

May 2008 - Issue 30

employment

Agency Workers

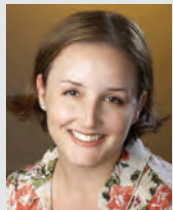
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We are delighted to announce the promotion of **Andrea London** to head the Employment Department. If you would like to speak to Andrea about an employment matter, please email her at andreal@rosenblatt-law.co.uk or telephone 020 7955 0880.

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Employment Law Changes – April 2008

Every April the world of employment law sees new legislation come into force and this year is no exception with a raft of changes being introduced. Here are a few of the more significant changes that came into force on 6 April 2008 and of which every employer ought to be aware.

Sex Discrimination Act 1975 (Amendment) Regulations 2008

In March 2007 the Equal Opportunities Commission was successful in a claim that the Employment Equality (Sex Discrimination) Regulations 2005 which amended the Sex Discrimination Act 1975 did not adequately implement the EU Equal Treatment Directive. As a result the Government has introduced these 2008 regulations to ensure compliance:

- The link between the harassment and the person's sex has been removed. A person therefore no longer has to show that the harassment was on the grounds of his/her

sex but that it was **related to** his/her sex or that of another person's sex. The test for harassment is therefore much wider and a person may now be entitled to bring a claim where general sexist comments are made in the workplace, even if such comments were not actually directed at the person in question;

- An employer's liability has been extended to cover harassment of its workers by third parties (such as clients) where such harassment is known to have occurred on at least two occasions (whether it be by the same third party or not). The employer will be

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liable in these circumstances if it has failed to take reasonably practicable steps to protect its workers from such harassment;

- An employee who has been discriminated against on grounds of pregnancy or maternity leave does not have to compare her treatment to someone of the opposite sex;
- Employees whose expected week of childbirth starts on or after 5 October 2008 will enjoy greater rights during additional maternity leave (i.e. the second 26 week period of maternity leave). Amendments have been made so that no distinction is made between ordinary maternity leave and additional maternity leave in terms of the provision of benefits which means that it now appears that a female employee has greater rights under the Sex Discrimination Act 1975 than under the Maternity and Parental Leave Regulations 1999 which provided that only limited benefits were preserved during additional maternity leave;
- Employers must take into account the compulsory maternity leave period (i.e. the first 2 week period after childbirth) when pro-rating any bonus payable to an employee.

Suggested Action: Review maternity and harassment policies to ensure they are compliant with the new legislation.

Information and Consultation of Employees Regulations 2004 (“ICE”)

ICE has been around for a while and provides that an employer must inform and consult with its employees about matters which affect their employment and the future of the business (such as potential redundancies, mergers or re-organisational proposals). The obligations under

ICE are not automatic but are initiated by either the employer or by written request of at least 10% of the employees. As of 6 April 2008, ICE will apply to all companies with 50 employees or more (previously it was 100 employees).

Corporate Manslaughter and Corporate Homicide Act 2007

This Act has been introduced to make it easier for the authorities to prosecute large companies for management failures that have led to death. The Act replaces the existing common law offence of manslaughter by gross negligence which required the identification of a ‘directing mind’ who was personally guilty of manslaughter. In practice this was very difficult due to the complex management structures of many companies and the inability to prosecute a specific individual. A new statutory criminal offence of corporate manslaughter has been created whereby an organisation will be guilty of an offence if the way in which its activities are managed or organised causes a person’s death.

Suggested Action: Check insurance policies to ensure that legal fees incurred in successfully defending claims under this Act are covered.

Income Tax (Pay as you Earn) (Amendment) Regulations 2008

The starting rate of income tax (namely, 10%) has been abolished for the financial year 2008/09 and the basic rate income tax has been reduced from 22% to 20%. In addition, Her Majesty’s Revenue and Customs (HMRC) now has the power to transfer PAYE liability from an employer to an employee where otherwise tax would or could be charged on the same income twice. Typically (but not always) this power would be used by HMRC where a consultant is re-categorised from self-employment to employment following a review by HMRC and the employer has failed to deduct or account for tax under PAYE

Suggested Action: Review arrangements in place with consultants to establish the risk of such persons being deemed employees.

Social Security Benefits Up Rating Order 2008

Statutory Sick Pay has increased from £72.55 to £75.40 per week and Statutory Maternity/Paternity/Adoption Pay will increase from £112.75 to £117.18 per week.

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Agency Workers

The rights of agency workers have come under the spotlight in the recent Court of Appeal decision in *Merana James v London Borough of Greenwich* [2008]. This case helpfully shifts the case law in this area back in favour of companies, but once again highlights the continuing problem of lack of protection for agency workers under English law.

The previous rulings in *Brook Street Bureau v Dacas* [2004] and *Cable & Wireless v Muscat* [2006] (both Court of Appeal decisions) led to considerable concern for employers that used agency workers regularly and/or for long periods. In these cases the courts held that although an agency worker is not employed by the end user, Employment Tribunals should consider the facts of the case to decide whether there is the possibility of an implied contract of employment between the end user and the agency worker. In these cases the Court of Appeal found that there was a deemed employment relationship between the agency worker and the end user. The agency worker was therefore able to claim against the end user (under the employment legislation) for unfair dismissal.

The recent judgment in *James* seems to indicate a change in direction for the courts. Although the basic principles of *Dacas* and *Muscat* have not been directly challenged the court did display a significant shift in focus, ruling that a tribunal must examine and assess the factual evidence presented to it in order to decide whether the agency worker is an employee. In the absence of an express written or oral contract it must be assessed whether it is indeed necessary to imply a contract of employment between the parties. This makes it more difficult to establish that an employment relationship exists.

In the instant case, Ms James worked for Greenwich Council (via an employment agency) for three years, when she was replaced. She then claimed that she had been unfairly dismissed by the Council. An Employment Tribunal dismissed her claim on the grounds that there was no implied contract of employment between herself and the Council.

This was upheld by the Employment Appeals Tribunal and the Court of Appeal.

As a post script to the leading judgment, Lord Justice Mummery commented that the debate surrounding the rights of agency workers is a matter of social and economic policy. Clearly, there is a requirement to balance the need for a flexible labour market and companies' ability to engage temporary workers during busy periods against the positions of agency workers who currently enjoy little or no legislative protection.

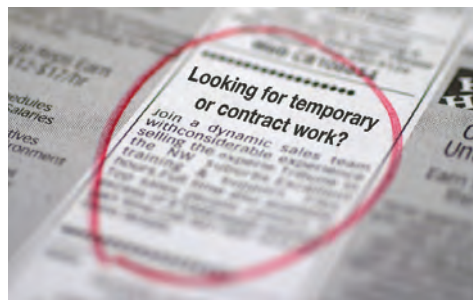
This topic has been the subject of discussion at European level and a draft EU directive which would give agency workers equal rights has been proposed for a number of years. The UK has consistently opposed the draft directive and European level discussions in December 2007 ended without agreement.

On the domestic front, a private members bill in Parliament on this issue had its second reading in February 2008. If successful, this bill would give new rights to the U.K.'s 1.4 million agency workers affording them the same pay and conditions as full-time employees. At present the bill is being strongly resisted and is unlikely to succeed in view of the current Government's lack of support.

Therefore, until a compromise can be reached and legislation put in place providing more certainty in this area, temporary workers will have little choice but to look to the courts for protection of their rights, which may or may not happen depending on their specific circumstances.

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Does annual leave accrue during long term sickness?

The position surrounding the accrual of holidays during sick leave has been the subject of much case law over recent years, and in December 2006 resulted in the House of Lords requesting guidance from the European Court of Justice (ECJ). The Advocate General (AG) has this year provided her opinion on this issue.

The Working Time Regulations 1998 (WTR) which implement the EC Working Time Directive, provide for a minimum entitlement to paid annual leave for workers and upon termination of employment, payment in lieu of accrued but untaken annual leave.

The current position under English law is that annual leave does not accrue during sick leave, as confirmed by the Court of Appeal in *Commissioners of Inland Revenue v Ainsworth*; which found that an employee whose employment was terminated following a period of long-term sick leave was not entitled to any payment in lieu of untaken holiday in respect of that year.

The employees in *Ainsworth* appealed to the House of Lords, who considered this appeal (along with other related claims) under the new case name of *Stringer v HM Revenue & Customs*. In the light of the issues raised, the House of Lords referred the following questions to the ECJ, for a preliminary ruling:

1. Can employees on long term sick leave take paid annual leave whilst they are on sick leave?
2. On the termination of employment of an employee who has been on sick leave, is the employee entitled to payment in lieu of accrued but untaken holiday?

In January 2008 the AG gave her opinion. Whilst the opinion is not binding on the ECJ, it is likely to be followed and is therefore a good indication of the ECJ's decision. In summary, the AG's opinion is that annual leave does continue to accrue during a period of sick leave. The leave cannot be taken during sick leave but can be taken on the employees return to work. If the employment is terminated, the employer is obliged to make a payment in lieu of holiday accrued during the sickness absence period.

The AG unfortunately did not give guidance on whether accrued annual leave will carry over from one holiday year to the next, nor did she address the question of whether the workers should be paid in lieu of that accrued holiday. In normal circumstances there is no entitlement to carry annual leave over from one year to the next. However, in a linked German case of *Schultz-Hoff v Deutsche Rentenversicherung Bund* the same AG extended her opinion to conclude that an employee should not be prevented from taking leave on their return to work, even if this is in another leave year. This could potentially allow employees to accrue substantial amounts of leave which the employer will either have to permit them to take, or pay them in lieu of, if employment terminates.

The ECJ will now give consideration to the questions referred to it by the House of Lords, and a decision is expected later this year. The House of Lords will then deliver its judgment in the *Stringer* case (formerly *Ainsworth*) thus clarifying the position under English law, hopefully once and for all.

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QUICK FACT: TAXATION OF NON-EXECUTIVE DIRECTORS FEES

It is a common misconception that the fees paid to Non-Executive directors should be made gross and without deduction of tax or National Insurance. Any payments made to directors in respect of their directorship duties must be paid after deductions for income tax and employee's national insurance contributions under PAYE. Because Non-Executive directors are office-holders they are deemed to be "employees" under section 5 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") and as such, provisions in ITEPA which are expressed to apply to employment also apply equally to offices. Therefore fees paid to Non-Executive Directors are considered "employment income" and subject to appropriate deductions. Following from this, the National Insurance Regulations apply to any "employed earner" the definition of which includes a person who is gainfully employed in the United Kingdom in an office with emoluments/earnings chargeable to tax as employment income.