

Employment Bulletin

● Page 2:

Right to private life

Working abroad

Policies on time off

● Page 3:

Monitoring
Employees - the
New Code of
Practice

Calculating holiday
pay

● Page 4:

New Equality
Commission

Mobile Phones

National Minimum
Wage

ACAS Annual Report

Long-term agency workers - who is the employer?

The issue of the employment rights of agency workers has vexed employment specialists for many years. In recent times many agency workers seemed to have little protection, being found to be neither the employee of the agency nor the client company. However, a recent decision of the Court of Appeal may give workers more rights against client companies where the relationship has been in existence for a number of years.

In the case in question the employee had worked for the client company for over five years in several different jobs. Throughout this time he continued to be paid through the agency. When he was told that his services were no longer required he brought a claim of unfair dismissal against the client company.

An employment tribunal held that neither the agency nor the client company employed the worker. On the worker's appeal to the Court of Appeal, the court decided that the tribunal should have considered whether a contract could be implied between the worker and the client company. The court noted that the worker's service was very long for a temporary worker and that such a long-term relationship could give rise to an implied contractual relationship.

The Court's decision means that tribunals may find that a contract exists between the agency worker and the hiring company by virtue of the day-to-day reality of the relationship in relation to matters such as the nature of the work, the hours worked, the fixing of pay rates and disciplinary matters.

The case underlines the need for companies who use the services of temporary workers to consider from the start what obligations they are taking on when they use agency workers.

New discrimination rules

Important new regulations outlawing discrimination on the grounds of sexual orientation and religion come into force on 1 and 2 December 2003. These regulations will add a whole new layer of discrimination law for employers to get to grips with. The impact of the regulations will be felt across the employment spectrum, from recruitment to dismissal.

The new regulations follow the same structure as existing anti-discrimination laws on sex, race and disability outlawing direct and indirect discrimination and harassment. The key differences are what is covered by 'sexual orientation' and 'religion or belief' and the extent to which employers may discriminate if being of a particular sexual orientation or possessing a particular religion or belief is a 'genuine occupational requirement' for the job in question.

Right to private life

The impact of Article 8 of the European Convention on Human Rights - the right to a private life - on UK unfair dismissal law was at issue in a recent case. The case concerned an employee who was dismissed after being cautioned by police for engaging in sexual activity with another man in a public toilet. The employee claimed unfair dismissal, arguing that Article 8 applied to his case and that under European law 'private life' includes sexual orientation and sexual activity.

The appeal tribunal rejected the employee's case. They held that as the act in question had taken place in toilets to which the public had access, it had been, in reality, a public act. As such, the right to a private life was not relevant. They went on to decide that the employee's sexual orientation had not been the reason for his dismissal. The employer had dismissed him because he had committed a criminal offence that was relevant to his employment with young offenders and had chosen to try to hide the facts from his employer. It was reasonable for the employer to dismiss in those circumstances.

Working abroad

We reported in the last newsletter that the appeal tribunal had decided that UK employment tribunals have jurisdiction to hear unfair dismissal claims brought by British citizens working abroad where the respondent employer resides or carries on business in England or Wales. In their latest decisions on this subject the appeal tribunal have completely reversed their opinion.

The latest cases rule that tribunals could not hear the unfair dismissal claims of UK citizens who worked in Italy and the USA respectively. As the decision reported in the last newsletter was considered and rejected in the case involving the employee in the USA it appears that the position is now that tribunals will only have jurisdiction to hear statutory claims such as unfair dismissal if the employment has a substantial connection with the UK. The American case indicated that relevant factors are likely to include where the employer is based, where the work was performed and where the employee was recruited.

Policies on time off

The lack of a policy dealing with employee requests for time off was criticised by the appeal tribunal in a recent case. The case concerned an employee who was appointed as a magistrate. Under the Employment Rights Act employees are entitled to take reasonable time off to perform duties as a magistrate. The employee was required to sit at the local magistrates' court for a minimum of 13 days each year. She asked her employer if she could take these days as unpaid leave. The employer examined its compassionate leave policy and said she could take 8 days' unpaid leave and the remaining five days as paid holiday. The employee said that this was unacceptable, resigned and claimed unfair constructive dismissal.

The employment tribunal rejected the employee's claim but her appeal was successful. The tribunal had failed to take into account all the relevant circumstances and had focussed solely on the employer's business and the effect of the employee's absence on the running of that business. These considerations should have been balanced by consideration of how much time off is required to perform the duties of a magistrate.

The appeal tribunal commented that it was the absence of any policy on time off for public duties that had caused the dispute in the first place. Employers would be well advised to heed these remarks and put in place policies dealing with applications for all kinds of time off.

Monitoring Employees - the new Code of Practice

On 11th June 2003 the part of the Employment Practices Data Protection Code dealing with Monitoring at Work was published. The Code is important because it provides guidance from the Data Protection Information Commissioner on how to comply with the Data Protection Act when monitoring employees. Monitoring is described in the Code as "activities that set out to collect information about workers by keeping them under some form of observation, normally with a view to checking their performance or conduct". This includes opening emails, listening to voicemails and checking telephone and internet access records whether randomly or systematically.

The Code has no legal effect but can be taken into account by a court or tribunal when considering whether there has been a breach of the Data Protection Act. The Code must be considered in conjunction with the existing Regulation of Investigatory Powers Act 2000 and the Lawful Business Practice Regulations 2000 that also deal with monitoring.

The Code recognises that monitoring is important for businesses because it is a means of checking that their office systems are being used for appropriate and authorised purposes. It also makes clear however that monitoring will usually be intrusive and accepts that workers have a legitimate expectation of some degree of privacy at work. Employers must therefore be prepared to justify monitoring by the benefits to them or others.

The Code recommends that employers carry out an "impact assessment" to decide if and how to carry out any monitoring. This will involve identifying its purpose and any likely adverse effect and considering what alternatives there may be. If monitoring is justified by an impact assessment then the consent of individual workers is generally not needed. However if "sensitive" personal data (eg information relating to trade union membership, racial or ethnic origin or health information) is being collected then explicit consent is required and for that reason it is always sensible to obtain explicit consent to monitoring by inclusion of a suitable data protection policy in contracts of employment.

If covert monitoring is to be undertaken (i.e. without an employee's knowledge) then the Code recommends that this should only be done if senior management are satisfied that there are grounds for suspected criminal activity or equivalent malpractice.

Calculating holiday pay

The Working Time Regulations, in particular the provisions surrounding holidays, have been the subject of much case law. The regulations give all workers the right to take four weeks' paid annual leave. For workers with normal working hours it is relatively straightforward to calculate how much holiday pay is owed. But the position is more complicated where the employee performs a lot of overtime.

In a recent case the appeal tribunal had to consider whether an employer was right to count only contractual hours towards the calculation of holiday pay. The case concerned a worker who was contracted to work 39 hours per week. In fact he usually worked 58 hours per week. When he took annual leave his employers paid him by reference to a 39-hour week, a loss to the worker of some £130 per week.

The appeal tribunal decided reluctantly that the employer's interpretation was correct and that overtime was not included when calculating holiday pay. But the tribunal were unhappy with this result as it militated against the objective of the regulations, which was safeguarding the health and safety of workers. If a worker only received two thirds of his normal average weekly wage he would be placed under economic pressure not to take his minimum holiday entitlement. It may be, therefore, that this is an issue that a higher court returns to in the near future.



New Equality Commission

On 30 October 2003 the Government announced the creation of a new body provisionally called the Commission for Equality and Human Rights. It will bring together the three existing bodies; the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission. The new single body will fight discrimination in all its forms and promote equality and diversity. There will be a consultation on its structure prior to a White Paper in Spring 2004.

Mobile Phones

With effect for 1 December 2003 it will be unlawful for drivers to use hand-held mobile phones whilst driving. It will also be unlawful to 'cause' or 'permit' a driver to do so. To protect themselves employers should ensure that they forbid employees using such phones while driving. There is a £30 fixed penalty or a fine of up to £1000 on conviction in Court.

National Minimum Wage

The National Minimum Wage increased from £4.20 to £4.50 per hour with effect from 1 October 2003, for those aged 21 and over and from £3.60 to £3.80 for those aged 18-21.

ACAS Annual Report

The recently published ACAS Annual Report for 2002/2003 reveals that the number of tribunal applications has decreased for the third successive year. In excess of 94,000 applications were still made however, of which 77% were either settled or withdrawn before reaching a tribunal hearing.

Media, Entertainment and much, much more...

DAVENPORT LYONS

This Bulletin is designed to provide a summary of the subject matter. It does not purport to be comprehensive or a substitute for specialist legal advice in individual circumstances.

If you would like any further information on these or any other employment-related topics please contact one of the Partners in our Employment Department:

Kathy Pavey
020 7468 2668
kpavey@davenportlyons.com

Marie Van der Zyl
020 7468 1620
mvanderzyl@davenportlyons.com

Tony Gould
020 7468 2667
tgould@davenportlyons.com

Michael Hatchwell
020 7468 2647
mhatchwell@davenportlyons.com

Alon Domb
020 7468 2684
adomb@davenportlyons.com

Davenport Lyons
1 Old Burlington Street
London W1S 3NL
Tel: 020 7468 2600
Fax: 020 7437 8216
Web: www.davenportlyons.com