

Agency workers could be your employees

The recent Court of Appeal decision in the case of Dacas –v- Brook Street Bureau suggests that agency workers could be employees of the end client, with resulting rights not to be unfairly dismissed. The use of agency staff may now be less attractive.

The case involved an agency worker, Mrs Dacas who worked for six years through an agency, Brook Street, to carry out work for local authority, Wandsworth Council. Mrs Dacas was dismissed for misconduct and brought proceedings in an Employment Tribunal for unfair dismissal.

In her claim to the Employment Tribunal, Mrs Dacas cited Brook Street and Wandsworth, as her employers. The Employment Tribunal which heard the case rejected Mrs Dacas' argument that she was employed by either Brook Street or Wandsworth, and dismissed her claim. Mrs Dacas appealed successfully to the Employment Appeal Tribunal. The Employment Appeal Tribunal found that Mrs Dacas was an employee of the agency, Brook Street.

Brook Street then appealed to the Court of Appeal, and was successful. The Court of Appeal held that the relationship between the agency and Mrs Dacas could not amount to a contract of employment. One of the factors that pointed to this was the fact that the day to day control of Mrs Dacas' work rested with Wandsworth and this is a necessary requirement if an employment relationship is to be established. The majority of the Court indicated that the most likely outcome in such cases is that agency staff are employees of the end user; in this case Wandsworth.

The case has given rise to some criticism. However, unless or until it is overturned, the case has far reaching implications. It now appears that agency workers who have been retained with one client for more than 12 months may qualify for the right not to be unfairly dismissed. Whether the agency worker becomes an employee of the end user will depend on the circumstances of each individual placement. However, in most cases where day to day control is exercised out by the end user, it is likely that the agency worker will be the end-user's employee. If you find yourself in such a situation, you should ensure that fair processes are undertaken before dismissing the employee and ensure that the reason for the dismissal is a fair one.

Companies who do use agency workers frequently may seek to negotiate with the agency an agreement whereby the agency will indemnify the end user against any claims that arise but, equally, one can see the agency resisting this.

If you have any questions regarding this article, then please contact Sejal Raja.

Data protection burdens eased

The Data Protection Act has given rise to a number of problems. Quite apart from interpretation problems raised by Humberside Police in connection with the Soham murders, HR professionals have had the problem of deciding how much personal information should be disclosed under the Act. The Act appeared to impose significant obligations on the employer, but as Sejal Raja explains, as a result of a recent case the burdens have been eased.

“...a barrage of detailed requests ...”

Prior to the Court of Appeal’s decision in the case of *Durant -v- the FSA*, employers were faced with a barrage of detailed requests by employees requesting copies of personal data held about them pursuant to Section 7 of the Data Protection Act. The request extended to items such as memoranda in which the employee happened to be mentioned. This was a tool used by claimants to obtain data during the course of litigation without going through the process of discovery.

However, the case of *Durant -v- FSA* provided welcome guidance as to what data was capable of falling within the definition of personal data pursuant to Section 7 of Data Protection Act. Subsequent to that case the Information Commissioner has issued guidance on two issues considered by the Court of Appeal in the *Durant* case.

What makes “data” “personal” within the meaning of “personal data”?

The Data Protection Act applies only to “personal data”. The Court of Appeal concluded that “personal data” is information that affects a person’s privacy whether in his personal or family life, business or professional capacity.

In the circumstances, privacy is clearly central to the definition of personal data. A factor, employers should take into account is whether or not the information in question is capable of having an adverse impact on an individual.

The Information Commissioner suggested that where an individual’s name appears in the information, the name will only be personal data where its inclusion in the information affects the individual’s privacy. Simply because an

individual’s name appears on a document, the information contained in that document will not necessarily be personal data about the named individual.

It is more likely that an individual’s name will be personal data where the name appears together with other information about the named individual such as address, telephone number or information regarding the individual’s hobby. The Information Commissioner has suggested that the following examples will fall within the definition of personal data;

- Information about the medical history of an individual;
- An individual’s salary details;
- Information concerning an individual’s tax liability;
- Information comprising an individual’s bank statements; and
- Information about an individual’s spending preferences.

The above may be contrasted with the following examples of information which would not normally be personal data:

- A reference to an individual’s name where the name is not associated with any other personal information;
- Incidental mention in the minutes of a business meeting of an individual’s attendance at that meeting in an official capacity; or
- Where an individual’s name appears on a document or email indicating only that it has been sent or copied to that particular individual, the content of that document or email does not amount to personal data about the individual unless there is other information about the individual within it.

The second issue is what is meant by a “relevant filing system”?

In the Durant case the Court concluded that a relevant filing system for the purposes of the Data Protection Act is limited to a system:

- in which the files forming part of it are structured or referenced in such a way as to clearly indicate at the outset of the search whether specific information capable of amounting to personal data of an individual requesting it under Section 7 is held within the system and, if so, in which file or files it is held; and
- which has, as part of its own structure or references mechanism, a sufficiently sophisticated and detailed means of readily indicating whether and where in an individual file or files specific to criteria or information about the individual can be readily located.

For example, if your employee, Trevor Green, requests details of the leave he has taken in the last six months, and such records are not computerised, but kept in a manual file called “Trevor Green” and which contains a number of documents which are filed in chronological order but regardless of subject matter, then this would not amount to a relevant filing system.

If, however, there is a file called “Trevor Green” which is sub-divided into categories such as “contact details”, “sickness”, “pension” and “leave”, then this could amount to a relevant filing system.

It seems to be that following the Durant judgment it is unlikely that very few manual files will be covered by the provisions of the Data Protection Act. Most information about individuals held in manual form therefore will probably not fall within the Data Protection Act.

The case has brought welcome guidance in that it clarifies the purpose of the Data Protection Act, namely to allow individuals to access personal information held by others and, if the information is incorrect, to enable individuals to correct that information. The purpose is not for employees to obtain information to assist in litigation. The decision and the guidance provided by the Information Commissioner has curtailed the requests made under the subject access provision.

If you have any questions regarding this article, then please contact Sejal Raja.

SICKIES

You must have seen the recent publicity given to Tesco’s proposal not to provide for sick pay during the first three days of any absence. This is to counter what is widely believed to be an increasing practice of tacking days of sickness onto weekends and bank holiday weekends.

Recently we encountered the following provision in a director level service contract under the heading “Holidays”.

“With respect to statutory holidays, payment will only be made providing both the working day before and the working day immediately following the holiday is worked, unless such a statutory holiday is taken in conjunction with annual holiday or is covered by a doctor’s certificate”.

Not a common provision, but not a bad idea. What it says in English is that if you take the day before or after a bank holiday weekend as a “sickie”, then we will not pay you holiday pay for the bank holiday.



Ask REG

For those who have not been introduced to REG

Who is REG? REG (otherwise known as RadcliffesLeBrasseur Employment Group) is a friendly, approachable and yet knowledgeable character (who is also pretty good at pub quizzes!) and is going to appear here as a regular feature in our Update to answer employment law questions.

Dear REG,

I am thinking of selling my business and I have heard that I have to consult with the staff before doing so. However, I have discussed this with the buyer and any working changes after the transfer are going to be minor and, overall, will not adversely affect staff. Neither of us can see any advantage to us or the staff in consulting. Do we have to do it?

The answer is that the Transfer of Undertakings Regulations envisage that there will be consultation. You can choose not to do it but, if you do not, then staff can claim up to three months' pay, whatever the Tribunal thinks is just and equitable.

Traditionally, the view was that payment should compensate for loss and, in practice in a case like yours, there would usually be no loss and just token compensation.

Since the recent case of *Susie Radin Limited –v- GMB*, this view has been shown to be wrong. The intent is that recovery should be penal and, if you make no effort at all to consult, then you risk claims of about three months' pay for each employee affected.

Dear REG,

A female member of staff is pregnant and has asked for time off to attend parentcraft classes. Is she entitled to this time off and if so, do we have to pay her or can we tell her that she must take this time off as holiday?

The employee should not be unreasonably refused time off work for ante-natal care if it is made on the advice of a registered medical practitioner, midwife or health visitor. Apart from

the first appointment, you can ask the employee to show a certificate from one of such health professionals confirming that she is pregnant and an appointment card showing the appointment that has been made.

Ante-natal care can include, for example, relaxation classes and parent craft classes, as long as advised by a registered medical practitioner, midwife or health visitor.

All time off should generally be paid at the employee's normal rate of pay.

REG invites you to email your questions to reg@rlb-law.com. You can also telephone or email any of us and we will pass your questions on. Look out for REG's answers to your questions in forthcoming issues of the Employment Update.

Disability Discrimination

Our workshop on 10 June was well received but some of you asked for more information on how the Disability Discrimination Act affects property owners/occupiers.

Help is at hand in that our property department is holding a workshop on this on Tuesday 7 September.

You may not be on our property mailing list, so please phone Anne-Marie Fennell on 020 7227 7450 for information.

Workshop/Seminar Dates

Disciplinary Processes – 16 September 2004
Annual Seminar – 11 November 2004

If you require any further information regarding the issues mentioned in this bulletin please contact Robert O'Donovan or Sejal Raja.

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Readers should take professional advice before taking any action based on this bulletin.

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