EMPLOYMENT LAW FOR THE CONSTRUCTION INDUSTRY

Summer 2005 Edition

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1. Employment Status Update

As the Inland Revenue's purge on employment status continues, it has been reported that many contractors are switching to directly employed labour. This shift towards direct employment is likely to continue particularly as Ken Livingstone has announced that he expects all contractors working on Olympic 2012 projects to use directly employed labour.

Switching to directly employed labour is not simply a matter of tax treatment. Employees have far greater rights under employment legislation and so carefully drafted contracts are essential to prevent employment related claims.

In addition, changing from self-employed status may not suit all workers and so to prevent unrest we strongly recommend that contractors consult workers prior to switching from self-employed to employed status. For further advice on how to carry out such consultation please contact a member of the construction industry employment team (Mel Smith, Sara Taylor or Alison Gair).

2. Agency workers

Several recent cases have made it more likely that a business which uses staff supplied by an agency could be deemed to be the employer for employment law purposes. Most recently in Bunce v Postworth Limited ("P") trading as Skyblue (May 2005) B, a welder who signed up with P carried out regular work mainly at one client's site. His terms of engagement stated he was not an employee of the agency. A dispute ensued and the issue before the courts was whether B was an employee of the agency or the client.

On appeal, the Court of Appeal stated that courts and tribunals must consider the "bigger picture" and not simply look at individual contractual terms when determining the identity of an individual's employer. In this case, the Court of Appeal found that P did not exercise day to day control over B and so was not his employer.

Our precautionary advice at this stage is that any business using agency workers is at risk of being found to be the agency workers' employer.

3. Age discrimination

The government has published draft regulations which will implement age discrimination legislation with effect from 1 October 2006. The draft regulations:

- prohibit unjustified age discrimination in employment and vocational training;
- require employers who set their retirement age below the default age of 65 to justify or change it;
- introduce a new duty on employers to consider an employee's request to continue working beyond retirement;
- require employers to inform employees in writing, and at least 6 months in advance, of their intended retirement date. This will allow people to plan for their retirement;
- remove the upper age limit for unfair dismissal and redundancy rights, giving older workers the same rights to claim unfair dismissal or receive a redundancy payment as younger workers, unless there is a genuine retirement; and
- include provisions relating to service related benefits and occupational pensions.

The regulations also remove the age limits for Statutory Sick Pay, Statutory Maternity Pay, Statutory Adoption Pay and Statutory Paternity Pay. The consultation period is due to end on 17 October 2005.

The latest ECIA Annual Report suggests that the average age in some sectors of the construction industry is 54 years old. With this in mind, construction employers should be carefully considering the impact of the new legislation on their business. In the first instance, employers should carry out an age profile of their workforce followed by a careful review of working practices and procedures, pay and benefits structures. An age discrimination policy is also useful but as usual must be put into practice to prevent liability arising.

4. Unfair dismissal not redundancy

The Scottish Employment Appeal Tribunal has recently upheld a tribunal decision that a man who was "made redundant" was in fact unfairly dismissed as there was no redundancy situation.

In the case of APM Contracts v Duggan, D was employed as a workshop assistant responsible for buying materials and dealing with site craftsmen. In July 2003, APM told D his job no longer existed. He was offered an alternative position but it was for less pay. In fact, as the tribunal found, D's job was still required but while he had been on holiday another member of staff had taken on his role and continued to do so.

This case highlights the danger of "bumping" employees – dismissing one employee so another may take his job. The term redundancy has a technical meaning which if not satisfied can lead to a finding of unfair dismissal (for which the maximum compensatory award is £56,800).

5. Smoking at work

On 20th June 2005 the Department of Health launched a full consultation on the proposals to ban smoking in enclosed public places including in the workplace. A commencement date of mid-winter 2007 has been suggested.

6. Final version of the Employment Practices Data Protection Code published

A consolidated version of the Data Protection Employment Practices Code has been published by the Information Commissioner. Copies are available from ***www.informationcommissioner.gov.uk/cms/DocumentUploads/ICO_EmpPracCode.pdf***

A quick guide for small businesses can be found at ***http://www.informationcommissioner.gov.uk/cms/DocumentUploads/ICO_SmlBusGde_A5.pdf***

7. Transfer of Undertakings (Protection of Employment) Regulations 1981 ("TUPE")

Implementation of the Transfer of Undertakings (Protection of Employment) Regulations 2005 has been delayed until 6 April 2006.

8. Workers on long-term sick leave are not entitled to holiday pay

The Court of Appeal has ruled that workers who have exhausted their entitlement to contractual sick pay are not entitled to an additional four weeks' pay under the Working Time Regulations 1998 ("WTR").

A previous Employment Appeal Tribunal decision had suggested that Regulation 13 WTR provided an entitlement to four weeks paid holiday regardless of whether any work was done during that period. This meant that employees who had even been off sick for a full year and who had exhausted all contractual and statutory sick pay were entitled to four weeks' pay for annual leave in that year.

The Ainsworth case clearly establishes that there is no such entitlement to WTR holiday pay for employees on long term sick.

The case prescribes that when an employee's employment terminates after a period of long term sick, then that employee will not have accrued WTR annual leave over that sick pay period. Likewise, if an employee returns to work, any entitlement under the WTR will not have accrued.

However, a word of warning, this only relates to pay for annual leave under the WTR. Contracts should be reviewed to ensure that the point is covered regarding contractual pay and you should also look to what has been done in the past regarding holiday pay when employees have been on long term sick. A contractual right could have arisen by custom and practice. Disputes may also arise if employees have expectations of holiday pay in these circumstances.

Please note that the case law does not establish a clear definition of long-term sickness absence.

The case also establishes that a claim to enforce rights to WTR holiday pay is not a claim for deduction from wages and therefore is limited to the most recent holiday year. Note this is different from a claim for contractual holiday pay which if unpaid can be claimed for up to 6 years in arrears.

9. Working time opt-out to stay

The UK's right to maintain an opt-out of the WTR has been preserved. Equally, importantly the EU Council of Minister's proposals that "on call" time when a worker is inactive be included as working time have been dropped.

The practice of asking workers to "opt out" of the maximum working week by signing a contractual provision therefore remains legal. We would advise clients to watch this space, however, as this issue will almost certainly surface on the European agenda at some point in the future.

10. Modern Apprenticeship training scheme is not a contract or apprenticeship

The EAT has recently held that a modern apprenticeship is not a contract of apprenticeship in a traditional sense and therefore a "modern apprentice" is simply employed under a contract of employment.

In Flett v Matheson 2005, the Claimant was employed under an "individual learning plan" as part of the electrical industry's modern apprenticeship training scheme. F was dismissed by his employer in breach of contract and the question before the EAT was whether he had been employed under a contract of apprenticeship or a contract of employment.

The EAT found that a traditional contract of apprenticeship was usually for a fixed term and the employer had an obligation to train the apprentice. In the case of a modern apprenticeship, there was usually a three way relationship between the employer, the apprentice and a separate training provider.

The EAT found in this case that the features of a traditional apprenticeship were lacking. Therefore, F was simply employed under a contract of employment which could be terminated on one week's notice.

While this means that "modern apprentices" are entitled to the full range of employment rights afforded to employees, it also means that, subject to those rights, employers can simply terminate a modern apprenticeship on reasonable or contractual notice. A traditional apprenticeship can only be ended on the expiry of the fixed term or if the apprentice commits gross misconduct. Otherwise, the employer incurs liability for damages for the remainder of the fixed term.

11. CIJC apprentice rate increases

Rates of pay for apprentices employed under the Construction Industry Joint Council have increased with effect from 27 June 2005. Year 1 apprentices are now entitled to £3.75 per hour, year two apprentices - £4.84 per hour. Year three apprentices with NVQ level two are entitled to £7.20 per hour and the rate for year three apprentices with NVQ level three are entitled to £9 per hour.

Employers must remember that where an apprentice is aged 22 or over, national minimum wage rates apply (£4.85 per hour rising to £5.66 per hour).

12. Tribunal awards £477,000 in whistle blowing case

A Leeds Employment Tribunal has awarded £477,000 in compensation to a whistleblower who it found had been unfairly dismissed as a result of making a disclosure protected by the Public Interest Disclosure Act 1998.

Health and safety issues routinely form part of whistle blowing claims and so the construction industry is particularly at risk from such claims. Although a significant proportion of this award represented future loss of earnings and loss of future pension rights, this is a timely reminder that employers should have carefully thought through whistle blowing policies. In addition, employers must deal with employee's concerns appropriately and must avoid penalising employee's who raise genuine concerns.

13. Work related stress

A recent survey of construction industry managers as part of a Chartered Management Institute survey highlighted managers in the construction industry particularly prone to long hours culture – ultimately risking stress claims.

As stress claims can be costly to defend, we recommend employers use the HSE Management Standards for assessing work related stress (http://www.hse.gov.uk/stress/standards/) to indentify areas of risk within their organisation.

14. Health and safety

The New Control of Major Accident Hazards (Amendment) Regulations came into effect on 30 June 2005 and the New Control of Vibration at Work Regulations came into effect on 6 July 2005.

In our Spring 2005 bulletin we highlighted that the Work at Height Regulations came into effect on 6 April 2005. At Morgan Russell we work closely with a range of other professionals – including Catalyst 123 Limited, health and safety and occupational health consultants – to provide a fully integrated approach to advising construction industry clients. Catalyst have recently prepared a briefing note on the Work at Height Regulations the full text of which you can access at www.morganrussell.co.uk.

Prepared: August 2005 by Sara Taylor