

Fraudulent ET Claims – A Word of Warning

In the current economic climate, where many former employees have nothing to lose and potentially much to gain, employers must be alert to the risk of speculative Employment Tribunal claims brought by individuals hoping to negotiate a commercial/nuisance settlement – often successfully!

Whilst there are clearly some benefits to making early commercial offers of settlement – not least to avoid the cost and management time involved in defending Employment Tribunal proceedings, the downside is the risk of payment to claimants whose allegations are entirely spurious.

A Freedom of Information request sent to the Ministry of Justice has confirmed that the Employment Tribunals do not operate a central monitoring system for claims. The MOJ indicated that it does not hold information in relation to claimants that have brought multiple claims in a “collated and accessible format”.

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Clearly this is good news for vexatious litigants who, unless they come to the attention of representatives, go largely undetected. Earlier this year an individual, John Berry, brought a claim for age discrimination against a recruitment agency. His claim was struck out after he failed to corroborate his identity and the Judgment noted that it appeared that Mr Berry had previously brought 50 similar claims against various employers.

Whilst the concept of age discrimination now has wide currency, numerous employers still use language such as “recent graduate” and “school leaver” which may enable speculative claimants to latch on to the possibility of bringing discrimination claims.

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employment

Regulation of Agency Workers

The Agency Workers

Regulations 2010 came into force on 1 October 2011 in order to enact the EU's Agency Workers Directive in the UK and have been lectured on, blogged about and written about to death. So – here's the quick guide!

You need to know that the main feature of the Directive is the requirement that agency workers engaged on assignments lasting 12 weeks or more receive equal treatment when compared to permanent employees. The aim being, to give agency workers the same basic employment and working conditions as if they had been recruited directly.

The Guidance published to help people understand the Agency Workers Regulations provides some useful clarity but has no legal force in its own right. Practical and helpful as many of its recommendations are, ultimately it will be for the courts to determine the correct interpretation of the Regulations and (here's the geeky bit) the extent to which they properly implement the Agency Workers Directive.

Who is covered by the Regulations?

In order to qualify for protection under these Regulations, a worker will need to show that:

- there is a contract between the worker and a Temporary Work Agency;
- the worker is temporarily supplied to the "hirer" and works under the supervision of the "hirer"; and

- the worker is not self-employed.

This is a broad definition and as a result, with limited exceptions, most agency workers will be covered.

The Guidance lists those "likely to be outside" the Regulations as including:

- the self-employed;
- those working on genuine Managed Service Contracts;
- those employed via in-house temporary staffing banks (where the company employs the workers directly);
- individuals finding permanent employment through recruitment agencies; and
- individuals on secondment or loan from one organisation to another.

In relation to Managed Service Contracts, the Guidance reiterates that to fall outside the scope of the Regulations there must be genuine direction and supervision of workers by the contractor, and not the hirer. Having a named supervisor, on site, from the contractor is not enough!

For staffing banks, the Guidance warns that in order to fall outside the Regulations, the arrangement must involve direct employment by the relevant legal entity. Setting up a company to provide temporary workers to other associated or group companies is likely to constitute a temporary work agency and will therefore be captured by the Regulations.

Equal treatment

With effect from their first day of work, an agency worker should receive "equal treatment" and be able to access relevant facilities provided by the hirer to permanent staff. This includes benefits such as car parking, staff canteen and

childcare facilities (the Guidance provides a non-exhaustive list of these facilities); and access to vacancies within the hirer.

This is the only element of the Regulations where there is a defence of objective justification for less favourable treatment of agency workers. According to the Guidance, hirers should ask themselves "is there any good reason for treating the agency worker less favourably". Whilst the Guidance does not give detailed examples of what may be an appropriate justification, it does state that cost alone is unlikely to be sufficient to justify different treatment.

After 12 calendar weeks of work in the same role, an agency worker will be entitled to receive the same terms and conditions as a comparable permanent employee. These will include:

- key elements of pay;
- duration of working time;
- provisions in relation to night work;
- entitlement to rest periods;
- annual leave entitlement; and
- paid time off for ante natal appointments.

Even if the agency worker is on assignment for only a couple of hours a week, it will still count as a week and they will still be entitled to equal treatment after 12 calendar weeks.

Qualifying Service

In order to establish whether an agency worker has accrued qualifying service, the Guidance states that agencies would be "well-advised" to ask workers about their work history to reduce their exposure to equal treatment liabilities. Whilst there is no

legal obligation on the worker to provide this information, the failure by the worker to disclose periods of previous work with the hirer in the last 6 weeks may be taken into account by a Tribunal in any subsequent equal treatment claim. A break between assignments of 6 weeks or more will reset the qualifying “clock”.

When the claims start flowing a key question will undoubtedly be whether qualifying service is lost when a worker moves between related companies? Arguably by virtue of the protection of the corporate veil, where a hirer is part of a larger group and each company has its own legal identity, then the qualifying period will restart when an agency worker moves between different legal entities. However, hirers deliberately adopting this approach to prevent agency workers qualifying for equal treatment run the risk of breaching the anti-avoidance provisions.

The qualifying period is also re-started where there is a substantive change to the agency worker’s role. Two key factors will determine whether a job is substantively different; changes in

1. the skill set required to do the job; and
2. the nature of the work and duties carried out.

A combination of factors, including change of location, manager, pay rate, etc will be taken into account in the event of any dispute. The guidance imposes an obligation on hirers to notify the agency in writing when a role is substantively different.

Comparators

In identifying the basic working and



employment conditions to which an agency worker would be entitled if they qualify under these Regulations, the Guidance emphasises the importance of proper comparison, so that distinctions in working hours, qualifications, etc., are appropriately taken in to account.

The Guidance highlights possible issues arising from attempts at avoidance, such as the creation by a hirer of “artificial starter grade”, with the intention of suppressing terms and conditions. That is not to say that a junior or entry-level grade salary will not be applicable to agency workers in some cases, but this should reflect the level at which the agency worker would have been recruited directly with regard to his or her skills, experience, etc.

Actual comparator employees are not required to identify inequality of treatment in relation to terms and conditions (a “what if” test being applicable). However, in the context of access to facilities, an agency worker must identify an actual comparator. The Guidance suggests that hirers identify relevant facilities

(possibly with reference to staff handbooks, etc) and, for the sake of clarity, refer to these in an induction pack for agency workers or in the information provided at the outset to the agency.

Avoidance by “structure of assignments”

The Guidance says little about attempts by hirers to avoid the Regulations by offering 11 week assignments. Nonetheless, the language used does suggest a slightly more flexible approach than originally appeared from the Regulations. The Regulations make clear that consecutive use of two or more short assignments intended to avoid the qualifying period (or where this is the most likely explanation) will be caught within the Regulations. Whilst similarly recognising the relevance of the hirer’s intention, the Guidance appears to place greater emphasis on establishing a deliberate act by the hirer and regular pattern designed to avoid the Regulations. In any event, hirers will need to be very cautious in offering more than two short-term consecutive assignments to the same agency worker.

Conclusion

Hirers may be encouraged by the more relaxed language in the Guidance which suggests a greater degree of flexibility than previously envisaged. However, there would be considerable risk in applying such an interpretation until such time as the courts suggest otherwise. Employers should carefully consider their position regarding agency workers and proceed with caution. That ... or employ everyone via an agency!

Data Protection – are the stakes rising?

In an appearance before the Justice Select Committee in the week commencing 12 September, the Information Commissioner, Christopher Graham, argued that custodial sentences need to be available to stop the unlawful use of personal data.

Mr Graham's call for prison sentences to be available as a sanction for breaches of the Data Protection Act 1998 comes as a bank cashier pleaded guilty to using her position to illegally access the personal details of a sex attack victim. The cashier's husband had been convicted of carrying out the attack and was in prison. The cashier, Ms Sarah Langridge - a former employee of the bank - claimed she accessed the victim's accounts and banking records to try to build a picture of the woman who had accused her husband. In line with existing penalties available for breaches of the Data Protection Act Mrs Langridge was fined £800, made to pay £400 costs and a £15 victims' surcharge. Not exactly a jilting sanction.

Information Commissioner, Christopher Graham, said:

"It beggars belief that - in an age where our personal information is being stored and accessed by more organisations than ever - the penalties for seriously abusing the system still do not include the possibility of a prison sentence, even in the most serious cases. Access to online records is now part and parcel of almost every transaction the citizen makes - with government agencies, local government, the NHS,



DVLA, high street banks, insurers, social networks. This only makes the risks to privacy greater and the need for security greater still."

"I note the outcome of this latest case, and I remain concerned that the courts are not able to impose the punishment to fit the crime in all cases, because the current penalty for this all too common offence is limited to a fine rather than the full range of possible sentences, including prison for the most serious cases,"

Mrs Langridge's offences came to light following a sentencing hearing during which her husband's victim recognised her as working at her local bank. Having become concerned that her bank account may have been accessed unlawfully, the victim contacted the bank and the police. Upon investigation it transpired that during the 8 month period that her husband's case was ongoing Ms Langridge accessed the victim's records on 8 separate days.

In his comments Mr Graham made references to recent media coverage of "blagging" personal information - an offence under s 55 of the Data Protection Act, which makes it an offence to "knowingly or recklessly,

without the consent of the data controller, obtain or disclose personal data."

He commented that the offence has the potential to devastate ordinary people's lives and is not just about "private investigators finding out about celebrities' hospital appointments," going on to indicate that the Government must show that the problem is regarded seriously - by enabling the courts to impose prison sentences and community service etc.

The ICO has successfully prosecuted a number of cases under s55, including one against a personal injury claims company employee for obtaining NHS patients information from a former girlfriend who worked in a NHS walk in centre, and using it to generate leads for personal injury claims! The ultimate in ambulance chasing. Mr Graham's comments emphasise the value of personal data and the facts of the cases prosecuted demonstrate the lengths that people will go to in order to obtain a competitive advantage in a tough market. The ICO reports a rise in s55 offences which in 2010 - 2011 are up 18% from 2008 - 2009.

Fiduciary duties – strict obligations!

Earlier this year the importance of Directors complying with fiduciary duties was re-emphasised by the Court of Appeal, in the case of Philip Towers v Premier Waste Management.

In the current economic climate, where temptation to maximise income may cloud otherwise safe judgement, Directors should remember that their primary duty is to the company – and breaching that duty could have consequences that last far longer than the current economic climate.

The Director in question, Mr Towers, had taken a loan of equipment from one of the Company's customers (also an old friend) but had failed to disclose this to the Company. When the Company became aware of the loan it claimed that Mr Towers was



liable to account to the Company for the benefit of the loan. Mr Towers argued that the loan was simply a private arrangement between friends and furthermore because the equipment was old and dilapidated, any benefit was negligible.

Lord Justice Mummery giving a succinct judgment held :

- That a Director's duty to avoid situations where his interests

conflicts with those of the Company; extended to these circumstances.

- The fiduciary duties owed by Mr Towers to the Company prevented him from depriving the Company of the ability to consider whether it objected to the opportunity offered to the Company being diverted to Mr Towers;
- the fiduciary duties of strict loyalty and no conflict were breached on the facts;
- the fact that there was no evidence to suggest that the Company would have taken the opportunity was immaterial;
- the fact that there was no evidence to suggest that the Company suffered any loss was not relevant.

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Ultimately little can be done to prevent speculative claims – and there is often much to be gained from commercial settlement, even in such cases. However, there are steps that can be taken to recognise such claimants and to deter them from issuing or pursuing their claims (or at worst accepting a minimal nuisance payment):

- A clear and transparent recruitment policy;
- Appropriate HR approval on all recruitment advertisements;
- Employers in receipt of demands for compensation

upon threat of proceedings should also remember that demanding money with menace, was last time anyone checked, blackmail;

- Clear rationale for short-listing, interviewing and rejecting applicants;
- Immediate investigation into any allegation (including requiring verification of claimant ID);
- Appropriate threats of costs at an early stage; and
- Robust defence of any claim – before any settlement negotiations commence.

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