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EMPLOYMENT BULLETIN: OCTOBER 2011

Government's proposed changes to employment law

With the intention to reduce the number of employment tribunal claims and to offer a boost to the economy, two important changes to employment legislation were announced last week.

The first of these changes is to increase the qualifying period for unfair dismissal from one year to two years. This will take effect on 6 April 2012.

The second change relates to the introduction of fees for issuing and proceeding with an employment tribunal claim. Currently, no fee is imposed on claimants who issue an employment tribunal claim against their employer/ex-employer. From 6 April 2012, the following fees will apply:

- Initial fee of £250 for a claimant when lodging his/her ET1 claim form; and
- A further fee of £1,000 for the claimant when the hearing is listed for a hearing.

Higher fees will be imposed if the value of the claim is more than £30,000. These fees will be refunded if the claimant is successful. There is also a fee-waiver for those who are unable to pay these fees.

Whilst most employers are likely to welcome these new changes, some concern has already been expressed that the increase of the qualifying period may lead to more discrimination claims, for which there is no qualifying period. It is worth bearing in mind that such claims will still need to have a solid basis if the claimant wants to avoid forfeiting the fees paid for issuing and proceeding with their claims.

We await the legislation which will bring these changes into force.

The Agency Workers Regulations 2010 (the "Regulations")

These came into effect on 1 October 2011. The Regulations do not confer employee status on agency workers, and they will not therefore have the right to claim unfair dismissal, minimum notice or redundancy pay,

for example. Instead, the Regulations' purpose is to ensure that the same "basic working and employment conditions" are provided to agency workers as are provided to permanent employees of the hirer. These include remuneration, paid holiday, working hours and overtime.

There is a 12 week qualifying period before an agency worker is entitled to these terms and conditions. However, from the first day of the agency worker's assignment, they must have equal access to collective facilities, such as childcare facilities, canteen facilities and/or transport. Additionally, they will now need to have access to details of any job vacancies for roles similar to the ones they are performing for that company.

While the direct cost of providing this equal treatment to agency workers will fall on the employment agencies, agencies will probably seek to pass on these costs to end-users in the rates charged for their workers.

Employers should be aware that there are anti-avoidance provisions contained in the Regulations. Whilst liability for breach of the Regulations will primarily lie with the agencies, it will switch to the hirer where it is shown that it was the employer who was actually responsible for the breach. Therefore, where the hirer decides to terminate an agency worker's appointment before the 12 week period has lapsed, and seeks to re-hire that individual, or another agency worker after a short period (primarily to avoid being caught under the Regulations), it is probable that the employment tribunal will make a finding against the hirer rather than the agency.

Acas provides guidance on Social Networking

Acas has recently commissioned a research paper assessing the need for employers to create a social networking policy. The research found that employers were experiencing difficulty in setting standards of behaviour in relation to the use of social networking tools, such as Facebook, Twitter etc. It has been estimated that misuse of the internet and social media costs Britain's economy billions of pounds each year in wasted employee time.

The report advises employers to take a "common sense stance" to regulating behaviour and to draw on "norms that might apply in non-virtual settings". One way of addressing these issues is for employers to have a written policy on "the acceptable use of social networking" at work. In doing so, the employer can

- Help protect itself against liability for the actions of its workers;
- Give clear guidelines for employees on what they can and cannot say about the company on social networking sites;
- Help managers to manage performance effectively;
- Help employees draw a line between their personal and professional lives;
- Comply with the law on discrimination, data protection and protecting the health of employees;

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- Be clear about sensitive issues like monitoring and how disciplinary rules and sanctions will be applied;
- Set standards for good housekeeping.

Injunctions- Practical issues to be aware of

Over recent months, we have seen an increasing number of employers seeking to rely on the post-termination restrictions contained in their departing employees' contracts of employment. The primary reason behind this is the need for employers to protect and hold on to their existing business. This is of particular importance to many businesses nowadays, especially given the current economic climate.

Seeking injunctive relief against an ex-employee can be a costly exercise. It requires immediate action to be taken once it is clear that there has been a breach of any post-termination restrictions. Prior to taking this action however, the following issues must be considered by the employer:

- Is there sufficient evidence against the ex-employee? If so, has there been an excusable delay on the part of the employer since discovery of the evidence?
- How wide are the restrictions?
- Does the employer have a legitimate business interest that requires protection against that particular ex-employee?
- How much influence did the ex-employee have over the employer's employees/clients/customers/suppliers?
- Has there been any attempt to obtain undertakings from the ex-employee?
- Is the employer prepared to engage in costly High Court litigation?

If an employer answers in the affirmative to these questions, it may well be that injunctive relief is the proper course of action to take. The necessary legal advice should still be obtained before a final decision is made.

If you have any queries about issues raised in this bulletin or would like to discuss any other employment law issue, please contact Layla Bunni, at +44 (0)20 7199 1457 or lbunni@starrlegal.com or your usual contact in the employment team - http://www.starrlegal.com/people.html

Please note that the contents of this bulletin are for information only. Nothing in this bulletin is intended to take the place of formal advice, and you should seek specific advice on any legal issues that you have.