

EMPLOYMENT LAW NEWSLETTER

AUTUMN 2011

Welcome to the Autumn edition of the Woodfines Employment Newsletter.

In this edition, we take a brief look at the Agency Worker Regulations 2010 which are now in force, examine some recent decisions affecting the law on unfair dismissal, and end with a round up of some important recent employment cases.

THE AGENCY WORKER REGULATIONS 2010

Readers will be aware that on 1st October 2011, the Agency Worker Regulations (AWR) came into force. Briefly, the AWR gives agency workers several rights:

- a) Day 1 rights
 - i. a right to be told of relevant vacancies at the end-user's organisation
 - ii. a right to be treated no less favourably than employees in terms of access to facilities and amenities eg works canteens and toilets.
- b) Week 12 rights
 - i. a right to equal treatment in terms of basic work and employment conditions, as though the worker was doing the same job but hired direct by the end user eg pay, working time, breaks and annual leave
 - ii. a right to paid time off for antenatal appointments

As a result of the AWR, many companies who have used agency workers historically, now find it unattractive to do so due to the cost of doing so; the costs have gone up as Temporary Work Agencies are insisting on being paid more money for each member of staff so that they can comply with the duty of equal treatment. A number of options are open to companies who wish to use agency workers but now find it too expensive to do so:

- a) Ensure agency workers never work for the company for more than 12 weeks
- b) Have a well defined pay structure, in which all employees doing the same type of work are paid according to experience. For example if a company has machine operators and pays them £7.00 per hour until they have been employed with the company for a year, it will be lawful for the agency worker to be paid £7.00 per hour until he or she has a year of service.
- c) Look at the Swedish Derogation. The rules on equal treatment don't apply if the agency workers are employed by the agency AND their contract

of employment entitles them to be paid between assignments. The contract also has to say that the agency won't terminate the contract for at least 4 weeks if there is a gap between assignments.

DISMISSAL OF EMPLOYEES

In order to dismiss an employee who has 12 months or more of service, an employer needs to have a potentially fair reason for dismissal, and needs to follow a fair procedure.

The potentially fair reasons for dismissal are set out in s.98 of the Employment Rights Act 1996. The most common of these are: conduct, capability and redundancy.

The procedure to be followed depends upon what the reason for dismissal is. In conduct cases, the employer should carry out an investigation into the allegations, present the evidence to the employee, invite them to a disciplinary hearing at which they are allowed to have a representative, make a decision that is within the range of reasonable responses, and allow the employee to appeal against any decision made.

In capability cases, the employer should notify the employee of the deficiencies in their work and allow a reasonable opportunity to improve before dismissing. Dismissals for single instances of poor performance will only rarely be fair.

In redundancy cases, employers should identify employees at risk from redundancy from a pool of employees carrying out similar work, select from the pool using fair and objective criteria, consult affected employees about the proposals, and consider alternatives to redundancy, including alternative employment with the employer.

There have recently been some important decisions within the context of unfair dismissal:

a) A second dismissal can prevent a claim in relation to the first dismissal

In the case of *M-Choice UK Ltd v Alders* the employer served the employee with notice to terminate her employment. The notice was served before the employee had reached 12 months of service and expired sometime after the employee had 12 months service. The notice

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period given was greater than the statutory minimum. The employee brought a claim for unfair dismissal. In response to this, the employer summarily dismissed the employee before she had 12 months service. The employee claimed this was unfair. Not so, said the Employment Appeal Tribunal – the right to claim unfair dismissal only arose when the employee had reached 12 months service.

b) A dismissal by the employer cannot be retracted

In *CF Capital v Willoughby* the employer and the employee had discussions about redundancy. In the context of those discussions, the idea of the employee becoming a self employed contractor was talked about. Prior to any agreement being reached, the employer sent the employee a letter by mistake, in which the employer stated that the employee's employment would end on a specific date, and from that time she would be self employed. The employee contacted the employer and said that she did not agree to become self employed and that the letter from the employer had dismissed her. The employer replied that if that were the case, the employee could continue to be employed but the employee did not accept this and sued. The Court of Appeal said the Employee had been dismissed and confirmed the general rule that once a dismissal has been given, it cannot be unilaterally retracted.

c) Strike out of unfair dismissal claims

In *Lockey v East North Homes Leeds* the employee was dismissed for gross misconduct. It was alleged that the employee had refused a management instruction, sworn at a member of staff, and behaved unacceptably before a client. The tribunal found that the third allegation was flawed as the employer had not interviewed the client but in any event found that there was no reasonable prospect of success in the claim and struck it out. The Employment Appeal Tribunal said that the tribunal had made a mistake – having found that the third ground was flawed, the case should have been allowed to proceed, with the employer giving evidence about whether a decision to dismiss would have been made on the first two grounds alone.

d) Self dismissal

Does failure to respond to an employer's letter constitute 'self dismissal'? No, said the Employment Appeal Tribunal in *Zulhayir v JJ Food Services Ltd*. The Employee was injured at work and on long term sick leave. He stopped sending sick notes, and moved house without telling the employer. 5 months after the employee became ill, the employer wrote to him and said that if he did not contact them the following month, they would presume he had resigned. That letter was returned undelivered by the post

office. The employee found out about the loss of his job in correspondence 3 years later between his personal injury solicitors and the employers solicitors. He brought tribunal proceedings which were unsuccessful due to being out of time. The EAT allowed his appeal and said that if an employee is in repudiatory breach of contract (by not working or informing the employer of his medical condition) then the employer needs to accept the repudiation by dismissing the employee (presumably following disciplinary proceedings even though the employee does not attend).

CASE-LAW ROUND UP

• **Expensive adjustment for disability was not reasonable.** In *Cordell v Foreign and Commonwealth Office*, the employee was disabled and needed 'lip speakers' to enable her to do her job. She applied for a different role, based in Kazakhstan. She was offered the job, subject to an assessment as to the feasibility of accommodating her disability. The assessment concluded that the cost of lip speakers in Kazakhstan would be in the region of £250,000 – 5 times the employee's salary. The offer was withdrawn. The employee brought claims for disability discrimination. The claims were rejected by both the tribunal and the EAT. The EAT said that whilst cost alone was not determinative of whether an adjustment was reasonable, it was not an irrelevant factor.

• **Equal pay following TUPE transfer.** In the case of *Skills Development Scotland v Buchanan*, the EAT dealt with a case of an employee who had TUPE transferred to the employer. The employee's pay was 'protected' under TUPE rules, and was more than fellow employees. This was potentially in breach of equal pay rules, but the TUPE transfer provided a defence of there being a genuine material factor. However, the employer did not take any action to close the pay gap, by keeping the employee's pay the same when other people got payrises. The EAT found that as long as the decision to give everyone payrises (and thus maintain the pay gap) was not related to sex, the genuine material factor defence continued to apply.

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