action is for damages, and 3 years for personal injury claims. This means that an employer may be at risk for up to 6 years after the event.

Further, in general where there is a claim of vicarious liability against an employer for the discriminatory acts of its employee, such as harassment under the Sex Discrimination Act 1975 or the Race Relations Act 1976, it is open for the employer to argue as a defence that it took such steps as were reasonably practicable to prevent the employee discriminating. This defence is simply not available under the Protection from Harassment Act.

Majrowski also establishes that the traditional test for determining vicarious liability has been widened. Historically, the test was whether the employee was acting in the course of employment. This has now been substituted by a new test of fairness and justice, turning on the circumstances in each case, on the sufficiency of the connection between the breach of duty and the employment and/or whether the risk of such breach was one reasonably incidental to it.

Finally, we would like to draw your attention to our new newsletter, Retail People, which covers employment issues in the retail sector. Please let us know whether you would like to be added to the circulation list by e-mailing erica.neustadt@ffw.com. You can have a look at the April issue, and several other new materials which are posted on our website at www.e-employmentlaw.com.

STOP PRESS! The Office of the Information Commissioner has published a consolidated version of the Employment Practices Data Protection Code; previously issued in 4 parts, the consolidated version has been updated and takes into account the Court of Appeal's decision in *Durant v Financial Services Authority* [2003]. Note that, as reported in our Autumn 2004 newsletter, the European Commission is currently considering Mr Durant's case.



2 Changes to TUPE

In 1981, the Transfer of Undertakings (Protection of Employment) Regulations 1981 ('TUPE') came into force, implementing the EU Acquired Rights Directive in the UK.

Before the advent of TUPE, the legal position of employees on the transfer of the business in which they worked was relatively simple. Taking the example of a business sale, the employees remained with the seller of the business (the transferor), and were made redundant following the transfer. Possibly the buyer of the business (the transferee) would recruit them, but often on inferior terms.

The aim of TUPE is to safeguard employees' rights when an undertaking transfers. Contracts of employment are automatically transferred to the transferee, so that the transferor's employees become employees of the transferee with their accrued employment rights preserved.

Whilst the government regards TUPE as a positive measure, it considers that it could operate more effectively. After a wait of several years, the government published its proposed changes to TUPE in March. We look at the changes that were scheduled to come into effect on 1 October of this year, but have just been put back to 6 April 2006.

Pensions

Following earlier consultation the government took a policy decision to deal with changes to the law on pensions outside TUPE. As a result, pensions changes were incorporated into the Pensions Act 2004, which came into force on 6 April 2005. In our Spring newsletter, we covered these changes in detail – that newsletter is available on our dedicated employment law site at www.e-employmentlaw.com.

Main changes to TUPE

The main changes to TUPE will be:

- a wider definition of 'transfer' to make it clear that TUPE applies to 'service provision changes';
- clarification of the effect of TUPE on transfer-related dismissals and changes in terms and conditions of employees' contracts;
- an obligation on the transferor to notify the transferee of the identities of transferring employees and of the rights and liabilities that will transfer with them; and
- a greater flexibility when applying TUPE to certain insolvency situations to enable the rescue of a company in trouble.

Service provision changes

Service provision changes typically include the contracting out (or in) of services or the replacement of one contractor by another. A typical example is where a hospital contracts out its catering function, or, having done so in the past, replaces the incumbent catering company with another.

Most service provision changes from one provider to another fall uncontroversially within the scope of TUPE, as the service before the transfer amounts to an economic activity which is recognisable as the same economic activity after the change (in other words, it retains its identity). However, where transfers involve a service which is labour intensive, such as cleaning or security, with minimal or no transfer of assets such as machinery or premises, the issue has sometimes been less clear. In these cases, a key factor in deciding whether or not there is a TUPE transfer has been whether or not the *employees* transfer. Because of this, transferees have sometimes refused to take on employees, in an attempt to circumvent TUPE.

The aim of the revised regulations is to remove that uncertainty. Instead of looking at whether an entity retains its identity after the transfer, the new rules will focus on whether it is intended that the transferee, as the new service provider, will carry out the same activities as were carried out before.

So where currently, an economic entity must be identified which retains its identity post transfer, under the new regulations there simply needs to be an organised grouping of employees, which has as its principal purpose the provision of services to a client and that client then changes its service provider. There will therefore be a transfer even if the transferee has produced an innovative bid, for example, replacing a manual system for a computerised one. The policy rationale is that the employees stand a better chance of securing on-going employment with the transferee even in an innovative bid situation than with the transferor that has either outsourced or lost the work.

Changes to terms and conditions of employees' contracts

At the moment, the terms and conditions of transferring employees' contracts may not be varied, if the reason for the variation is the transfer or a reason connected with the transfer. This is so even if the relevant employees



agree, and even if, globally, the changes are advantageous to them.

This does not prevent the employer dismissing the employees and rehiring them on new terms, although it risks claims for unfair dismissal, particularly as any such dismissals will be automatically unfair unless the employer has an economic, technical or organisational reason entailing a change in the workforce.

The government argues that the potential effect of this could be for employers to dismiss their employees rather than seek their agreement to a change in contractual terms. The opposing argument is, of course, that the risk of unfair dismissal claims arising out of a dismissal and rehire provides a check on employers and therefore protects employment rights. By contrast, where terms of employment are renegotiated, employees are typically in an inferior bargaining position.

In any event, the proposal is to make TUPE more flexible by allowing agreed changes where the sole or principal reason for the variation to employees' contracts is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce (meaning, on current case law, changes in the *overall numbers and functions of the employees*).

Changes where the sole or principal reason for the variation is either the transfer itself or a reason connected with the transfer that is *not* an economic, technical or organisational reason entailing changes in the workforce will remain void, notwithstanding employees' agreement.

Changes where the sole or principal reason for the variation is a reason unconnected with the transfer will be, and always have been, valid.

This is, however, only a limited relaxation of the rules on changing terms and conditions of employment for reasons connected to a transfer. In order to effect changes which are transfer related, the employer requires a reason that is an economic, technical or organisational reason entailing changes in the workforce. The usual reason for making changes is to harmonise transferring employees' contracts with those of the transferee's existing workforce. Such changes would still probably be void in most cases given that there is unlikely to be a change in the overall numbers and functions of the employees.

Effect of a TUPE transfer on contracts of employment

Currently TUPE operates to transfer "...any person employed by the transferor in the undertaking or part transferred...". This is set to change, and the new

wording will be: "...any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer..."

This change simply reflects case law on who is included in a relevant transfer. Note that 'assignment' does not include anyone assigned on a temporary basis.

The revised regulations may also affect the position of employees retained by the transferor. TUPE currently states that:

".... any [employment] contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee."

Some commentators have interpreted the highlighted wording as meaning that only those contracts of employment that would be terminated by the transfer, will transfer to the transferee. In contrast, where an employee has agreed with the employer that he or she will not transfer it has been argued that his or her contract would not be terminated and therefore will not transfer.

In the new draft, the highlighted words have gone. The government has omitted them because it considers that they add nothing of value and suggest a loophole in TUPE's coverage. For instance, the transferor might exclude an employee from the list of employees to transfer to the transferee, retain that employee for a short period post transfer before terminating the contract of employment. In those circumstances, the employee may now be better able to assert that his or her contract had in fact transferred to the transferee. The whole concept of the transferor retaining some employees is currently uncertain but there may be some clarification when *Celtec v Astley* is heard by the House of Lords later this year.

Notification of employee liability information

As TUPE is currently drafted, there is no obligation on a transferor to provide details to the transferee, of the employees and employment liabilities that will be transferred under TUPE. The onus is on the transferee to carry out detailed due diligence and this can only be achieved through the co-operation of the transferor. The revised regulations will introduce a general obligation on a transferor to notify the transferee, in good time and in writing, of all rights and obligations relating to transferring employees. This information should include such detail as the number and identities of employees to be transferred, their ages, length of service, salary and benefits, full contracts of employment, staff handbooks



and policies, and so on. In fact, all the information that is typically gathered during a due diligence exercise. Penalties of up to £75,000 will be risked for non-compliance.

Company 'rescue'

Where a transferor is in financial straits, and is behind in paying its workforce, TUPE currently operates to transfer such liabilities to the transferee. This has obviously made deals less attractive to potential buyers, and undertakings that could otherwise have been rescued, along with some or all of the jobs they provided, have gone under.

In the new draft regulations, the government has taken steps to put in place a 'rescue culture': where an undertaking faces certain types of insolvency proceedings, employees will be entitled to claim certain categories of payments, owed by the transferor to employees, from the government, subject to a statutory cap. Payments outside these categories, and any balance above the statutory cap will transfer to the transferee.

A further 'rescue culture' step is to allow employers and employee representatives to agree permitted variations to terms and conditions of employees' contracts. A permitted variation is one which, among other things, is

designed to safeguard employment opportunities by improving the undertaking's chances of survival.

The consultation closed on 7 June 2005. To view the consultation paper and draft revised regulations see the DTI website at <http://www.dti.gov.uk/er/tupeconsultation.pdf>.

What does this mean in practice?

The main issues in practice are likely to be:

- TUPE is more likely to apply to changes in service provider even where the new service provider delivers the service in a different way;
- TUPE is more likely to be an issue where a client changes providers of professional services – it will therefore affect industries where there has not previously been a culture of considering TUPE issues;
- the new obligation on the transferor to provide full details of transferring employee liabilities will require extra work to ensure compliance and minimise the risk of penalty notices; and
- standard TUPE provisions should be reviewed to ensure that they take account of the revised regulations.

3

Agency Workers Revisited

The recent development of the law concerning the status of agency staff has meant that the traditional perception of such workers as a risk-free labour resource is at an end. Although there remain very real benefits from utilising agency staff, employers need to be aware that if used for anything other than a temporary solution, real risks will arise that the relationship will develop into one of greater responsibilities and rights.

In situations where agency staff are used, there are typically 3 parties; the worker, the agency, and the organisation in which the worker is placed by the agency (otherwise known as the 'end user').

Background

In our Spring/Summer 2004 edition we drew attention to the case of *Dacas v Brook Street Bureau* [2004]. In *Dacas*, the Court of Appeal held that in certain circumstances an agency worker may in fact be the employee of the end user, even where the parties have not consciously entered into a contract of employment. In other words, where there is uncertainty about who the employer is, a contract of employment may be implied between the agency worker and the end user who

exercises direction and control over the worker's activities.

The case of *Franks v Reuters & First Resort Employment Limited* [2003], another Court of Appeal decision, is also important. Mr Franks had been placed by an employment agency with the same company for over five years. The Court found that he had an implied contract of employment with that company. The Court held that tribunals should look at all the facts of a case, including what was said and done in addition to any relevant documentation before concluding whether or not there was a contract of employment. It stated that an overall picture of the work relationship between the parties was necessary to reach an informed and sound conclusion as to whether or not there was indeed an



obligation upon the employee to accept work and at the same time upon the employer to provide such work. This is known as 'mutuality of obligation' and is an essential element of a contract of employment.

These two cases caused widespread concern amongst organisations regularly using agency workers who had, until then, always assumed that such agency workers or "temp staff" did not have any employment rights. They appeared to suggest that, on the contrary, agency workers might sometimes be entitled to the same protections and benefits as permanent staff, and as a result end users might be at risk of claims such as unfair dismissal when agency worker arrangements are brought to an end.

Recent developments

It has been just over a year since *Dacas*, and in that time, there have been a number of tribunal cases which have examined the status of agency workers. Several of these have now made their way to the Employment Appeal Tribunal and indeed to the Court of Appeal. These decisions throw further light on the role and rights of agency workers, and significantly, suggest that at present tribunals will adopt a broad interpretation of the contractual relationships between agency workers, agencies and end users and fix the end user with the status of employer.

Three recent decisions which have considered the employment status of agency workers and which illustrate the current approach are:

- *Cable & Wireless Plc v Muscat* (decided by the EAT on 17 November 2004);
- *Royal National Lifeboat Institution v Bushaway* (decided by the EAT on 22 April 2005); and
- *Bunce v Postworth Limited (t/a Skyblue)* (decided on 4 May 2005 in the Court of Appeal).

Cable and Wireless Plc v Muscat

Mr Muscat was employed as a senior manager by Exodus Internet Ltd. In late 2001 he was told that because of a potential buy-out of the business and a consequent need to reduce headcount, if he wished to continue working he would have to become an independent contractor. He agreed and set up a personal service company which provided his services to Exodus. He continued to work on the same terms and conditions as before except that his pay was increased to allow for the fact that he now paid national insurance and was responsible for the payment of income tax.

Cable & Wireless subsequently took over the Exodus Internet business and informed Mr Muscat that he would

have to provide his services through an agency. As a result there were 4 parties involved in the arrangement to supply Mr Muscat's services:

1. Cable & Wireless, which contracted for the provision of Mr Muscat's services with
2. a third party agency, which in turn contracted with
3. Mr Muscat's service company, which engaged
4. Mr Muscat personally

Despite this complicated arrangement, Mr Muscat continued working as before under the direction of Cable & Wireless' management and under the same terms and conditions, until Cable & Wireless eventually terminated the contract. Mr Muscat brought a complaint of unfair dismissal.

At first instance the employment tribunal held that there was a contract of employment between Mr Muscat and Cable & Wireless that was not destroyed by the imposition of the service company or of the agency. It recognised that Mr Muscat's contract of employment had transferred to Cable and Wireless by virtue of the TUPE Regulations. It also held that, before this transfer, Mr Muscat had continued as an employee of Exodus despite the "contractor" arrangement.

Cable and Wireless appealed, but the Employment Appeal Tribunal upheld the tribunal's decision. The EAT considered the fact that Mr Muscat contracted with the agency through his service company rather than directly and held that it made no difference. Cable & Wireless was the real and immediate recipient of the work done by Mr Muscat, and the commercial reality was that he was working for them.

The EAT referred to the ruling in *Dacas* and said that the Court of Appeal had consciously decided to extend quite radically the circumstances in which a contract of employment might be implied. It had also intended the guidance given to be followed by tribunals in cases such as this. Cable & Wireless' argument that the written contracts between the parties were the exclusive record of their agreement and that a contract of employment should only be implied if necessary to do so was rejected. The EAT again referred to *Dacas*, concluding that in these circumstances a contract should indeed be implied.

The EAT's reasoning in this case, in line with that in *Franks v Reuters*, emphasised that there should not be an exclusive focus on the express terms of written contracts, and tribunals should not be deflected from considering facts relevant to a possible implied contract of service.



Royal National Lifeboat Institution v Bushaway

Ms Bushaway registered with an employment agency to find work. The agency offered her temporary work with the Royal National Lifeboat Institution, and she began work there as an administration assistant.

Her role was to fill an existing full-time position which could not be filled on a permanent basis because of internal recruitment restrictions. The agreement between Ms Bushaway and the agency described her as a temporary worker and specified that she was not an employee of the agency or of RNLI.

After six months, Ms Bushaway took up a permanent role with RNLI. However, the relationship began to deteriorate, and after 10 months of permanent employment, Ms Bushaway gave notice of resignation and claimed constructive unfair dismissal.

Before the tribunal, RNLI noted that Ms Bushaway had only been on their books for 10 months, and argued that she had less than a year's service. Ms Bushaway responded that her time as a temporary worker when employed through the agency should count towards her length of service. RNLI replied that during that time it had no contractual relationship with her and that both RNLI's contract with the agency and the agency's contract with Ms Bushaway specified that each contract was the entire agreement between the parties.

Nonetheless, the Tribunal followed *Dacas* and held that Ms Bushaway had been RNLI's employee for the entire period. The Employment Appeal Tribunal agreed, relying on both the *Dacas* and *Muscat* decisions. It specifically held that the existence of an "entire agreement" clause is not conclusive, and that it was clear in these circumstances that the written contracts did not reflect or contain the entire bargain between the parties.

Bunce v Postworth Limited t/a Skyblue

Mr Bunce was engaged by Skyblue, an employment agency, and his services supplied to various end users. When Skyblue terminated his contract, Mr Bunce brought a claim for unfair dismissal.

Although his contract with the agency specified that it was a contract for services and not of employment, Mr Bunce relied on the fact that the agency sent him on a very regular basis to carry out work for various companies, and in particular to its associate company. Mr Bunce also contended that the power to control and direct his activities rested with the agency, although, as he accepted, it delegated that power to its clients.

The tribunal, the EAT and then the Court of Appeal all disagreed with him. They found that:

- there was no mutuality of obligation between Mr Bunce and Skyblue: Mr Bunce was not entitled to expect a constant stream of work, and Skyblue would not insist upon him accepting assignments offered to him; and
- minimal control was exercised by Skyblue over Mr Bunce's activities, with day-to-day control being exercised by the various end users. The Court of Appeal noted that the law is concerned with who in reality has the power to control what the worker does.

This meant that two of the key requirements for a contract of employment had not been established, and accordingly Mr Bunce was not the agency's employee.

It is worth noting that the tribunal found, as did the Court of Appeal, that Mr Bunce did not enjoy anything like the consistency and continuity of placement that existed in circumstances like those in *Dacas*. Although Mr Bunce did not pursue a case against any of the end users, it appears likely from these comments that he would have in any event failed, and indeed no claim of unfair dismissal could have been pursued without at least a year's service. The Court of Appeal did comment that its decision meant that Mr Bunce had no employment protection, but suggested that this is a matter for legislation rather than judicial creativity.

Hot off the press

In *Astbury v Gist*, the EAT recently considered how to deal with tri-partite arrangements where it is not clear whether the agency or the end user is the employer. It recommended that either the claimant claims against the 2 parties in the alternative, or, where only one is party to the proceedings, tribunals exercise their power to join the other member of the 'triangle' as a respondent.

The EAT summarised the current position by giving the following guidance to tribunals faced with such claims:

- in a tri-partite relationship of worker, agency and end user, the worker may have a contract with either the end user, the agency, or the agency and end user might jointly exercise the functions of employer;
- a contract of employment must be based upon mutuality of obligation and control;
- the tribunal must consider whether an implied contract of employment between the worker and the end user has evolved; and
- tribunals must look beyond contractual documents and make findings of fact regarding what has happened in practice, before reaching conclusions about the legal analysis of the tri-partite relationship.



Conclusion

These cases demonstrate that *Dacas* has had a profound and ongoing impact upon tribunals' approach to the status of agency workers. Where there is a long-term arrangement between the three parties and it is unclear who is the employer, the end user should be aware that it is more than likely to be found to have this role. The existence of comprehensive contractual documents setting out a non-employment relationship, even with an "entire agreement" clause, will not necessarily prevent this result.

Nonetheless, the basic tests which determine who is an employee remain relevant. For the moment, the readiness of the courts to extend employment rights to temporary workers appears limited to the circumstances identified in *Dacas*. However, organisations that use agency workers must assume that retaining such workers for more than a year may mean that they accrue employment rights and indeed retaining their services may amount to their undeclared recruitment.

We suggest that organisations utilising agency workers who wish to minimise the risks of becoming the employer might consider insisting that the agencies themselves enter into a contract of employment with agency staff. Not only does this make it less likely that a

worker can successfully claim an implied contract of employment with the end user, there would also be less incentive to make such a claim if the worker has a remedy against the agency. However, large agencies operating on standard terms and conditions are unlikely to alter their business models unless large numbers of their clients adopt this approach.

More realistically, organisations should consider conducting frequent reviews of their use of agency staff to ensure as far as possible that such staff are being utilised in a manner consistent with the status of a temp rather than a permanent employee, for example, by ensuring that temps are recruited for specific and short projects. However, we would suggest caution before adopting any blanket policy to terminate assignments before a year's service is reached simply to avoid unfair dismissal claims. That might, in some circumstances, constitute indirect discrimination depending upon the ratio of male to female workers and/or one racial group to another within the pool of agency workers engaged by the end user. If a policy or standard approach is to be adopted we would recommend obtaining legal advice. Indeed, in general, if you have any concern that your organisation may be using agency workers otherwise than as a purely temporary solution, it would be wise to examine what steps may be taken to minimise your risk.

4 Decision on holiday pay – a healthy development?

Under the Working Time Regulations 1998 (the Regulations), workers are entitled to 4 weeks' paid leave a year. This entitlement may only be taken during the year that it is due, and cannot be replaced by a payment in lieu, except where the contract is terminated part-way through that year, in which case the worker can claim pro-rated pay for leave accrued but not taken on termination.

So what if a worker has been off sick long-term, and has exhausted any right to statutory or contractual sick pay? Are they entitled to claim holiday pay, despite being absent? The answer appears to be 'no, but, yeah, but, no, but....'

Historically, most employers took the view that entitlement to paid annual leave did not accrue during long-term sickness. However, in 2002 the Employment Appeal Tribunal (EAT) in the case of *Kigass Aero Components v Brown* ruled that workers were entitled to be paid their entitlement to 4 weeks' annual leave under the Regulations even if they had been off for the entire year, and had done no work at all. In other words, leave continued to accrue during such absence and a worker's entitlement to paid annual leave was unaffected by absences from work due to sick leave.

This position was turned on its head by the recent Court of Appeal ruling in *Commissioners of Inland Revenue v Ainsworth & others*. In *Ainsworth*, the Court of Appeal ruled that *Kigass* was wrongly decided and workers on long-term sick leave are not entitled to claim holiday pay under the Regulations. In contrast to the approach taken in *Kigass*, the Court of Appeal focused on the concept of 'leave', and found that it means a release from what would have otherwise been an obligation to work. A worker who is absent due to sickness has no such obligation from which to take leave.

The Court of Appeal backed up this analysis by looking at the underlying purpose of the Regulations, which is to protect workers' health and safety in relation to working time, so that workers can expect a minimum period of release from the pressures of work. Workers on long-



term sickness absence do not need such protection and would simply receive a 'windfall' of 4 weeks' money.

The Court of Appeal therefore concluded that a worker loses the right to 4 weeks' paid annual leave during a year in which he or she has been unable to work *at all*. In addition, it decided that having lost this right, if the employer terminates the contract on the grounds of ill health at the start of a new leave year, the worker has no entitlement to claim payment in lieu of accrued but untaken leave.

The Court of Appeal also concluded that a worker whose employment is terminated *during* a leave year is not entitled, under the Regulations, to claim payment in lieu of leave, where he or she has been on continuous and long-term sick leave from the beginning of that year, up to the date of dismissal.

The Court of Appeal then turned to a second issue of whether the Regulations may be side stepped, by making an application under the Employment Rights Act 1996 (ERA).

This point arose in *List Design Group Ltd v Douglas & Others* [2002], in which the EAT held that a claim for payment in lieu of accrued, but untaken holiday could, in addition to being made under the Regulations, be brought by way of a complaint of unauthorised deductions from wages under the provisions of the ERA. The advantage of this was that under the Regulations a worker must apply to a tribunal within 3 months of the date upon which the employer should have made payment, and can only apply in respect of the current year's entitlement, whereas a claim for unauthorised deductions under the ERA need only be made within 3 months of the last in a series of deductions. This decision effectively allowed individuals to circumvent the Regulations so that a claim for 'back pay' could go back as far as to 1998, when the Regulations were introduced.

In *Ainsworth*, however, the Court of Appeal overruled *List Design*. It held that the Regulations provide an enforcement regime for the rights that they provide and that any claim brought under the Regulations is subject to that regime.

Note that the issues decided above relate to the statutory position under the Regulations, and workers' entitlement to any contractual holiday pay during long-term sickness will depend on the terms of the contract.

Implications of decision

As far as *Ainsworth* deals with long-term sickness absences, it only gives guidance to employers in

instances where a worker has been absent, continuously, since the beginning of a particular leave year. As such, it raises a lot of 'what ifs?'

For instance, say the leave year is 1 January to 31 December, and A, who has taken no holiday in this particular year, is absent from 1 March to 30 June, when his or her employment is terminated. How much should A be paid in lieu of holiday? Two weeks', one week, or nothing at all? What if B is absent from work from 1 January to 30 June, save for a week's work in May? Should B receive a pro-rated payment in lieu, nothing, or 2 weeks'? *Ainsworth* does not help employers on these points.

Guidance for employers

We would suggest the following (reasonably) simple summary of the current position:

- If a worker is continuously absent from work on long-term sick leave for an entire leave year, he or she is not entitled to pay in lieu of holiday under the Regulations
- If a worker is continuously absent from the beginning of the leave year, and his or her contract of employment is terminated during that year, he or she is not entitled to pay in lieu of holiday under the Regulations
- Even where a worker is off sick for the majority of the time, if he or she works or attends work at any point during a leave year, and the contract continues to subsist throughout that year, he or she is likely to be entitled to the full amount of annual paid leave under the Regulations
- Even where a worker is off sick for the majority of the time, if he or she works or attends work at any point during a leave year, and the contract is terminated during that year, he or she is likely to be entitled to payment in lieu of accrued, but untaken holiday under the Regulations
- In each case described above the position is stated in respect of the 4-week paid holiday entitlement under the Regulations. Employers should also check the position they have agreed with workers in the contracts of employment or engagement as these may provide rights over and above those determined by the Regulations.

Please note that the claimants in *Ainsworth* have applied for leave to appeal to the House of Lords and therefore the position on annual leave and sickness absence may change yet again!



5 Pensions update

As reported in previous issues of *People*, wide-scale pension reforms covering how schemes are funded, how schemes are run, how schemes are regulated and the tax treatment of pension benefits will be implemented during 2005 and 2006.

For a start, a new pensions regulatory regime came into force on 6 April 2005. The newly created Pensions Regulator is producing a number of consultation documents and draft codes of practice, setting out the way in which it proposes to use its powers. These can be viewed at www.thepensionsregulator.co.uk.

Most notable of these is the draft Code of Practice on providing clearance statements for corporate transactions. The consultation on this Code has finished but it remains "draft" as it awaits Parliamentary approval. Changes to its text are not expected.

This will have to be taken into account in any corporate merger or acquisition or even a business sale to which TUPE applies where the employer sponsors a final salary/defined benefit occupational pension scheme. The Code of Practice is in itself not law but can be taken into account by the Regulator in deciding whether to use any of its powers.

Pensions dispute resolution

Where people have a complaint about the operation of, or their treatment under, a pension scheme, they must be given access to a pensions dispute resolution procedure under their pension scheme. The current mandatory procedure has two stages, with only the second stage requiring the trustees of the scheme to be involved.

The statutory standard procedure is shortly to be changed: following amendments contained in the Pensions Act 2004, trustees of occupational pension schemes may operate a simplified one stage internal dispute resolution procedure rather than the current two-stage process. Originally scheduled to come into force this April, the amendments will now come into force for all disputes raised on or after 23 September 2005.

Government officials had hoped that these changes could be implemented without schemes having to change their documents; however, unfortunately, this will

not be the case. Schemes and employers will need to review staff handbooks, pension scheme booklets and, in some cases, pension scheme trust deeds and rules, to ensure that they can operate the simplified process once it becomes mandatory to do so in September. Depending on the contents of their documents, failure to amend could leave trustees having to operate the new statutory process and their scheme process based on the old law.

Government funding for pensions education

Everyone is aware of the deepening concern that both government and individuals have about the provision that individuals have made for their retirement years. The government is also concerned that, even though the public at large is aware that their pension provision may be too low, not enough people are taking action to improve their personal financial situation.

In one of several initiatives, the government has launched a funding programme for pensions education, called, unsurprisingly, the Pensions Education Fund. The scheme, originally called the Pensions Challenge Fund, was first launched in September 2004.

The Fund is part of a programme in which government money is available to not for profit organisations that come up with innovative ways to encourage working people to provide for their retirement and improve working people's financial awareness. Specifically "working people" includes the self-employed who are much more likely to have no or inadequate pension savings. Schemes eligible for support include those that involve the private sector and indeed, those involved in partnership working with employers are actively encouraged.

An application pack can be obtained from the Pensions Education Fund, Room BP9158, DWT Benton, Park View, Newcastle upon Tyne NE98 1ZZ or take a look at http://www.dwp.gov.uk/pef/pef_app_guidance.doc.



6 Contacts

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