

# Recruitment Industry Update

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## The Conduct of Employment Agencies & Employment Business (Amendment) Regulations

The Conduct of Employment Agencies and Employment Business (Amendment) Regulations 2007 came into force on 6 April 2008. The aim of these Regulations is to increase protection for work-seekers and reduce regulatory burdens faced by employment businesses.

In summary, the main changes are as follows:

- Work-seekers who take up additional services from an employment business or agency, such as accommodation or transport, are able to give 5 business days notice (or 10 business days in the case of living accommodation) to cancel those services without any detriment or penalty. Work-seekers must be given a statement to this effect.
- Where an employment business intends to introduce or supply a work-seeker to a hirer for an assignment of 5 consecutive business days or less, (a) they must give the hirer the work-seeker's name together with confirmation that they have complied with the obligations set out by the Conduct Regulations (regulation 19) about checking the work-seeker's identity and suchlike and (b) if they have previously given the work-seeker the requisite information required under the Conduct Regulations (regulation 18) and

that information remains unchanged, they only need to provide the work-seeker with confirmation of the identity of the hirer, the nature of the hirer's business, the date of which to commence work and the duration of the work.

- Where an agency proposes to charge for including information about a work-seeker in a publication, a 7 day cooling-off period is imposed in which the work-seeker can cancel or withdraw from the publication without any detriment or penalty.

## Money Laundering Regulations

These Regulations have caused much concern and confusion to the industry. The Recruitment & Employment Confederation ("REC") has therefore been campaigning for clarification on the application of the Regulations to recruitment companies. We understand that HMRC and HM Treasury will be considering this issue.

In the meantime, the registration rules are now as follows:

- Trust and company service providers, being those companies involved in placing directors, company secretaries, partners and suchlike, should ideally have already registered with HMRC. However, because of the confusion as to how the Regulations are intended to apply to recruitment companies



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and, following lobbying by REC, it has been confirmed by HMRC that no penalties will be imposed providing registration is completed by 31 May 2008.

- Accountancy service providers, such as recruitment companies that act as payroll agents, must register by 30 June 2008.

Further details can be found on the HMRC's website at

<http://www.hmrc.gov.uk/mlr/regs.htm>

### James v London Borough of Greenwich

The Court of Appeal has confirmed that an employment relationship should only be implied between a temp and end-user where it is necessary to give business efficacy to the arrangements.

#### The facts

Ms James worked for Greenwich Council via an employment agency. There were two written contracts in place; one between Ms James and the agency and one between the agency and the Council. There was no express contract directly between Ms James and the Council, as is typical for a temporary worker.

Ms James was absent from work due to illness during which time another worker was provided by the agency to the Council. When Ms James returned, she was told that she was

no longer required as the agency had sent a replacement. Ms James subsequently brought a claim against the Council for unfair dismissal (which is a claim that can only be brought by employees, not workers).

#### The decision

It was found that Ms James was not an employee and therefore she was unable to claim that she had been unfairly dismissed. It was held that where the facts and relationships between the parties can be explained by genuine express contracts between the worker and the agency and the end-user and the agency, an implied employment contract between the worker and end-user is unjustified.

The key issue is therefore whether it is necessary to imply a contract between the worker and end-user and that this will only be the case where the express contracts do not reflect the business reality.

#### The guidance

At an earlier stage in this case, the Employment Appeal Tribunal set out some guidance to help determine the employment status of a temporary agency worker. This guidance was approved by the Court of Appeal and includes the following:

- It is not appropriate to imply a contract of employment where the end-user cannot insist on the agency supplying a particular worker;

- If the agency arrangements are genuine, it will be a rare case where there will be evidence entitling the Tribunal to imply a contractual relationship between the agency worker and the end-user;
- If an employment contract is to be implied, there must be evidence entitling the Tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed. In other words, it will be necessary to show that the agency worker is working not because of the agency arrangements but because of mutual obligations binding on the worker and the end-user which are incompatible with those arrangements; and
- The mere passage of time does not justify the implication of a contract of employment. Something more is required to establish that the tripartite relationship no longer holds good.

### The consequences

In practical terms, this decision means that the risk of an agency worker being found to be an employee of the end-user is reduced. However, it is still extremely important to ensure that mutuality of obligation does not exist between the agency worker and the end-user so it is critical that the worker is not treated by the end-user as an employee (for example, by providing them with sick pay, disciplining them,

etc). If so, this may undermine the express contracts and therefore increase the risk of the agency worker being found to be an employee.

### Increases in Statutory Payments

Statutory maternity, adoption and paternity pay has increased to £117.18 per week and statutory sick pay to £75.40 per week.

### National Minimum Wage Increase

It has recently been announced that the national minimum wage will increase from 1 October 2008. The new rates will be £5.73 for those over 22, £4.77 for 18 to 21 year olds and £3.53 for 16 and 17 year olds.

### Temporary & Agency Workers (Equal Treatment) Bill

The Temporary and Agency Workers (Equal Treatment) Bill seeks to provide protection for temps and agency workers by introducing a requirement for equal treatment between temporary and agency workers and permanent employees of the end-user. It passed a second reading in the House of Commons in February 2008 and as a result a committee will be set up to consider the Bill further. However, as it is a private members bill, without Government backing,

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it is unlikely that it will become law.

There have been mixed responses to the Bill with the Confederation of British Industry saying that if the Bill was passed it would “harm the economy and put jobs at risk” while the Trade Union Congress on the other hand thinks that it is an “important milestone on the road to achieving fair treatment”.

While the Government is not a supporter of the Bill, it does recognise that equality for agency workers is an important topic. It has therefore suggested that an independent commission (chaired by Sir George Bain) be established to consider whether a more practical solution can be found.

### Employment Bill

The Employment Bill was originally published in December 2007 and is progressing its way through the various stages before it becomes law. Amongst other things, the Bill proposes that penalties for offences under the

Employment Agencies Act 1973 be increased and that the Employment Agencies Standards Inspectorate powers be strengthened.

Various amendments have also recently been proposed to the Bill including (a) that any fee which is charged to a work-seeker be subject to a contract being entered into which sets out the terms of that arrangement and (b) that new duties be imposed to protect the welfare of temps who are placed on a single contract by providing, at no cost to the work-seekers, supervision of accommodation, adequate and secure transport and suchlike.

Further, there appears to be an attempt to give agency workers protection against being unfairly dismissed by including the typical tri-partite temp/agency/client contractual relationship within the definition of a “contract of service”. However, the proposed amendment is ambiguous at this stage and, unless it receives the support of the Government, is unlikely to become part of the final legislation.

If you would like further information about the issues raised in this newsletter, or any other aspect of employment law or the recruitment industry, please contact Helen Wyatt, Head of Employment, or any other member of Goodman Derrick LLP’s recruitment Industry team.



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