

Employment Law FAQs: Hotel and Leisure Sector

Having acted for clients in the hotel and leisure industry for many years, the Employment team 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.

Q We have a number of individuals who work for us on a casual “as required” basis. They do not have contracts of employment. What employment protection do these workers have?

It is commonly assumed that casual staff who work on an “as required” basis are not employees and therefore do not have any employment rights, such as the right to claim unfair dismissal. The legal position is not so clear cut.

To establish whether any particular worker is an employee or not, there are three main factual elements which must be considered:

1. whether the worker is obliged to render services personally;
2. whether the worker is controlled in a manner consistent with an employer and employee relationship; and
3. whether “mutuality of obligation” exists between worker and employer, i.e. an obligation to provide work and payment for work and an obligation to perform work that is offered.

In respect of casual workers it is the 3rd element, mutuality of obligation, that is usually absent.

Casual workers are likely to be

engaged under a series of temporary contracts and courts have found in some cases that there is an overarching or “umbrella” contract in existence during the gaps. Recent case law indicates that courts will sometimes examine the nature of each individual assignment, rather than the overall umbrella arrangement. If there is sufficient mutuality during the course of each period of work, the relationship may be found to be one of employer and employee, with any gap in continuity between these periods being deemed to be a “temporary cessation in work”, which do not break continuity of employment as a whole.

Where there is continuity of employment between the engagements, it is possible that casual workers will qualify for protection under unfair dismissal legislation if they accrue a year’s service under successive engagements.

It should be noted that, even if a casual worker does not qualify as an employee, they are likely to fall within the legal definition of a “worker” which covers individuals who perform their services personally and do not provide their services as part of a business. The test for worker status is therefore



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less stringent than that for employee status.

Workers have legal protection and rights including the following:

- the national minimum wage;
- paid annual leave, rest breaks and a maximum working week under the Working Time Regulations 1998;
- under whistle-blowing and data protection legislation;
- the right to equal pay for work of equal value;
- the right not to be discriminated against on grounds of age, gender or marital status, race, disability, religion or belief, sexual orientation, or part-time status;
- the right not to be victimised for alleging discrimination or providing information in relation to a discrimination claim.

It should also be noted that even casual workers should be provided with a statement of initial employment particulars in accordance with section 1 of the Employment Rights Act 1996, to evidence the terms of their engagement if this is to extend for one month or more. Such a statement should expressly state that the position is casual, that the employer has no obligation to provide work to the worker and the worker may refuse to work if they wish, to assist with any future argument regarding employment status.

Q We provide accommodation for a number of our employees. What documentation should we have in place to ensure that these employees leave the accommodation when their employment terminates?

As you will not want to create a situation which might give the employee a legal right to occupy the property after termination of employment, it is advised that you have clear contractual documents setting out the employee's right to occupy. What you want to achieve is a "service occupancy" or "service licence" which arises when an employer requires an employee to reside in their property for the better performance of the employee's duties. As a service occupier, the employee only has a right to occupy the property for as long as they are employed by the employer.

An employee will not be a service occupier unless there is a genuine requirement for the employee to live at the property as part of their employment. You should consider providing contractual documents which include the following:

1. A provision that the accommodation is provided for the better performance of the employee's duties;
2. An inventory setting out those items at the property available for the employee's use;
3. A provision that the employee has a licence to occupy and a record of the parties' intention to create a licence and not a tenancy;

4. A declaration that the employer retains control, possession and management of the property and is entitled to enter it at any time;
 5. A list of employee's and employer's obligations, for example, that the employee must keep the property clean and tidy; and
 6. Clear provision that the licence to occupy terminates with immediate effect and without notice on the termination of the employment, or if the employer gives a set period of notice to terminate the licence to occupy on it's own, and that the employee must vacate upon termination of the licence to occupy.
- includes, by way of example only, the following:
1. A passport containing a certificate that the person has the right of abode in the UK.
 2. A passport or national identity card from a member of the EEA or Switzerland.
 3. A passport or other travel document stating that the person is exempt from immigration control, can stay indefinitely in the UK or has no time limit on their stay.
 4. A passport or other travel document stating that the person can enter or remain in the UK and can do the type of work being offered without a work permit.
 5. A Registration Card issued by the Home Office to an asylum seeker stating that they can take employment

Q We employ a number of non-UK nationals. What do we need to do to ensure that a worker is entitled to work in the UK?

Firstly, it is unlawful to employ an individual who is not entitled to work in the UK and a breach of this could expose an employer to a fine of up to £5,000. This is known as a "section 8 offence".

An employer has a statutory defence to the section 8 offence if, before the employment began, it checked that the individual had certain documents evidencing their right to work in the UK, as specified in section 8 of the Asylum and Immigration Act 1996. The list of appropriate documents which are to be checked is extensive and

Employers are required to satisfy themselves that the individual is the rightful holder of the documents and should keep copies of the front page, any pages containing personal details (including a photo or signature) and any pages containing a UK government stamp or endorsement.

Nationals of the EU or EEA are generally free to take employment in the UK with a few exceptions. Nationals of the 8 countries that joined the EU in May 2004 (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) are required to register with the Home Office under the Worker Registration Scheme unless

they are exempt. If they have not registered, it is an offence for an employer to employ them. Nationals of Romania and Bulgaria who joined the EU on 1 January 2007 must get authorisation from the Home Office before starting work in the UK, unless they are exempt.

In order to avoid claims of race discrimination, it is advisable to carry out these checks on all applicants for employment, not just those who the employer suspects might not have the right to work in the UK.

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.



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About Goodman Derrick LLP

Goodman Derrick LLP regularly acts clients in the hotel and leisure industry, some with a large group of operations and others with just one hotel or restaurant. In all cases, we pride ourselves on providing an individual partner-led service, whilst at the same time providing cost-effectiveness by ensuring that work is undertaken by the person best suited to the task. The firm has a specialist Hotel and Leisure Group which includes lawyers with expertise in corporate and commercial matters, property, licensing, and litigation as well as employment.

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.