AUTUMN 2011

EMPLOYMENT LAW UPDATE

BATES WELLS & BRAITHWAITE LONDON LLP

IN BRIEF

William Garnett outlines the key provisions of the new Bribery Act and reassures companies that they can hold on to their Olympics tickets. Page 3

Discrimination questionnaires allow potential claimants to determine whether they would be able to bring a successful claim. **Denise Owusu-Ansah** looks at the use of discrimination questionnaires and how employers can avoid the hazards. Page 6

Ownership of intellectual property is a key issue for all companies. Where employers are using both permanent and contract staff to develop IP, this can become particularly problematic, warns **Sean Egan**. Page 9

The Additional Paternity Leave Regulations 2010 apply to parents both of children born to them and of children matched for adoption on or after 3 April 2011. **Victoria Cook** looks at how the Regulations are working in practice. Page 11

Sarah Bull provides a list of FAQs on the new Agency Worker Regulations, due to come into force on 1 October 2011. Page 13

Lucy Rhodes provides our regular roundup of recent key cases and legislation. Page 14

CONTENTS

Front Cover: London Millennium Footbridge

COMMENTS
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BRIBERY ACT 2010 – AN INTRODUCTION

The Bribery Act 2010 ('the Act') came into force on 1 July 2011, replacing and bringing together bribery laws dating back to 1889 into a single, unified legislative framework.

The Act sets out four offences

The general offences

The two general offences, which re-define pre-existing bribery offences, are of

- Bribing another person (offering, promising or giving a financial or other advantage) (s.1); and
- Being bribed (requesting, agreeing to receive or giving a financial or other advantage) (s.2).

The key test for judging whether an offence has been committed is whether the advantage is offered with the intention of inducing 'improper performance' of a 'relevant function or activity'.

Bribing a foreign public official (s.6)

This offence is committed by a person

- who bribes a foreign public official with the intention of influencing him or her as a foreign public official; and
- intends to obtain or retain business or a commercial advantage

where the foreign public official was neither permitted nor required by written law to be so influenced.

The 'Corporate Offence' (s.7)

The section 7 'Corporate Offence' will be of the most pressing significance to employers. An offence under this section is committed where a person associated with a 'relevant commercial organisation' bribes another person with the intention of obtaining or retaining business or a commercial advantage for that organisation i.e. failure by the organisation to prevent a s.1 or s.6 offence.

The definition of 'relevant commercial organisation' is extraterritorial, covering companies and partnerships formed under UK law that carry on a business (whether in the UK or elsewhere) or any other company or partnership (wherever incorporated or formed) that carries on a business, or part of a business, in any part of the UK.

'Associated' persons is also widely defined and can include employees, agents, subsidiaries, contractors, third party service providers and suppliers.

However, the commercial organisation will escape liability for failing to prevent bribery if it can prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct.

The Act does not define 'adequate procedures' but the Ministry of Justice has published some useful guidance ('the Guidance') on six key principles that commercial organisations should consider when implementing anti-bribery measures:

William Garnett outlines the key provisions of the Act

William Garnett
Partner and Head of Department
The 'formidable' William Garnett applies 'great clarity of thought and strategy'
Legal 500 2011

‘Ken Clarke himself has explained that he does “*not expect a large number of prosecutions and certainly not for trivial cases*”’

- Proportionate procedures
- Top-level commitment
- Risk assessment
- Due diligence
- Communication (including training)
- Monitoring and review

The Guidance provides a generic list of suggested measures in light of these six principles. However it also notes that employers of different types and sizes will face different issues and, therefore, advocates flexibility in ensuring that the compliance approach most suited to their business is taken. Some organisations might find that there is very little risk of bribery being committed on behalf of the organisation and, in that case, there may be no need for anti-bribery measures.

Penalties

- Ten years and/or a £5,000 fine (£10,000 in Scotland) for individuals.

- An unlimited fine for a commercial organisation.

- If a commercial organisation is found guilty, a senior corporate officer can also be convicted if he or she is deemed to have given his ‘consent or connivance’ to the offence.

In addition to the penalties set out in the Act, a company director convicted of a bribery offence is likely to be in breach of his duties under the Companies Act 2006 and could face disqualification up to 15 years under the Company Directors Disqualification Act 1986. It is also possible that organisations convicted for bribery could face permanent exclusion from EU Government contracts.

In light of its wide-ranging scope and stringent penalties, the Act has provoked huge controversy from its inception. Criticisms have been levelled at the section 6 offence and the issue of facilitation payments, which, in contrast to US law, continue to be illegal under the Act. Organisations that operate in high-risk areas overseas should be particularly wary of this offence. Other concerns have been targeted at the issue of corporate hospitality, with protests that UK businesses will be put at a disadvantage by the new legislation.

Corporate Hospitality

A closer reading of the Act and associated guidance will alleviate any unfounded fears in relation to legitimate corporate hospitality. Under section 10 of the Act, prosecutions cannot go ahead without the consent of the DPP, Director of the SFO or the Director of Revenue and Customs Prosecutions. Prosecuting guidance (‘Prosecuting Guidance’) published by the DPP and SFO states that they will bring cases only where they are in the public interest and Ken Clarke himself has explained that he does ‘not expect a large number of prosecutions and certainly not for trivial cases’.

So when will a case be considered non-trivial in relation to corporate hospitality?

The Guidance explains that hospitality that is disproportionate or unreasonable may attract scrutiny. In relation to the section 6 offence, for example, the more lavish or expensive the hospitality put on for a foreign public official, the greater the inference that the intention behind the hospitality was to influence him or her in exchange for business or a business advantage.

Whether or not hospitality is deemed to be proportionate and reasonable will, to a certain extent, depend on the norms of the particular industry and upon the standards set by the organisation itself. A charity, for instance, is unlikely to (and indeed, should not) have the same levels of expenditure on corporate hospitality as an investment bank. But levels of expenditure are not the only consideration. It goes without saying that simply providing hospitality, with no evidence of a connection between the hospitality and decision-making, is unlikely to be considered unlawful.

Organisations that take part in bona fide hospitality should be reassured by the guidance but remain mindful of the potentially severe consequences of falling foul of the Act. If, having assessed the risk of hospitality, it is decided that hospitality is excessive, best practice would be to reduce its scope to a more proportionate level. If the extent to which employees are providing corporate hospitality is not clear, then gift and hospitality procedures might need to be tightened up, or put in place, if non-existent. In accordance with the six key principles, any changes should be communicated properly to employees (and other 'associated persons') and monitored on an ongoing basis.

Prosecution

In spite of the commotion surrounding the 'Corporate' offence, the first prosecution under the Act provides a salutary lesson for those who thought the new legislation was limited to commercial bribery.

Munir Yakub Patel, a Magistrates' Court clerk, is due to appear before Southwark Crown Court on 14 October 2011 for allegedly breaching section 2 of the Act, 'requesting and receiving a bribe intending to improperly perform his functions'. Mr Patel is alleged to have told an individual summonsed for a motoring offence that he could influence the course of proceedings in return for £500.

Conclusion

The London 2012 Olympic Games are drawing closer and it has been estimated that £100m will be spent on events and hospitality by organisations hoping to capitalise on the endless opportunities for entertaining that such an event brings. It is inevitable that prosecutors will be on the look out for potential cases of bribery at the Games and appropriate measures, such as gift and hospitality policies, procedures, budgets and sanctions should be in place to ensure that the organisations taking part are bribery-free.

But for those organisations that weren't lucky enough to get Olympics tickets, it is still advisable to assess the risks of bribery being committed and ensure that a clear anti-bribery message is sent to employees and other associated persons to mitigate any risks. For as the BAE–Saudi investigations demonstrated in 2008, the damage that corruption allegations can do to an organisation's reputation cannot be underestimated.

'it has been estimated that £100m will be spent on events and hospitality by organisations hoping to capitalise on the endless opportunities for entertaining that such an event [the Olympics] brings'

DISCRIMINATION QUESTIONNAIRES – GETTING THE RESPONSE RIGHT

Under the Equality Act (the 'EqA'), discrimination questionnaires allow potential claimants to determine whether they would be able to bring a successful claim; employers, therefore, need to know how best to deal with them.

Denise Owusu-Ansah looks at the use of discrimination questionnaires and how employers can avoid the hazards

Denise Owusu-Ansah
Solicitor
Denise trained and qualified at BWB and now advises predominantly employer clients on a broad range of employment law and HR issues.

As most employers know, they are under no legal obligation to reply to a discrimination questionnaire, but a failure to do so (or to reply to a particular question asked within it) might lead to a tribunal drawing inferences against them if relevant claims are brought. Employers therefore need to understand the role played by questionnaires and how to avoid some of the hazards that they present.

The purpose of the questionnaire

Whilst the questionnaire procedure is often considered one of the most useful devices in a claimant's (or potential claimant's) armoury, there are also aspects of the questionnaire process that can be used to benefit the employer. For many complainants, the questionnaire process is an opportunity to test the water in order to decide whether they could bring a successful claim. If an employer is able to prepare a robust response, which addresses the key allegations, this may discourage weak or vexatious claims before they reach the tribunal, saving valuable time and costs.

The questionnaire procedure

The statutory discrimination questionnaire procedure for asking and replying to questions is now set out in section 138 of the Equality Act 2010 (EqA). There are cases to which the previous legislation still applies, namely where the act complained of occurred wholly before 1 October 2010, or where an employment tribunal claim was commenced prior to that date.

There is a standard questions form and a standard answers form, both of which are available from the Home Office website and which apply to any of the protected characteristics*. There are also separate forms to be used in respect of equal pay claims.

Complainants are not required to use the standard forms and may instead decide to pose their questions within a letter or other document. An employer who is asked direct questions in writing by a complainant and who fails to respond, or is evasive, will be treated in the same way irrespective of whether or not the question has been asked in the form of a statutory questionnaire.

Time limits

A complainant may serve their questions on an employer at any time before a tribunal claim is submitted. Where a complainant has already submitted a tribunal claim, they must serve the questions within a 28-day period, beginning with the day on which the claim is submitted. Employers should ensure that they first check whether the questions have been served within the time limits. However, employers should remember that the tribunal has discretion to extend the 28-day time limit and specify a later date for the complainant to serve the questionnaire.

If the treatment being complained of took place before 1 October 2010, the EqA will not apply and there are different time limits in relation to claims where the previous discrimination legislation applies.

Employers should serve their response on the complainant within eight weeks of receiving the questions.

Preparing your response

There is often a temptation for employers to answer the discrimination questionnaire as quickly as possible, which can sometimes result in a hasty or ill-prepared response. This can be a risky approach. Firstly, the tribunal can draw an adverse inference that discrimination has taken place even where an employer has replied to the questions, but where the reply is held to be evasive or equivocal. Secondly, the questions and answers are admissible as evidence in a case. This means that employers will be tied to the answers that they have given, which may be before they have seen the details of a claim set out in an ET1 or any of the evidence on which the claimant intends to rely. Employers need to ensure that the information they give is consistent with anything that they might provide at a subsequent tribunal hearing.

Requests for additional documentation

Complainants frequently use the questionnaire process to request additional documentation and therefore gather large quantities of information a long time before any disclosure exercise takes place as part of tribunal proceedings. Employers should carefully consider whether to provide such documentation at this stage, particularly if the requested documentation does not appear to be relevant. What is 'relevant' will depend on the particular circumstances of the alleged discrimination. If the requested information is relatively easily available, employers should seriously consider providing it, rather than risk being found to have inadequately addressed the request. Where the information is not readily available, employers must decide whether to incur the cost and inconvenience of collecting the required information, or to refuse on the basis either that the additional burden of compiling the material renders the request unreasonable, or that the information requested is not relevant.

Confidentiality

Questionnaires may include requests for details of personal information relating to other employees. Employers may object to disclosing certain information on the grounds of confidentiality, for example information on the rate of pay of an individual comparator in an equal pay case. Given that the tribunal may, in any event, order the disclosure of the information, and that an evasive or equivocal answer to the questionnaire may lead to an inference of discrimination, employers should be very cautious in relying on confidentiality to refuse to provide the information requested. Employers should first try to obtain the consent of the individuals concerned before releasing information about them. Where an employer is unable to obtain the individual's consent to the disclosure of their personal information, it may be able to rely on section 35(2) of the Data Protection Act 1998, which provides an exemption allowing the disclosure of personal data where this is 'necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings)'. Alternatively, employers could, where possible, answer detailed questions in relatively general terms or in such a way as to preserve the anonymity of workers, for example by providing details of workers by grade.

Drawing inferences

Whilst it is clearly important for employers to respond to discrimination questionnaires in a considered and timely manner, the risk that a tribunal may draw an adverse inference as a result of a failure to respond or because the response is evasive or equivocal, should not be overstated. The Employment Appeal Tribunal (EAT) guidance on when it is appropriate for a tribunal to draw inferences of discrimination, confirms that a failure to respond to a questionnaire will not raise an automatic inference of discrimination. Adverse inferences from an employer's failure to answer

‘The Employment Appeal Tribunal (EAT) guidance on when it is appropriate for a tribunal to draw inferences of discrimination, confirms that a failure to respond to a questionnaire will not raise an automatic inference of discrimination’

questionnaires or provide information or documents can only be drawn in appropriate cases and will not be drawn as a ‘tick-box exercise’.

In a recent case, *Deer v Walford and another* EAT/0283/10, which dealt with replies to a questionnaire served under the now repealed Sex Discrimination Act 1975, the EAT confirmed that the approach of the tribunal should be to consider whether the failure in question tends to show that the employer acted with a discriminatory motivation. Whether or not it is appropriate to draw an inference of discrimination will depend on the factual circumstances and any explanation supplied by the employer for the failure to reply or an evasive or equivocal reply.

It is therefore vital that employers explain fully any failure to provide the requested information.

Six key points to remember when replying to questionnaires:

1. Reply to any discrimination questions regardless of whether or not they are set out in a standard questionnaire form.

2. Ensure that your response is served on the complainant within eight weeks of receiving the questions.

3. Make sure any answers are not evasive or ambiguous and are consistent with the potential documentary and witness evidence.

4. Anonymise personal information about other employees, where possible, or obtain the individual’s consent. Rely on the Data Protection Act 1998 exemption if you need to disclose personal information but cannot obtain the individual’s consent.

5. Provide a full and clear explanation of the reasons why you cannot provide an answer or a document, for example, where it is unduly burdensome to do so or the information requested is not relevant to the alleged discrimination.

6. Keep a copy of the questions and your reply – they will be admissible as evidence in the event tribunal proceedings are pursued.

* Protected characteristics are: sex, race, religion/belief, disability, sexual orientation, age, pregnancy/maternity, gender reassignment status, marriage/civil partnership status.

FIND OUT MORE

We have covered the provisions of the Equality Act 2010 extensively in previous updates. Please refer to the Employment department section of the BWB website for more information:
www.bwbllp.com/Departments/Employment.html
or contact your usual adviser.

BEWARE WORKERS WEARING TWO HATS: COPYRIGHT ISSUES

Ownership of intellectual property is a key issue for all companies. Where employers are using both permanent and contract staff to develop IP, this can become particularly problematic.

In an environment where organisations are looking for new income streams and looking to diversify, the development of intellectual property-based products can be important. Employers also want to maintain flexibility within a workforce by the use of consultants alongside employees. Recently I have dealt with a number of cases where employers have had to deal with difficult issues affecting the ownership of IP products. These disputes have the potential to affect an organisation's bottom line.

Section 11(2) of the Copyright Designs and Patents Act 1988 provides that work created by an employee in the course of his or her employment is presumed to be owned by the employer, subject to any agreement to the contrary.

However, this only applies to employees, so where consultants are engaged and there is a possibility of use of intellectual property they create, it is essential to ensure that sufficient rights are acquired. It can be difficult at a later stage to re-negotiate agreements, as usually this is after rights of potential value have been created and therefore an organisation's negotiating position is weak.

For employees it is far better to deal with intellectual property rights expressly in the employment agreement as this trumps the presumption in the Act. Even if employment and consultancy agreements are drafted to transfer the rights needed there are still situations where an organisation can find itself at a disadvantage when developing IP-based products. The cases I have dealt with are where a worker develops material that is based on his or her own IP, which the employer does not own.

Workers in IT departments are often enthusiasts and write software programmes or routines in their spare time. They may seek to make use of the fruits of their hobby as part of their work. Employers should monitor the origin of source material in order to ensure that the development process does not make use of material that is not owned by the organisation. One such example would be that a worker created a useful framework or programme at another organisation and he or she either owns IP rights in that work or the former employer does. The individual may then seek to incorporate that material in work for a subsequent organisation. It is natural to use programmes that you are familiar with and have created. The issue for the subsequent organisation therefore is to have procedures in place to ensure that it is clear where source material comes from so that before significant time and effort is spent on a project, any rights issues are identified. If the worker or another organisation has rights in a product, even if the proportion of such proprietary rights is small, those rights need to be cleared. A copyright owner has no obligation to agree to any clearance and therefore organisations can face what may feel like paying a ransom payment or face re-writing the product to ensure that any suspect material is removed.

Sean Egan warns that in the area of IT in particular, IP rights may become very unclear

Sean Egan
Partner in the IP/IT and Information team
'He receives praise for his excellent client service skills'
Chambers UK 2011

‘workers are often keen to come up with bright ideas and run with projects themselves. Organisations can find themselves in a difficult position if a key individual decides to try and develop a project elsewhere’

The issues arise not just in the context of software but also in relation to the creation of training materials and reports.

A separate issue is that workers are often keen to come up with bright ideas and run with projects themselves. Organisations can find themselves in a difficult position if a key individual decides to try and develop a project elsewhere because he or she feels that he or she is uniquely placed to realise the value. It may be that the real value of the individual is in his or her know-how rather than IP, which can be extremely difficult to protect. When there are projects that could be of significant value it will always be helpful for an organisation to ensure that employees and consultants provide written updates as to progress regularly so that the know-how is not just ‘in their head’.

These considerations do need management time but also an appreciation of where these sorts of issues are likely to arise. Advice at an early stage can help prevent later problems arising, particularly when projects have had significant resources invested in them.

FIND OUT MORE
Our IP/IT and Information team provides specialist advice in all areas of Intellectual Property.
Please contact Sean Egan s.egan@bwbllp.com or Lawrence Simanowitz l.simanowitz@bwbllp.com for more information.

BWB Trade Marks Services

Many law firms outsource their trade marks work to trade mark agents (and pass on the costs to the client). At BWB, we retain our own experienced trade marks specialists. We can review your existing trade marks, register new ones and monitor and protect all your trade marks. We advise on the related areas of copyright, passing off and domain names; we also handle resolution of disputes, contractual issues and all aspects of sponsorship and endorsement.
Contact: Lawrence Simanowitz, l.simanowitz@bwbllp.com or 020 7551 7796

ADDITIONAL PATERNITY LEAVE AND PAY

The Additional Paternity Leave Regulations 2010 apply to parents both of children born to them and of children matched for adoption.

Parents of babies born and children matched for adoption on or after 3 April 2011 are able to rely on the right to take additional paternity leave (APL) under the Additional Paternity Leave Regulations 2010 and additional statutory paternity pay (ASPP) under the Additional Statutory Paternity Pay (General) Regulations 2010. The Regulations give eligible employees (usually fathers) the right to take up to 26 weeks' additional paternity leave, when the mother or primary adopter returns to work. However, some confusion has surrounded the practical application of the right to the leave and pay.

Who is eligible to take APL?

- The child's biological father or the spouse or partner (of either sex) of the child's mother, or
- The spouse or partner (of either sex) of the person who, having been matched for adoption, has elected to take adoption leave ('the adopter').

If the employee:

- has or expects to have responsibility for the child's upbringing;
- is taking the leave to care for the child and/or to support the child's mother or primary adopter;
- has been continuously employed for at least 26 weeks ending with the relevant week (the week immediately preceding the 14th week before the child's expected week of birth or the week in which the employee is notified of having been matched with the child); and
- remains in continuous employment with that employer until the week before the first week of their APL.

In addition, the child's mother must have been entitled to maternity leave or statutory maternity pay (SMP) or maternity allowance and have returned to work. In the case of adoption the child's adopter must have been entitled to adoption leave or statutory adoption pay (SAP) with reference to the child's adoption and have returned to work.

What is the entitlement?

The entitlement is to one period of APL, which must be in multiples of complete weeks and last between two weeks and 26 weeks. The period of APL must be taken within a 'window' that starts 20 weeks after, and ends twelve months after, the child's date of birth or placement for adoption and is dependent on the employee's spouse, civil partner or partner having returned to work from their statutory maternity or adoption leave.

In order for a father or partner to receive ASPP, the mother or adopter must have been entitled to maternity allowance, SMP or SAP and must have returned to work with at least two weeks of their pay period remaining. The total number of weeks of ASPP that the employee may receive will depend on the number of unused weeks of their maternity allowance, SMP or SAP that were left when their spouse or partner returned to work.

Confusion has surrounded whether the mother or adopter needs to retain some of their leave in order for the father, spouse or partner to be able to take additional paternity leave. This is not the case. While the Government's guidance on Business Link suggests that the mother or adopter

Victoria Cook looks at how the Regulations are working in practice

Victoria Cook
Solicitor
Victoria advises predominantly employer clients on a broad range of employment law and HR issues including family friendly rights, discrimination, handling grievances and disciplinaries, sickness absence and managing performance.

FIND OUT MORE

The Business Link website provides extensive, detailed guidance on both ordinary and additional paternity leave: www.businesslink.gov.uk/bdotg/action/layer?&topicId=1080898061

must return with at least two weeks of unexpired leave entitlement remaining for the employee to be entitled to APL, this is not included in the Regulations. The scheme does not require a mother or adopter to return to work with some of their maternity or adoption leave remaining for an employee to be eligible to take APL.

So, a mother or adopter could return to work after taking the full 52 weeks of maternity or adoption leave and, providing that there are at least two weeks before the child's first birthday or year since adoption, the father, spouse or partner can take a period of additional paternity leave in whole weeks up to that first anniversary. In this instance, however, the father or partner would not be entitled to SAPP. If the mother or adopter returns after they have exhausted their right to maternity allowance, SMP or SAP, the employee will not be eligible for ASPP.

Although, prior to their introduction, the Regulations were subject to review, the Government confirmed that they would remain in place 'as an interim measure' in order to facilitate its plan to extend flexible working rights and encourage 'shared parenting from the earliest stages of pregnancy'. The Government commenced a consultation on modern workplaces in May this year, which included consultation on a new system of flexible parental leave. The consultation closed on 8 August and the Government's response to consultation is due to be published at the end of October. In July this year the think tank Demos published a survey that showed that only one in ten fathers would take advantage of the current additional paternity leave. However, as the shared parental leave proposals remain based on current flat rates of statutory pay, it seems unlikely that a greater uptake by fathers and partners of flexible parental leave will be encouraged.

A CHECKLIST OF EVIDENTIAL REQUIREMENTS

Birth cases

Eight weeks before the date on which they wish their APL to start, the employee must give the employer:

• A written 'leave notice' specifying what was the child's expected week of childbirth, the child's actual date of birth and the employee's chosen start and finish dates for their period of APL.

• A signed 'employee declaration' stating that:

– the purpose of their APL will be to care for the child;

– they are either the child's father or married to the partner or civil partner of the child's mother; and

– they have, or expect to have, the main responsibility (apart from that of the child's mother) for bringing up the child.

• A written 'mother declaration' from the child's mother stating:

– the mother's name, address and national insurance number;

– the date on which she intends to return to work;

– that the employee is either the child's father or is their spouse, partner or civil partner;

– that to her knowledge the employee is the only person exercising the entitlement to APL in respect of the child; and

– that she consents to the employer processing the information that she has provided in the declaration.

Within 28 days of receiving the employee's leave notice, the employer must confirm the relevant dates to the employee in writing and may request a copy of the child's birth certificate and the name and address of the mother's employer. The employee must comply within 28 days of such a request being made by the employer.

Adoption cases

Eight weeks before the date on which they wish their APL to start the employee must give their employer:

• A written 'leave notice' specifying the date on which the employee was notified of having been matched for adoption with the child, the date on which the child was placed for adoption with the employee and the employee's chosen start and end dates for their period of APL.

• A signed 'employee declaration' stating that:

– the purpose of their APL will be to care for the child;

– they are married to the partner or civil partner of the child's adopter; and

– they have been matched for adoption with the child.

• A written 'adopter declaration' from the child's adopter stating:

– the adopter's name, address and national insurance number;

– the date on which the adopter intends to return to work;

– that the employee is their spouse, partner or civil partner; and

– that they consent to the employer processing the information provided in the declaration.

Within 28 days of receiving the employee's leave notice, the employer must confirm the relevant dates to the employee in writing. The employer may request evidence, in the form of one or more documents issued by the adoption agency that matched the employee with the child, of:

• the agency's name and address;

• the date on which the employee was notified of having been matched with the child; and

• the date given by the agency on which it expected to place the child with the employee for adoption.

The employer may also request the name and address of the adopter's employer.

AGENCY WORKER REGULATIONS FAQS

1. When do the Agency Worker Regulations 2010 come into force?
1 October 2011.

2. What rights will Agency Workers have under the Regulations?
They will have two sets of rights. From day one of their assignment Agency Workers will have access rights to collective facilities and information about vacancies. After twelve weeks in the same role the Agency Worker will qualify for equal treatment which means equal pay, working time, night work, rest periods, rest breaks and annual leave.

3. Does this mean that the Agency Worker is an employee?
The status of the Agency Worker is not altered by the Regulations. If the Recruitment Agency contracts with the Agency Worker under a contract for services (as opposed to a contract of employment or of service) then the Agency Worker will remain a worker.

4. What does equal pay mean?
It means basic pay, overtime pay, bonuses which are based in full or in part upon an individual's performance, holiday pay and any vouchers and stamps which have a cash value and which do not form part of a salary sacrifice scheme. Payments excluded from the definition of pay include occupational sick pay, pension, occupational maternity, paternity or adoption leave, redundancy pay, expenses, advances and loans, and health and life assurance.

5. What if I have an Agency Worker already on assignment?
Any work carried out before 1 October 2011 will not count towards the twelve-week qualifying period.

6. My Agency is telling me that the equal pay provisions do not apply to their workers. Is this right?
This could be right. The Regulations do not apply to Agency Workers who are self-employed. Also, under the Regulations agencies can enter into a contract of employment with their workers. If that contract of employment entitles the worker to minimum pay between assignments, and has a clause which explains that the worker is not entitled to any rights conferred by Regulation 5 of the AWR, then the equal pay provisions do not apply. You should ask for a copy of the contract between the agency and the worker to check it complies with the provisions before confirming that you accept this arrangement.

7. I heard that Agency Workers will now have maternity rights. What rights will they have?
After twelve weeks in the same assignment an Agency Worker will be entitled to paid time off to attend ante-natal appointments. The Regulations also give pregnant workers the right to be offered an alternative assignment if an assignment becomes unsuitable because of the pregnancy. The alternative assignment would have to be one which is free of health and safety risks. The terms and conditions which apply to the alternative role must be at least as favourable as those which applied to the original assignment. The obligation to offer an alternative role will continue for the duration of the original terminated assignment. If no alternative assignment is available then the agency will be required to pay the Agency Worker for the duration of the terminated assignment.

Sarah Bull provides a brief summary of the key points

Sarah Bull
Senior Associate
Sarah advises charities and commercial clients on a broad range of employment law and HR issues and has a specialist knowledge of recruitment agency legislation.

8. Who is liable for a breach of the Regulations?
Under the Regulations the hirer will be liable for any failure to provide the Agency Worker with access to its collective facilities and amenities (e.g. staff canteen) or to information about job vacancies. Both agencies and hirers can be liable for a breach of the right to equal treatment after twelve weeks. Check for indemnities in the Terms of Business between you and the agency.

FIND OUT MORE
Please refer to our brief article on the Agency Worker Regulations, here: www.bwbllp.com/updates/Agency-Worker-Regulations-2011.html

If your organisation uses agency workers you should be carrying out an audit of that use and considering how the organisation will comply with its obligations under the Regulations.

BWB can assist with audits and if you would like to discuss your organisation's needs, please contact Paul Seath: p.seath@bwbllp.com

CASE ROUNDUP

Lucy Rhodes
Paralegal
Lucy is currently working in the Employment Department where she assists with a variety of work.

For the purposes of equal pay, unsocial hours and basic pay were separate 'terms'

St Helens and Knowsley NHS Trust v Brownbill, Court of Appeal

Facts: Five female hospital workers were employed by an NHS Trust which required them to work unsocial hours, including weekends, Bank Holidays and nights. They were paid a basic hourly pay, with increases for work carried out during unsocial hours.

The female workers brought a claim for equal pay under the Equal Pay Act 1970, based upon comparisons with male colleagues who were paid a higher percentage increase of the basic hourly rate for work undertaken during unsocial hours.

The NHS Trust produced a spreadsheet that showed that the female workers received higher basic hourly pay, and all but one received higher overall pay, than their male comparators.

The Court of Appeal's decision was that a distinct term within a claimant's contract can be less favourable than a comparable, distinct term within a comparator's contract, irrespective of whether the claimant's contract is, as a whole, more favourable. Therefore, the Court of Appeal dismissed the Trust's appeal.

Practice point

This case demonstrates that the focus of equal pay law is not on the total pay or the contract as a whole but on ensuring equality of terms. A single term in an employee's contract will be compared to the same term in another contract when deciding whether less favourable treatment is being applied.

Knowledge (actual or constructive) required for duty to make reasonable adjustments

Wilcox v Birmingham CAB Services Ltd, EAT

Facts: As part of her work for the CAB Miss Wilcox was asked to work at different office locations in and around Birmingham. She objected, complaining that she did not like travelling the longer distances to work and asked to work closer to home. She then went on sick leave with work-related stress.

The CAB began its attendance management procedure and Miss Wilcox submitted a grievance. She did not tell the CAB that she suffered from travel-related anxiety and medical reports obtained by the CAB did not pick up on this either.

Miss Wilcox refused alternative employment at a fixed location and resigned, claiming disability discrimination and constructive unfair dismissal.

As part of the tribunal proceedings a report was commissioned which confirmed that she suffered from agoraphobia.

The EAT found that there was no disability discrimination because the CAB did not know (nor could they have been reasonably expected to know) that Miss Wilcox was disabled and likely to be substantially disadvantaged by the disability until they had read the consultant's report.

Practice point

The case demonstrates that an employee who fails to provide information and delays in obtaining medical advice may find it difficult to show that their employer had knowledge of their disability. Had the employer recognised that the employee suffered from agoraphobia, the case would have moved on to assess what, if any, reasonable adjustments could have been implemented to permit the employee to remain at work.

Remarks about employee's sexual orientation after he 'came out' did not count as discrimination

Grant v HM Land Registry, Court of Appeal

Mr Grant was employed by the Land Registry, initially at their office in Lytham. He was homosexual and chose to reveal this to his colleagues.

He gained a promotion and moved to the Land Registry's Coventry office where he had differences with his new line manager which culminated in him bringing a claim against his employer complaining of discrimination and harassment on the grounds of sexual orientation, contrary to the Employment Equality (Sexual Orientation) Regulations 2003. The ET decided in favour of Mr Grant. The EAT subsequently overturned the ET's decision.

The Court of Appeal upheld the EAT's decision that the ET had erred in not considering the fact that Mr Grant had 'come out' at the Lytham office.

In his judgment, the judge remarked that 'discrimination law cannot be used as a surrogate to enforce rights of privacy'. He concluded that the fact that Mr Grant had come out before was significant and that it could not be right that a defendant should be liable for doing something which a claimant had reasonably led him to believe would not cause the claimant concern.

Practice point

The fact that a homosexual person has already voluntarily 'come out' is a crucial factor in deciding whether he has been subjected to unlawful discrimination. In choosing to disclose his homosexuality the individual takes the chance of becoming the subject of gossip which would not, in itself, be discriminatory.

Worker who made no holiday requests during long-term sick leave still entitled to statutory holiday pay

NHS Leeds v Larner, EAT

A clerical worker for NHS Leeds had been absent on sick leave for the whole of the leave year and was subsequently dismissed on 8 April 2010 on the grounds of incapability due to ill health.

The employer refused to compensate her for annual leave not taken while she was absent on sick leave during the holiday year 1 April 2009 to 31 March 2010 on the grounds that she made no formal request (as required by her contract) to take leave during that year.

The EAT ruled that the employee was still entitled to her 'right to enjoy a period of relaxation and leisure' and therefore her payment in lieu of outstanding annual leave.

In its decision, the EAT made a distinction between this case and the case of an employee who had been able to take their leave (i.e. was not prevented from doing so through sickness) and had failed to make the request.

NHS Leeds has sought permission to appeal from the Court of Appeal so the case may yet be overturned.

Practice point

This case does not sit easily with the Working Time Regulations, which do not permit a worker to carry over the first four weeks of their statutory holiday.

However, the Government is currently reviewing the WTR (the consultation closed on 8 August 2011) with the view to the introduction of any changes by 2012.

Amendments have been proposed which will allow a worker who has been unable to take their annual leave due to sickness absence, or who falls sick during scheduled annual leave, and is not able to reschedule the leave in the current leave year, to carry it over into the following leave year.

Supreme Court grants leave to appeal decision on volunteers in discrimination law

X v Mid Sussex CAB, Court of Appeal

The question in this case was whether volunteer workers are afforded protection from acts of disability discrimination under the Disability Discrimination Act 1995 (and, by extension, the Equality Act 2010) or by recourse to the Framework Directive.

The Court of Appeal decided that they are not protected, in agreement with both the ET and EAT.

X has now been given permission to appeal in the Supreme Court.

LEGISLATION

National Minimum Wage increase

From October 2011 the National Minimum Wage will increase as follows:

- the adult rate, from £5.93 to £6.08
- for 18 to 21 year olds, from £4.92 to £4.98
- for 16 to 17 year olds, from £3.64 to £3.68
- for apprentices, from £2.50 to £2.60

Employment Tribunal figures

The Employment Tribunal and EAT Tribunal statistics have been published for the period from 1 April 2010 to 31 March 2011. Here are some of the highlights:

- 218,000 claims – an 8% drop in comparison to 2009-10
- 122,800 disposals – a 9% increase in comparison to 2009-10
- Age discrimination claims have increased by 32%

The average award for a successful age discrimination claim is £30,289 – triple last year's average, and more than twice the next highest average discrimination award (for disability discrimination).

Out of the 10,300 unfair dismissal cases that proceeded to a hearing, only eight resulted in orders for reinstatement or re-engagement – two more than last year.

Enquiries

For enquiries about any points covered in this Update, please contact:

William Garnett	020 7551 7720	w.garnett@bwbllp.com
Denise Owusu-Ansah	020 7551 7606	d.owusu-ansah@bwbllp.com
Sean Egan	020 7551 7796	s.egan@bwbllp.com
Victoria Cook	020 7551 7806	v.cook@bwbllp.com
Sarah Bull	020 7551 7849	s.bull@bwbllp.com
Lucy Rhodes	020 7551 7604	l.rhodes@bwbllp.com

Advice

Advertising & Marketing Law	Rupert Earle	r.earle@bwbllp.com
Charity & Social Enterprise	Philip Kirkpatrick	p.kirkpatrick@bwbllp.com
Competition Law	Julian Blake	j.blake@bwbllp.com
Corporate / Commercial	Mark Tasker	m.tasker@bwbllp.com
Dispute Resolution	Malcolm Robson	m.robson@bwbllp.com
Education Law	Julian Blake	j.blake@bwbllp.com
Employment Law	William Garnett	w.garnett@bwbllp.com
Environment	Stephen Lloyd	s.lloyd@bwbllp.com
Faith-Based Organisations	Leona Roche	l.roche@bwbllp.com
Film & Television	Sean Egan	s.egan@bwbllp.com
Finance	Stephen Lloyd	s.lloyd@bwbllp.com
Health & Social Care	Stuart Marchant	s.marchant@bwbllp.com
Immigration	Philip Trott	p.trott@bwbllp.com
Insolvency	Malcolm Robson	m.robson@bwbllp.com
IP / IT & Information Law	Lawrence Simanowitz	l.simanowitz@bwbllp.com
Legacies & Probate Disputes	Robert Oakley	r.oakley@bwbllp.com
Litigation	Malcolm Robson	m.robson@bwbllp.com
Media Disputes	Rupert Earle	r.earle@bwbllp.com
Membership Organisations	Dinah Tuck	d.tuck@bwbllp.com
Property	Anthony Cartmell	a.cartmell@bwbllp.com
Property Dispute Resolution	Lesley Robinson	l.robinson@bwbllp.com
Public & Regulatory Law	John Trotter	j.trotter@bwbllp.com
Public Service Reform Unit	Stephen Lloyd	s.lloyd@bwbllp.com
Sports	Mike Townley	m.townley@bwbllp.com
Theatre & Arts	Sean Egan	s.egan@bwbllp.com
Trade Associations	Dinah Tuck	d.tuck@bwbllp.com
Trade Marks	Lawrence Simanowitz	l.simanowitz@bwbllp.com

Comments

If you have any comments and suggestions, requests for other departmental updates, or would like to notify us of any changes to your contact details, please contact the Marketing Department at marketingdepartment@bwbllp.com

The information contained in this bulletin is necessarily of a general nature. Specific advice should be sought for specific situations.

BATES WELLS & BRAITHWAITE LONDON LLP
2-6 Cannon Street, London EC4M 6YH
Tel: +44 (0) 20 7551 7777 Fax: +44 (0) 20 7551 7800
www.bwbllp.com mail@bwbllp.com

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