

Employment Law FAQs: Hotel and Leisure Sector

GOODMAN DERRICK LLP

Having acted for clients in the hotel and leisure industry for many years, the Employment Department at Goodman Derrick LLP recognises that this sector is heavily reliant on the proper performance of its staff. This bulletin aims to address, in a practical way, some of the issues which commonly arise in this sector and to give realistic guidance on how to reduce the risk of employment related litigation.

LEGAL UPDATES

Troncs and national minimum wage implications

A recent case has confirmed that tips paid via a troncmaster do not count towards the national minimum wage. This means that employers who rely on tips paid through a tronc arrangement to raise pay to the level of the minimum wage are in breach and risk civil and criminal sanctions being enforced by HM Revenue & Customs and/or claims directly from the underpaid workers.

As most of you will know, a “tronc” is a system by which tips, gratuities and service charges are distributed to employees. The tronc is controlled by a troncmaster, usually the head waiter or a senior manager. The arrangements by which the funds are distributed are usually decided on by the troncmaster in consultation with the employees.

In the case of *HM Revenue & Customs v Annabels (Berkeley Square) Limited & Others*, the employers were private member clubs. Their workers received pay below the level of the national minimum wage. However, the employers paid over service charges and tips made by customers using their credit card or a cheque from their bank account to the troncmaster’s bank account. Cash tips and service charges were handed to the troncmaster directly. The troncmaster then distributed these funds to the workers in accordance with an agreed method.

The workers therefore received two payslips: one directly from the employer and one from the troncmaster. Together the payments exceeded the level of the national minimum wage. Individually, they did not. HMRC issued enforcement notices to the employers demanding that the workers be paid at least the national minimum wage. The employers disputed the notices, claiming that the money from the tronc should be included in the minimum wage calculation.

After many hearings and appeals, it was finally held that the payments by the troncmaster should not be included for the purposes of the national minimum wage legislation as they were not paid to the workers by the employers. Although much of the money had passed through the employer’s account, it actually belonged to the troncmaster once it had been paid over to them. The employers were therefore held to be in breach of the national minimum wage legislation.

To summarise the current position, gratuities paid directly to the worker by the customer or pooled and distributed via a troncmaster do not count



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towards the minimum wage calculation. Gratuities either (i) paid by the employer to the workers via the employer's payroll or (ii) pooled by a troncmaster but passed to the employer for payment via the employer's payroll do count towards the minimum wage.

It should however be noted that the Government intends to end the practice of employers using gratuities to top up wages to the level of the minimum wage, regardless of how they are paid over to the workers. It is anticipated that such reform will be introduced in 2009.

Increase in national minimum wage rates

From 1 October 2008, the minimum wage rates will rise to £3.53 for 16 and 17 year olds, £4.77 for 18 to 21 year olds and £5.73 for those aged 22 and over.

Maternity and adoption rights

Mothers of children born on or after 5 October 2008 will be able to enjoy increased rights during additional maternity leave. In brief, the same arrangements that currently apply in relation to ordinary maternity leave will be extended to also apply to additional maternity leave. This means that mothers will have a statutory right to benefit from all the terms and conditions of employment which would have applied to them had they been at work, except for the terms relating to remuneration, throughout their maternity leave. Similar provisions also apply in respect of adoption leave.

Agency workers rights

If you use agency workers in your business you will be interested to know that, from 27 October 2008, they will be entitled to receive statutory sick pay regardless of the length of their contract. Currently, only those with contracts over 3 months are eligible.

It should also be noted that there are proposals for agency workers to be granted the same basic employment conditions as permanent employees once they have worked for a particular business for 12 weeks or more. Consultation on how this will be implemented is underway.

FAQs

Q: We have just opened a French restaurant. We want to hire only French waiters and waitresses. Is this possible?

On the face of it, this is discriminatory on the grounds of nationality and therefore could lead to a race discrimination claim. However, there is a specific defence to such a claim if you can show that the particular characteristic (i.e. being French) is necessary for the job.

The race discrimination legislation sets out four specific grounds where it can be said that there is a genuine occupational qualification to employ someone of a particular racial group. This includes where a person of a particular racial group is required, for reasons of authenticity, for a job that involves working in a place where food or drink is provided for and consumed by members of the public.

Therefore, hiring only French waiting staff in a French restaurant is likely to be permissible. It should however be emphasised that the genuine occupational qualifications are very limited and careful consideration should be given as to whether your particular circumstances fall within the exception.

Q: We employ staff on a 24/7 basis. What are the rules regarding night work?

The Working Time Regulations 1998 set out specific rules for workers who normally work for at least 3 hours during the night time. "Night" is usually considered as being 11pm to 6am (although this period can be varied by a written collective, workforce or individual agreement, subject to the period being at least 7 hours and including the hours between midnight and 5am).

Firstly, there are limits on the number of hours that a night worker can work:

- They should not work more than an average of 8 hours per 24-hour period (usually calculated over a 17-week reference period); and
- If the work involves special hazards or heavy physical/mental strain, they should not, on any occasion, work more than 8 hours in any 24-hour period.

There are special rules relating to workers under the age of 18. Usually they should not work between 10pm and 6am, although exceptions may apply.

If you do engage night workers, you need to calculate how much time each works. Working time includes any regular or compulsory overtime. Average normal hours of work are calculated by dividing the number of hours worked by the number of days in the reference period minus the total rest days. If the working time limits are being exceeded, you will need to either amend the working time rules by written agreement (where this is possible - only certain rules can be modified) or alter your working patterns to ensure compliance.

Secondly, all night workers should be offered a free health assessment prior to commencing night work and periodically thereafter (e.g. annually). Assessments should ideally comprise of two stages: a health questionnaire, followed by a medical examination if the reply to the questionnaire raises any causes of concern. The employee's written consent to the disclosure of any medical examination results will need to be obtained. Also, remember that any information about health should be kept confidential and processed in accordance with data protection principles.

If the assessment shows that the night work is affecting the worker's health, they must be offered day work where this is available.

A record of your compliance with the above rules should be kept for at least two years.

Q: How do we check an employee's right to work in the UK?

You should check that a person has the right to work in the UK prior to their employment commencing.

Employing someone without obtaining sufficient evidence can result in a civil penalty of up to £10,000 and knowingly employing someone who has no right to work can lead to a criminal conviction (up to two years' custodial sentence and/or an unlimited fine). It is therefore very important that you undertake the necessary checks.

To verify that an employee has the right to work in the UK you should see and take copies of documentation evidencing their right to work, for example, a passport showing that the person is a British citizen or a national of a European Economic Area country (being Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Irish Republic, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom) or Switzerland.

Lists of acceptable documentation are detailed in the Border and Immigration Agency's Code of Practice which can be found at www.ukba.homeoffice.gov.uk. Some of these documents provide ongoing evidence of the employee's right to work; others have to be checked annually. The validity of the original document should be examined and a copy should be made for your records. The copy should be kept throughout the employment and for at least two years afterwards.

For nationals of countries that joined the EEA in or after May 2004, there are also additional checks that you should undertake:

- In respect of nationals from Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia, you should check that the employee is registered under the Worker Registration Scheme by seeing and keeping a copy of their registration certificate.
- For nationals from Bulgaria and Romania, accession worker registration requirements should be verified by seeing and keeping a copy of the employee's accession worker card. For some types of employment, a letter of approval is also required which means that you would need to apply for a work permit application from the UK Border Agency.



Key Employment Services for the Hotel and Leisure Sector:

- Providing general employment law advice and HR support
- Drafting and reviewing employment contracts, staff handbooks and service licences
- Employment due diligence, including examination and reports on staff contracts, during the course of a sale or purchase of a business.

This guide is for general information and interest only and should not be relied upon as providing specific legal advice.

Remember that the right to work should be checked for all employees. If you just target those that appear to be non-British, you could end up facing a race discrimination claim.

Q: How can we properly protect our confidential information?

During employment, confidential information will usually be protected by duties implied into the employment contract, such as the employee's duty of fidelity and good faith and the duty of trust and confidence. However, it is always best to have an express contractual obligation in place so that employees are clear about their obligations and particularly sensitive types of information can be highlighted.

After termination of employment, the situation is more complicated. Only exceptionally sensitive confidential information, such as trade secrets and information akin to trade secrets, will be protected (unless an express confidentiality covenant is in place). This type of information includes, for example, secret recipes and highly secret marketing plans. There is often uncertainty about exactly what information falls within this category so it is risky to merely rely on this principle to protect your confidential information.

The best way forward to ensure that there is sufficient protection in place to safeguard against unauthorised use or disclosure of

any of your sensitive confidential information is to include an express confidentiality clause in the contract of employment. Such a clause should be drafted carefully and, if there are particular types of information that you are concerned about, these should be specified. If the information ceases to be confidential after a certain period of time, the confidentiality clause should be expressed as being time limited. However, do bear in mind that information that has become part of the skill and knowledge of an employee and information that is trivial or already in the public domain is not capable of being protected.

On a practical level, there are also various things that you can do. Firstly, you should stress the confidential nature of the information to your employees as much as possible (although merely labelling information as "confidential" does not always make it so). Secondly, consider whether access should be restricted to only certain employees, for example, to senior managers. Thirdly, consider if physical security measures are possible and appropriate, such as passwords, codes or locks.

If the information is extremely confidential, you may also want to consider whether other forms of protection should be put into place, such as post-termination restrictive covenants to stop the employee from joining a competitor.

If you would like further information about the issues raised in this newsletter, or any other aspect of employment law, please contact Helen Wyatt, Head of Employment, or any other member of Goodman Derrick LLP's employment department. © GOODMAN DERRICK LLP