

Employment Write News

Clear, pragmatic and commercial advice on all employment issues faced by our clients.

01/02 Agency Worker Regulations 2010

03/04 Other News in Brief

The qualifying period

The right to equal treatment will only arise where an agency worker has undertaken the same role, whether on one or more assignments, with the same hirer for 12 continuous weeks. Note that changing agencies during this time will not affect the qualification period.

The “same role” requirement will only be broken where the worker begins a new role and *“the work or duties that make up the whole or the main part of that new role are substantively different from the work or duties that made up the whole or main part of the previous role.”*

What constitutes ‘substantively different’ has been considered in the Government’s recent Guidance on the Regulations which has been published this month (and is available at www.bis.gov.uk). According to the Guidance *“there has to be a genuine and real difference to the role”*. Additionally, the guidance sets out a number of key factors which it envisages an Employment Tribunal will take into account when considering whether or not a role is substantively different. These include:

- skills and competences required;
- rate of pay;
- level of responsibility;
- working hours;
- location;
- special training and/or qualifications required; and
- equipment required.

Crucially, in order for the role to count as substantively different, the hirer must notify the agency that the agency worker’s job duties have changed and this must subsequently be notified to the agency worker, so that they are aware that their role has substantively changed. A failure to do so will prevent the 12-week qualifying period from being broken.

Any breaks which do occur between or during assignments will not break continuity if they are for less than six weeks or for a number of other listed exceptions such as sickness absence or absence for pregnancy and maternity reasons. Therefore, as long

as the worker returns to a role with the hirer within six weeks, the time expended on the previous assignment will count towards the qualification period.

Anti Avoidance

The Regulations make provision to prevent the abuse of the qualifying period and to deter any deliberate attempts which prevent the worker achieving the qualifying period. These so called anti-avoidance provisions allow Employment Tribunals to impose a penalty of up to £5,000 on hirers or agencies who set out arrangements in order to prevent agency workers from being protected under the Regulations. However, the Regulations and guidance provide little detail on what will amount to anti-avoidance or how a tribunal will decide what penalty to impose. Employers will have to wait until Tribunals provide some guidance on these issues as cases arise.

Access to Employment and Collective Facilities

From the beginning of an assignment (not the end of the 12-week qualifying period) an agency worker has the right to be:

1. informed of any relevant vacancies during their assignment and to be given the same opportunity as a comparable worker to find permanent employment within the hirer; and
2. given access to ‘collective facilities and amenities’. These facilities include car parking, canteen (or similar), child care or the provision of transport services. Note that this is not an exhaustive list and serves only as an indication of the type of facilities which should be included.

The Guidance provides that this does not entitle an agency worker to ‘enhanced’ access rights but that agency workers should be allowed access to these entitlements on the same basis as directly engaged employees.

Enforcement and Liabilities

An agency worker can present a claim to the Employment Tribunal for compensation to be paid by the agency or the hirer as a result of unequal treatment. Damages will not be awarded on a joint and severable basis and will be apportioned on the basis who was responsible for any breach, subject to a minimum award of two weeks' pay. The level of damages will take into account the nature of the breach, any financial loss suffered by the worker and any expenses they have reasonably incurred as a result. There may also be an award of up to £5,000 should there be a finding of attempts to avoid the Regulations.

An agency will be able to defend any claim in respect of equal treatment if they can show that they took all reasonable steps to obtain the relevant information from the hirer in relation to the terms and conditions afforded to directly recruited employees. It is therefore important for agencies to ensure that they request the relevant information and for hirers to ensure that they respond to such requests.

What does this mean for Employers?

Employers need to:

- Review the use of temporary agency workers in their business and, in particular, assess the terms and conditions they offer to permanent employees in comparison to agency workers who do the same work.
- Consider access to facilities and information about vacancies in the company for those workers hired on a temporary basis.
- Review the contractual arrangements they have in place with any employment agency to assess whether they are being asked to accept liability for any of the agency's failures.
- Monitor the duration of any agency engagement and the terms given to agency workers who have satisfied the 12-week qualifying period.
- Ensure that any changes to an agency worker's role are notified to the agency and the worker.
- Respond to any requests for information received by agencies in relation to terms and conditions.

Other News in Brief

Proposals to reform the employment tribunal system

Earlier this year, the Government launched its consultation "Resolving workplace disputes", which sets out a number of proposed reforms to the existing employment tribunal system. Forming part of the Government's objective to make the UK "the best place to start and run a business", the reforms aim to achieve early resolution of workplace disputes, simplify the employment tribunal process and improve business confidence when it comes to hiring employees.

A summary of the main proposals are as follows:

- An extension of the qualification period for unfair dismissal claims from one to two years;
- Charging claimants a fee for bringing a claim;
- Obliging claimants to submit details of any dispute to Acas for pre-claim conciliation before lodging a claim with the employment tribunal;
- Introducing penalties on parties for failing to accept reasonable offers of settlement;
- An extension of tribunal powers to strike out weak and vexatious claims;
- Increasing the level of costs a tribunal can award from £10,000 to £20,000; and
- Imposing automatic financial penalties on employers who lose a claim (up to a maximum of £5,000).

While many of the proposals appear to focus on reducing the current caseload of the employment tribunal and addressing the cost of the system to the taxpayer, it will be interesting to see how some of the more ambitious suggestions develop. In particular, we await hearing whether and how much the Government intends to charge a claimant for bringing a claim (media speculation has suggested a fee as high as £500) and the reaction from employers who could potentially incur an additional levy, payable to the Exchequer, for unsuccessfully defending a claim.

The consultation closed on 20 April 2011, and we expect the Government will publish a response and concrete proposals in the upcoming months.

Planned Additional Review of Employment Law

The Government has recently announced a further review of a number of areas of employment law, as part of its plan to reduce the impact of employment law on business. In particular, it plans to review the required duration of collective consultation periods in large scale redundancy exercises, the size of discrimination awards made by Employment Tribunals and the extent of the scope of the TUPE Regulations.

Little detail has been released at this stage, although the Government's abilities to reduce the scope of these laws are limited by the fact a number stem from European legislation that the UK is required to implement by virtue of its membership of the EU.

We will keep you informed of any developments in this area.

Plans for Flexible Working not to go ahead in the immediate future

In our February 2011 edition of *Employment Write*, we discussed the Government's intentions to extend the right to request flexible working to parents of children under 18 years old. However, in a recent speech, Mark Prisk, Minister of State for Business and Enterprise, announced that the Government would no longer be extending this right to parents with children under the age of 18.

The right will therefore continue to be available for parents with children under the age of 17 or disabled children under the age of 18. The move is seen as further steps taken by the Coalition Government to reduce the impact of employment law on business. However, at the same time, we are anticipating proposals to extend the right to request flexible working to all employees from 2015.

TUPE and Pre-Pack Administrations

In its recent decision in *OTG Ltd v Barke and others*, the EAT held, contrary to its previous decision in *Oakland v Wellswood (Yorkshire) Ltd*, that administrations (including a sale pursuant to a "pre-pack" arrangement) are a "relevant transfer" for the purposes of the TUPE Regulations.

This means that employees will automatically transfer to the buyer under this type of arrangement and will also be protected against any transfer-related dismissals. As part of its decision, the court held that there was a need to establish a consistent approach in these situations and a fact dependent approach was rejected.

Although a degree of caution had always been exercised in relation to whether pre-pack administrations would be excluded from TUPE, this recent decision clears up any uncertainty. Practically, potential purchasers will have to be ever more aware of the potential costs of purchasing businesses out of administration, as employment related costs could be significant and have a considerable affect on the viability of any deal.

Increase in Statutory Payment rates

From 3 April 2011, the standard weekly rates increased as follows:

- Statutory maternity pay, statutory paternity pay and statutory adoption pay increased from £124.88 to £128.73 and the weekly earnings threshold rose from £97 to £102.
- Statutory sick pay increased from £79.15 to £81.60, with the weekly earnings threshold rising from £97 to £102.
- Maternity allowance increased from £124.88 to £128.73, with the earnings threshold remaining at £30.

The Employment Department - Key Contacts



Joanne Evans
Partner and Head of Department

Jo is a nationally recognised employment law specialist. She is a graduate of Cambridge University and was a partner at Addleshaw Goddard before she joined Neil Myerson in 2007 to head up the firm's team of employment specialists.

Jo has significant experience of dealing with Employment Tribunal claims, discrimination matters and the employment aspects of corporate and commercial transactions. She also regularly provides training to clients on HR and employment law issues. She is described by the independent legal directories as "bright, decisive, proactive and switched on", providing clients with "astute advice, straightforward thinking and client focus".

joanne.evans@neilmerson.co.uk



Joanne Henderson
Senior Solicitor

Jo has worked as an employment law specialist for many years at leading commercial firms, after studying Law at the University of Leeds. She joined us in 2009 from Eversheds to strengthen further our high level employment service to our commercial clients.

Jo is an experienced Employment Tribunal advocate and deals with complex, high value claims. She also has extensive expertise in executive arrangements and terminations and has a particular interest in the employment law aspects of corporate and commercial transactions, insolvency, restructuring and redundancy.

joanne.henderson@neilmerson.co.uk



John Morris
Solicitor

John has worked as a specialist employment lawyer since he qualified in 2005. He studied Law at Cardiff University and then worked at national law firms DLA Piper and Beachcroft before joining Neil Myerson in 2008.

His experience includes handling Employment Tribunal claims, disciplinary and grievance issues, negotiation of executive contracts and severances, and TUPE matters. John regularly provides training to our clients in order to keep them up to date. He also deals with business immigration issues for our commercial clients.

john.morris@neilmerson.co.uk



Charlotte Gilbert
Solicitor

Charlotte has been providing commercial and practical employment advice to our clients since she qualified as a solicitor in 2008. She studied Law at the University of Durham and then completed her training with the firm.

Charlotte deals with all aspects of employment law including contracts of employment, policies, handbooks, resolving employment disputes, compromise agreements and Employment Tribunal claims.

charlotte.gilbert@neilmerson.co.uk



Robert King
Solicitor

Robert studied Law at Leeds University before completing his training with national law firm Pinsent Masons in Manchester. He joined Neil Myerson in 2011.

Robert advises on employment disputes and litigation, disciplinary issues, employment contracts and all other employment issues facing our employer clients.

robert.king@neilmerson.co.uk

**NEIL
MYERSON
LLP**

SOLICITORS

Neil Myerson LLP
The Cottages Regent Road
Altrincham Cheshire WA14 1RX

T (0161) 941 4000
F (0161) 941 4411
DX 19865 Altrincham
E lawyers@neilmerson.co.uk
W www.neilmerson.co.uk