

# Employment newsletter

## Spring 2003

### In brief

- Agency workers
- Equal pay and bonuses
- TUPE – liability for failure to consult staff
- Family-friendly regulations
- Young workers
- News in brief
- Contacts

# Agency workers

## Agency workers recognised as “employees”

A number of recent cases have examined the question of whether agency workers are self employed or employees of either the agency or the client company.

In an unreported case involving Reuters, the Court of Appeal held that the agency worker who worked for 5 years for Reuters (via an employment agency) may have been employed by Reuters under an implied contract of employment. The Court of Appeal accepted the submission that dealings over a period of years (as contrasted with weeks or months) are capable of generating an implied contractual relationship. This case has been remitted back to the tribunal for consideration as to whether an implied contract of employment existed.

In another unreported case, this time involving Brook Street, the Employment Appeal Tribunal (EAT) held that, as the agency exercised “considerable control” over the agency worker (in the sense that the agency paid the agency worker’s wages and was entitled to discipline and terminate her services) the agency worker was an employee of Brook Street. This was despite the fact that Brook Street did not have day-to-day control over the agency worker, and also the fact that the contract between Brook Street and the agency worker expressly stated that the agency worker was not an employee of the agency.

These decisions could have significant implications for employment agencies and companies that use agency workers. Much will still depend (as it always has done) on the practical aspects of the working relationship – the question of whether or not there is an employment relationship remains very much a question of fact. However, the courts seem currently more willing to examine closely the status of agency workers.

In light of these recent decisions, it is important that companies treat all workers fairly and as far as possible apply disciplinary and termination procedures for agency workers in a way that could be defended as being “fair” but without compromising any argument that the individual is not an employee. For additional protection, a company may wish to seek from the agency some form of indemnity protection against claims made by the worker.

## Proposal for EC Directive on agency work

The above decisions are a precursor to proposed changes in the law. The European Commission has proposed a draft Directive on working conditions for

agency workers. The Government consulted on the European Commission’s proposals in 2002 and published its response to the consultation on 10 January 2003.

The proposed Directive aims to:

- improve the quality of agency work by applying an equal treatment principle to agency workers and by recognising employment agencies as employers
- establish a suitable framework for the use of agency work.

The proposed Directive will apply to workers with a contract of employment or an employment relationship with an employment agency, who are posted to a company to work under the supervision of that company.

The Directive proposes that there should be equal treatment of permanent and agency workers in respect of:

- pay
- working time
- specified maternity rights
- prevention of discrimination.

The equal treatment principle requires that agency workers are not treated less favourably than they would have been, had they been taken on as permanent employees of the company for which they work. This means that any statutory requirements, formal company policies, collective agreements and other general applicable provisions used to determine pay and working time for workers employed by the company should also apply to agency workers. Where the company has no formal policies, collective agreements or generally applicable provision on pay and/or working time, the statutory minimum provisions will apply. These are the National Minimum Wage and the provisions of the Working Time Regulations, which apply to most agency workers already.

In respect of pay, the Directive will not apply to agency workers who are posted to a company for less than six weeks.

The Directive also requires companies to:

- provide agency workers with improved access to training
- provide agency workers with access to collective facilities

- inform agency workers of permanent vacancies.

Employment agencies and agency workers will also be covered by the requirements for information, consultation and representation (for example, under TUPE (see below)).

The European Commission takes the view that extending the equal treatment principle to agency workers and creating a suitable framework for their use will promote agency work. This is not a view shared by UK businesses. The wage benefits to agency workers (estimated by the Government at £366 million) represents a wage cost to employment agencies. Agencies must either pass these increased costs on in the form of higher fees charged to the companies that use the agency workers, or take a cut in their profit margin, or both. As the profit margins of employment agencies are not especially large, it is estimated that 80% of any cost will be passed on to the companies that use agency workers. As a result, the Confederation of British Industry estimate that the proposed Directive could cost the UK over 160,000 agency assignments.

Currently there is no obligation in UK law to provide for equal treatment between agency workers and permanent staff. The Government will therefore have to introduce new legislation. At present, an amended proposal is before the European Parliament. It will therefore be some time before new legislation is introduced in the UK.

## Equal pay and bonuses

Equal pay is back in the spotlight after a number of high profile cases, as well as important changes in the law, which could result in greater transparency in pay awards.

### City bonus case

The EAT in the much publicised case of City worker, Louise Barton, suggested that City institutions, which operate secret bonus schemes, are at significant risk of losing equal pay and sex discrimination claims.

Louise Barton worked in the fund management and broking investment banking industry for 23 years. She was awarded a bonus which was a third of the amount awarded to a male comparator, who received an equivalent salary. Her employer argued that the comparator was one of three key young players for the future of the business and that increases in his bonus were prompted by the threat of him being poached by a competitor. The tribunal agreed with this argument and found that a vital component of the City bonus culture was that the granting of bonuses should be discretionary and shrouded in secrecy.

The EAT disagreed, stating categorically that no tribunal should be seen to condone any culture of secrecy or lack of transparency in the payment of bonuses. The EAT set out fresh guidance for tribunals to infer discrimination, bearing in mind the difficulty in finding direct evidence of discrimination in these circumstances, and remitted Louise Barton's case back for rehearing in front of a fresh tribunal.

### Practical tips

To avoid potential exposure to equal pay and sex discrimination claims, employers should scrutinise the processes by which they award bonuses and ensure that they are objective.

Pointers to take into account include:

- consider for what purpose bonuses are being awarded: are they designed to reward, incentivise, or retain employees or a combination of the above?
- consider the criteria to be applied and apply them objectively
- consider any disparity between awards amongst equivalent employees and be prepared to explain, if necessary, the difference
- consider publishing the criteria or providing an explanation for the decision
- if publication is not practical, be as open and as co-operative as possible when presented with a formal questionnaire on the matter (see below).

### Equal pay questionnaires

Bonuses will become even more transparent through the operation of the Equal Pay Questionnaire. Legislation, which came into force on 6 April 2003, provides that employees who suspect that they are not receiving pay equal to that of a colleague will be able to demand detailed answers and explanations from their employers about differences in pay. Employers have eight weeks to respond to a questionnaire.

## TUPE - liability for failure to consult staff

Over the last few years, there have been conflicting cases on whether the transferee is liable for the transferor's failure to inform or consult transferring staff under TUPE. In our Autumn 2001 newsletter, we reported a case in which the EAT decided that the transferee was not liable for the transferor's failure. However, following a new decision of the EAT it now

seems that the transferee is liable, even though it will normally have no control over the failure that gave rise to the liability. In light of this decision it is more important than ever that buyers of businesses and those taking on franchises or contracts to provide services ensure that they have the benefit of proper indemnities to protect them from liability arising out of the transferor's failure to inform or consult its staff as the potential liability is 13 weeks' pay for each affected employee.

## Family-friendly regulations

New family-friendly regulations came into force on 6 April 2003.

The regulations cover:

### Flexible working

Employees who care for a child may now request flexible working arrangements, which must be given serious consideration by their employer.

### Maternity rights

Ordinary maternity leave (OML) has now increased from 18 weeks to 26 weeks. Additional maternity leave has also been extended to 26 weeks from the date that OML expires. There are also changes to the qualifying criteria and notice requirements.

### Paternity rights

Qualifying employees are now entitled to two weeks' paid paternity leave.

### Adoption rights

New adoption rights have also been introduced which mirror the new maternity leave and pay rights.

Briefing notes covering these new rights are available from our website at [www.e-employmentlaw.com](http://www.e-employmentlaw.com).

## Young workers

Changes to the Working Time Regulations were also introduced on 6 April 2003. These changes affect the working hours of young workers aged between 15 and 18.

Employers are prevented from assigning young workers to work between the hours of 10.00 pm and 6.00 am or, where the young worker is contracted to work after 10.00 pm, they cannot be assigned to work between the hours of 11.00 pm and 7.00 am.

## News in brief

### Compensation limits

Compensation limits for unfair dismissal have increased as of 1 February 2003. The maximum compensatory award has increased to £53,500. The cap on weekly pay for the purposes of calculating the basic award has also increased to £260.

### Dates for the diary

The Government has set 6 April and 1 October as the two dates each year when domestic employment legislation will come into effect (with the exception of the annual increase in compensation limits (see above), which will remain as 1 February).

## Contacts

Our employment law partners, Margaret Davis, Richard Kenyon and David Fisher, lead a team of specialist lawyers whose experience ranges from newly qualified to lawyers with many years of experience in the employment field. If you need employment advice or assistance please contact:

Margaret Davis [mad@ffwlaw.com](mailto:mad@ffwlaw.com)  
Richard Kenyon [rjk@ffwlaw.com](mailto:rjk@ffwlaw.com)  
David Fisher [dzf@ffwlaw.com](mailto:dzf@ffwlaw.com)

FFW also has specialist **tax** and **pension** lawyers.

**This publication is not a substitute for detailed advice on specific transactions and should not be taken as providing legal advice on any of the topics discussed.**

© Copyright Field Fisher Waterhouse 2003. All rights reserved

Field Fisher Waterhouse 35 Vine Street London EC3N 2AA

Tel +44 (0)20 7861 4000 Fax +44 (0)20 7488 0084 e-mail [info@ffwlaw.com](mailto:info@ffwlaw.com) [london@thealliancelaw.com](mailto:london@thealliancelaw.com)  
[www.ffwlaw.com](http://www.ffwlaw.com) [www.thealliancelaw.com](http://www.thealliancelaw.com) CDE 823

London Berlin Dublin Düsseldorf Edinburgh Essen Frankfurt Glasgow Hamburg Munich Paris

Regulated by the Law Society. A list of the names of the partners of FFW and their professional qualifications is open to inspection at the above office. The partners are either solicitors or registered foreign lawyers. The European Legal Alliance is an alliance of independent law firms.