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HILL DICKINSON

Employment Focus

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OFFICIAL LAWYERS
EUROPEAN CAPITAL OF CULTURE

Welcome

Our ability to meet our clients' needs for swift and accurate advice on employment issues has been further enhanced by the arrival in our London office of Aidan Loy.

Aidan has joined the team as a partner from the London commercial firm of Rosling King.

A native of Cumbria, Aidan started professional life as a zoologist before embarking on a career in the civil service where he gained experience of working within the European Union. Despite (or perhaps because of) this, he changed track and embarked upon a career in the law. Whitehall's loss has become Hill Dickinson's gain.

Mark McKeating has also joined the Manchester team from our rivals, Eversheds.

This edition of Employment Focus highlights the new non-smoking legislation, the Equality Act and the fundamental but often neglected obligation of employers to issue written statements of the main terms and conditions of employment to staff.

We hope that you find it an interesting and informative read.

Michael Morrison
Head of Employment

A Breath of Fresh Air

Whilst some employers already operate a 'no smoking' policy, from 1 July 2007 (2 April 2007 in Wales) the UK will become 'smoke-free'. From this date it will be unlawful to smoke both in public places and in the workplace.

Enclosed and substantially enclosed premises must be smoke-free if they are used as a place of work by more than one person or where members of the public receive goods or services. Exclusions apply to premises and workplaces such as prisons and care homes. Hotels will be allowed to continue to offer designated smoking bedrooms but stringent conditions will apply to the provision of these rooms.

Any person knowingly smoking in smoke-free premises will face a fine of up to £200 or a penalty notice of £50. Owners and managers of smoke-free premises will incur a fine of up to £2,500 if they allow smoking on their premises.

Vehicles

Employers should note that the restrictions also apply to work vehicles, used by more than one person, if the vehicle is enclosed or substantially enclosed. For those employers who afford their employees the luxury of a convertible vehicle, these are excluded from this restriction supposing that the smoker only smokes whilst the roof is down!

Signage

The Regulations require A5 signs showing the international No Smoking symbol (see below) together with the words:

"No Smoking. It is against the law to smoke in these premises."

to be displayed in a prominent position at each entrance to each smoke-free premises. The Regulations set out specific instructions as to the content and size of these signs and these requirements differ in Wales. Failure to display a sign in accordance with the Regulations could result in a fine of £1,000 for summary conviction or £200 fixed penalty fine reduced to £150 if paid within 15 days. A sign showing the No Smoking symbol must be displayed in all vehicles caught by the Regulations.

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Back to Basics – Employee Contracts/ Terms and Conditions

Suzanne Nulty examines the issues relating to one of the most basic employment law principles – the employment contract or statement of terms and conditions – which can be overlooked more easily than one might expect.

It may seem rudimentary, but some of our readers would be surprised how often the terms or details of an employment contract are not clear to the parties or, to be more precise, cannot clearly be evidenced from relevant HR or other records. This not only has the potential to cause uncertainty in relation to the conduct or administration of the employment relationship, but may also expose an employer to additional financial risk in terms of potential compensation awards by the Employment Tribunal.



The requirements

Section 1 of the Employment Rights Act 1996 specifies that an employer must provide an employee with a written statement of his or her employment particulars not later than 2 months after the beginning of the employee's employment.

Similarly, if any of these basic terms and conditions are varied during the employment relationship, written confirmation of this should again be provided to the employee. However, in those circumstances, the relevant time limit is just 1 month.

The required particulars are as follows:

- Names of employer and employee.*
- Date upon which the employment began and date upon which the employee's period of continuous employment began.*
- Scale/rate/method of calculating remuneration and intervals at which remuneration is paid.*
- Any terms and conditions relating to:
 - hours of work, entitlement to holidays, including public holidays and holiday pay;*
 - incapacity for work due to sickness or injury, including any provisions for sick pay;Δ
 - pension and pension scheme details.Δ
- Length of notice which the employee is obliged to give and entitled to receive to terminate the contract of employment.
- Job title or brief description of work for which the employee is employed.*
- Where the employment is not intended to be permanent,

the period for which it is expected to continue, or, if it is for a fixed term, the date when it is to end.

- The place of work, or if the employee is required or permitted to work at various places, an indication of that and of the address of the employer.*
- Any collective agreements which directly affect the terms and conditions of employment.
- If the employee will be required to work outside the United Kingdom for more than 1 month:
 - the period of such work;
 - the currency of remuneration in respect of that work/period;
 - any additional remuneration including benefits relating to such work;
 - any terms and conditions relating to the employee's return to the UK.
- Any applicable disciplinary rules and any applicable procedures to the taking of disciplinary decisions (including dismissal) and the person to whom the employee can appeal a disciplinary decision. Δ
- The person with whom the employee can raise a grievance and the grievance procedure Δ to be followed.

* These details must be provided in a single document

Δ The statement may refer the employee to another reasonably accessible document for particulars/details of these matters.

Consequences of failure

In the event that these requirements are overlooked by the employer, an employee may:


1. **Seek a declaration** from the Tribunal as to what particulars ought to have been included in the statement. This can obviously create uncertainty and a lack of control on the part of the employer as to the terms on which it will be left employing its staff; and
2. If the employee successfully challenges the employer in Tribunal in relation to another freestanding employment matter (e.g. unlawful discrimination of any kind, unfair dismissal, deduction from wages, equal pay claims etc) s/he can also be awarded **compensation** in respect of the failure to provide the required particulars. Indeed, in such circumstances, the Tribunal must award compensation whether or not the employee has raised the matter of missing or inadequate particulars as part of their complaint.

Unless there are exceptional circumstances, the amount of any such award will be at least 2, and possibly 4, weeks' pay, capped in accordance with the relevant Tribunal cap on a week's pay (currently £310.00).

Therefore, whilst an employee will not have the right to instigate a stand alone claim for compensation in relation to such a failure by their employer, if other areas of dispute arise, the failure to provide a written statement will increase the potential value of awards which the Claimant might receive. Although the sums concerned may be relatively low, the lack of clarity on such a basic fundamental matter will potentially create a poor impression of the employer generally to the Tribunal, which might affect its views in relation to the more substantive (and probably more costly) issues before it.

Statutory Dispute Resolution Procedures - The Beginning of the End?

On 1 October 2004 the statutory dispute resolution procedures were introduced in the UK. Their purpose was to prevent the breakdown of employment relations and reduce the number of claims submitted in the Employment Tribunals by encouraging dispute resolution in the workplace.



Despite the sound intentions behind the procedures, 2 and a half years on, there are few employers who would agree that the procedures have achieved their desired effect. Rather, many employers say that the procedures have made matters more complicated, time consuming and confrontational. This has largely been attributed to the wide interpretation by the Tribunals of what constitutes a grievance and the requirement on an employer to address such a grievance at a formal meeting. What, for some employers, may have been dealt with on an informal basis has, by virtue of the procedures, been escalated to a formal level making both sides more defensive and likely to issue claims.

In response to such concerns, the Department of Trade and Industry commissioned a review of the efficacy of the procedures. On 21 March 2007, the results of the review, undertaken by Michael Gibbons, were published. In essence, the report recommended that the procedures, set out in the Employment Act 2002 and the Employment Act 2002 (Dispute Resolution) Regulations 2004, be repealed.

So, can employers and employees breathe a universal sigh of relief that they are no longer subject to the requirements of the procedures?

A cautionary approach is advised and employers should not discard or review their current procedures just yet! Certainly, the procedures still apply to employers and employees for the time being and the consequences of non compliance remain in place. Further, it is anticipated that more change lies ahead as the report goes on to make a number of recommendations which include:

- The introduction of new clear and simple non prescriptive guidance in relation to grievances, discipline and dismissal in the workplace for employers and employees
- The unification of time limits on Tribunal claims
- The simplification of Tribunal application forms
- The abolition of the ACAS fixed conciliation periods
- Strengthening the Tribunal's powers to award costs; including where parties have made efforts to resolve/settle workplace disputes

The report is now subject to public consultation and the deadline for responses is the 20 June 2007. Any action to be taken following the end of the consultation period will feature in subsequent email updates or editions of Employment Focus.

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"Agency Workers"- Recent Developments

Following on from the article in the last edition of Employment Focus about the status of agency workers in light of the decision in the [Dacas](#) case, we turn our attention to the latest decisions from the Employment Tribunal and also consider legislative proposals aimed at affording agency workers greater protection.

Since the [Dacas](#) decision in 2004, there has been a discernable trend for the Courts to imply a contract of employment between an agency worker and the end user. Recently, the Employment Appeal Tribunal (EAT) has looked to curb the trend with a recent spate of findings that agency workers were not employees of the end user. Below are some interesting issues/guidance arising from these cases:

- In [James -v- London Borough of Greenwich](#), the EAT gave clear analysis as to how the issue of implied employment relationships should be judged. Of particular note it stated that the passage of time does not justify the implication of a contract.
- In [Cragie -v- London Borough of Haringey](#), the EAT deemed that there was no necessity to imply a contract of employment in order to give "business efficacy" to the arrangements, since the terms of his contract with the agency were clear.
- In [Heatherwood & Wrexham Park Hospitals NHS Trust -v- Kulubowila and others](#), the EAT stated that "It is not enough to form the view that because the Claimant looked like an employee [of the end user], acted like an employee and was treated like an employee, the business reality is that he was an employee and the Employment Tribunal must therefore imply a contract of employment."
- In [Astbury -v- Gist](#), the EAT considered the express agreement and concluded that it was not necessary to infer a contract of service between the end user and worker. Furthermore, it was stated, in contradiction of an obiter comment made in the [Dacas](#) decision, that it is possible for someone to be in a position whereby they are employed by nobody.

It should, however, be noted that the [Dacas](#) decision is a Court of Appeal judgment which remains binding until such time as the issue is reconsidered by the Court of Appeal of higher court.

The future protection of agency workers?

The Temporary and Agency Workers (Prevention of Less Favourable Treatment) Bill is currently being discussed in Parliament with the following recommendations:

- To prohibit discrimination against agency workers (unless such treatment can be justified).
- To impose an obligation on end users to inform all agency staff of vacancies in their organisation.
- To ensure liability is shared between agencies and end users.

The proposals are part of private member's bill. It is therefore questionable whether they will make it onto the statute books in the near future.

In February 2007, the DTI issued a consultation paper on protecting agency workers, but these relate to the regulation of employment agencies rather than any material improvement in the protection of their workers.

At present, efforts at a European level to introduce a Temporary Workers Directive have stalled. The main aim behind the proposed Directive is to give temporary agency workers the same basic working conditions as those on permanent contracts of employment, such as pay and holidays.

In the short term, it therefore appears unlikely that the legal position will change. Any new developments will be highlighted in subsequent email updates and editions of Employment Focus.

In the meantime, it is always worthwhile remembering that when engaging employment agencies and their workers, employers must ensure that proper contractual documentation is in place which sets out the reality of the working relationship in order to avoid the consequences of [Dacas](#) and an employment relationship with the worker being implied.

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The Equality Act 2006 - The Blueprint for a New Society?

The Equality Act 2006 was given Royal Assent on 16 February 2006 and is expected to come into force in October 2007.

The Act has been heralded as the biggest shake up in decades for equality legislation and the way it is administered. The Act will consolidate a range of discrimination legislation; over 30 current Acts, more than 30 statutory instruments, 12 European Community Directives and 11 Codes of Practice.

The Act has 4 main provisions:

1. The creation of a new Commission for Equality and Human Rights (CEHR)

The CEHR will replace the three existing equality bodies – the Commission for Racial Equality (CRE), the Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC). It was initially intended that the CRE would remain independent at least until April 2009. However the CRE, like the other equality bodies, will now be replaced by the new CEHR as from 1 October 2007. The new CEHR will take over the enforcement functions of its predecessor bodies and will have the power to issue 'Unlawful Act Notices' to any person or organisation that fails to adhere to the Act. It will also have the ability to seek legal remedy on behalf of individuals to any acts of unfairness or discrimination based on inequality. The CEHR will also be responsible for promoting other specific areas of discrimination (sexual orientation, religion or belief and age) and will have a wider general remit to promote human rights and equality generally, even those areas not covered by specific pieces of legislation.

2. Extension of non discrimination on the grounds of sexual orientation and on the grounds of religion or belief

All employers should by now be aware that it is unlawful to discriminate on the grounds of religion or belief or sexual orientation in the employment field. The second and third aims of the Equality Act 2006 are to make it unlawful to discriminate on the grounds of religion or belief in the provision of goods, facilities and services, premises, education, and the exercise of public functions. The Act also provides for the creation of regulations to prohibit discrimination on grounds of sexual orientation in the provision of goods, facilities and services.

3. The Gender Duty

Finally, the Act also creates a general statutory duty on public authorities to promote equality of opportunity between women and men and to eliminate sex discrimination in the exercise of public functions ('the Gender Duty'). In addition, specific duties are created by subordinate legislation under the Act and public sector employers will already be aware that these include a requirement for them to publish a gender equality scheme by 30 April 2007, setting out how they intend to meet the Gender Duty and their other specific duties under the legislation; failure to do so may lead to enforcement measures being implemented. The duty is far reaching and will require public sector employers to review their employment practices from recruitment to equal pay audits and ensuring that access to training and promotion is open to both men and women.

It is likely that the Act will present a number of challenges in the years to come to employers and individuals alike. It is, however, hoped that it will achieve its purpose, which is to support and develop a society in which an individual's ability to achieve their potential is not limited or restricted by prejudice or discrimination.



About Hill Dickinson

Hill Dickinson offers a comprehensive range of legal services from offices in Liverpool, Manchester, London and Chester, and its associated firm Hill Dickinson International has offices in London and Greece. Collectively the firms have 152 partners and a complement of more than 1000 staff.

Hill Dickinson is a major force in insurance and is well respected in the company and commercial arena. The firm's marine expertise is internationally renowned and it has one of the largest marine practices in the UK following a merger with Hill Taylor Dickinson on 1 November 2006. The firm has an award winning property practice and is widely regarded as a leader in the fields of commercial litigation, employment, intellectual property, NHS clinical/health related litigation and private client.

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