

Briefing Note: Agency Workers and Employment Agencies

An Introduction to the Guide

This guide provides an overview of the Regulations applicable to employment agencies and agency workers. This guide should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

1. Who Employs Agency Workers?

The question of whether a Temporary Agency Worker is an employee or not and if he is who he is employed by, is something that the Courts have wrestled with for many years. Unfortunately recent decisions have hardly helped to clarify the issue. For employers and employees alike it is essential that some certainty is brought to bear upon this question. If the worker is found to be an employee, he has the benefit of unfair dismissal protection and a right to receive a redundancy payment. If he is not then he only has limited rights (and potentially none at all) beyond the bare contractual terms.

In 1997, in the case of *McMeechan*, the Court of Appeal ruled, in the case of an individual who worked for an Employment Business on a series of temporary contracts for various clients of the Business, that the individual was an employee of the agency even though it was expressly stated in the agreement that he was self-employed and could carry out self-employed work for other clients. The Court was particularly swayed by the existence of disciplinary and grievance procedures together with hourly rates of pay.

On the other hand, in the controversial case of *Molarela -v- Davidson* in 2001, the Employment Appeal Tribunal found that a worker supplied by an Employment Business was not an employee of the business but an employee of the hirer! The worker worked for Motorola under the standard terms and conditions of the Employment Business and was paid by the Business rather than by Motorola. He remained with Motorola for two years before being suspended and dismissed. The EAT was particularly influenced by the degree of control exerted by Motorola. For example, the worker undertook an induction course, received instructions directly from Motorola's employees, used Motorola's tools, wore its uniform, booked holidays through Motorola and was subject to its disciplinary and grievance procedures.

This decision has been followed by the Court of Appeal recently in *Franks -v- Reuters* where the Court held that dealings between the parties over a period of five years were capable of generating an implied contractual relationship. Therefore Mr Franks, even though he was supplied by an agency under a classic temporary worker agreement, was found to be an employee of the client.

This brings us to the most recent case of *Dacas -v- Brook Street Bureau*. Mrs Dacas was a cleaner, on the books of an Employment Business, who worked exclusively at one Care Home for six years, run by Wandsworth Council. The Care Home informed the Employment Business that they no longer wanted her services and she was duly dismissed by the Employment Business. Once again the temporary worker agreement expressly stated that she was not its employee and that the Bureau was not liable if it failed to obtain engagements for her.

The Court of Appeal ruled earlier this month, in what is intended to be a benchmark decision on the status of agency workers, that the crucial test is who controls the worker? They concluded that Mrs Dacas was an employee of the Council.

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Summary:

A guide to the law relating to employment agencies and employment businesses.

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The Court refused to countenance a situation whereby agency workers, such as Mrs Dacas, were left unprotected by the unfair dismissal legislation. They went on to suggest that if an agency worker remains on the same assignment for a period of 12 months then this would be sufficient time for an implied contract of employment with the hirer to have arisen.

The *Dacas* decision will not only have huge ramifications for those in the recruitment industry, but also for those businesses heavily dependant upon agency workers such as care homes, hotels and catering and IT companies. Despite the importance of the *Dacas* case by far the biggest change will be the long awaited implementation of the conduct of *Employment Agencies and 'Employment Businesses Regulations 2005*

The regulation of employment agencies and businesses has always been subject to state control. Prior to the Employment Agencies Act 1973, agencies used to have to be licensed by the Secretary of State. The 1973 Act enabled the Secretary of State to implement detailed statutory provisions regulating the industry and the first Regulations appeared in 1976. They have broadly remained unaltered until now. The Employment Agencies Act 1973 contains little by way of regulation itself, other than a section prohibiting an agency or business charging a fee to those individuals it tries to obtain work for. It also provides the Secretary of State with the power to apply to an Employment Tribunal for an Order prohibiting a person carrying on an Employment Agency or Business on the grounds that they are unsuitable. Such an Order may last for up to ten years and breach of the Regulations may be cited by the Secretary of State as evidence that a person is unsuitable.

The new Regulations arose from a consultation paper in 1999 and came into force on **6 April 2004**.

Although the DTI, in its summary, state that the new Regulations are "simple, designed to be updated, streamlined versions of existing regulations". That would not appear to be borne out by the Regulations in the detailed guidance recently published by the DTI itself.

Whereas the 1976 Regulations were simple, concise and comprised only a relatively minor amount of red tape, the same cannot be said of their replacement.

2. Employment Agency or Employment Business?

The Employment Agencies Act 1973 categorises those involved in the recruitment industry as either "Employment Agencies" or "Employment Businesses". It is essential to identify which one of the two categories applies to your business, because which Regulation applies depends upon which business activity is being undertaken.

In general terms, an "Employment Agency" introduces work seekers to client employers for direct employment by them, usually known as permanent recruitment.

"Employment Businesses" actually engage those seeking work under contracts and supply them to client hirers on temporary assignments, where they will be under the hirer's supervision or control.

Those looking for both permanent and temporary work through either an Employment Agency or Business, are defined under the Regulations as "work seekers" and importantly this determination extends not only to individuals, but also to limited company contractors. Those who actually use the services to hire work seekers, either on a temporary or permanent basis, are described as "hirers".

Many organisations in the recruitment industry will fall into both the categories of Employment Agency and of Employment Business. The organisation must provide both work seekers and hirers with written terms, which make clear the capacity in which it is acting in relation to the services being provided. The practice of firms claiming to be operating on one basis to the work seeker whilst advising the hirer that they are operating on another, is specifically prohibited in the Regulations

3. General Restrictions

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Part 2 of the Regulations contains a number of restrictions aimed at both Employment Agencies and Businesses. Since the 1973 Act came on to the statute books it has always been unlawful to charge work seekers fees for finding them work. Agencies and Businesses occasionally circumvented this prohibition by charging fees for additional services such as CV writing, training, photographic services or the provision of protective equipment. It is unlawful to make the provision of work finding services conditional upon the work seeker using any of these ancillary services. If however, the work seeker voluntarily chooses to use those services, then the level of fees and the service to which they relate must be set out in the contract.

Regulation 6 restricts Agencies and Businesses from taking any detrimental action against a work seeker on the grounds that the work seeker intends to terminate their contract, although it is permissible to require the work seeker to provide a period of reasonable notice prior to termination. One of the most significant effects of this Regulation is to prohibit the inclusion of any restrictive covenants in the work seeker's contract.

4. Transfer/Introduction Fees - Reg 10

It has traditionally been common for Employment Businesses to charge transfer fees, where a work seeker that they have introduced and/or supplied is offered permanent work by the hirer or where the work seeker is supplied to the same hirer by a different Employment Business, such as where the hirer puts the work out to tender and requires workers to transfer to the books of another Employment Business. The Government was concerned that these transfer fees were being used unreasonably as a means of discouraging hirers from offering permanent work to temporary workers.

Where an Employment Business has introduced (but not actually supplied) a work seeker to a potential hirer, the Business may charge a transfer fee in it's contract with the hirer, provided it also offers the hirer the option of having that worker supplied to it for a specified extended period of hire, at the end of which the worker can transfer without any transfer fee becoming payable. There is no limit of time on this extended period of hire, but once offered the worker must be supplied for the entirety of that period.

Where a temporary worker has actually been supplied to a hirer and the hirer offers the worker a permanent position or alternatively requires him to transfer to another Employment Business, a transfer fee can be charged, provided the option of the extended period is given and the transfer takes place within either 14 weeks of the first assignment or within 8 weeks of the end of any assignment, whichever is the later. If however, there has been a break of more than 42 days between assignments, the later assignment will be taken as the first.

The third scenario envisaged by Regulation 10 is where the worker has been supplied and the hirer has introduced the worker to a third party, either another Agency or another hirer. In this situation a transfer fee can be charged to the original hirer provided the transfer takes place within either 14 weeks of the start of the first assignment or within 8 weeks of the end of any assignment, whichever is later. There is no obligation to offer the option of an extended period of hire.

5. Withholding Payment - Reg 12

The next significant change brought about by the Regulations is contained in Regulation 12 which prohibits an Employment Business from withholding or threatening to withhold any payment to a work seeker, in respect of work done, on the grounds that either the Employment Business has not received payment from the hirer; the work seeker has not produced a signed time sheet or that the work seeker has not worked for a period beyond that for which he is claiming payment. It is not uncommon to find Employment Businesses withholding payment in these circumstances.

It is important to note that the Business is not prevented from delaying payment to the work seeker while it makes reasonable enquiries to verify the number of hours actually worked. However, the DTI's guidance is that this period will usually be for a few days at the most.

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Businesses are recommended to review carefully their procedures, particularly in relation to the receipt of timesheets and to ensure sufficient safeguards are built into their contracts with hirers, to avoid the effects of this regulation.

6. Contents of Terms and Conditions

Part 3 of the Regulations deals with the need to obtain agreement to the terms of the contract, with both work seekers and with hirers. Terms in relation to both work seekers and hirers must be fully included in a single document, which should be provided as soon as possible. The clear purpose behind these Regulations is to try to provide some certainty, particularly in relation to the employment status of the individual work seeker. Regulation 15 requires Employment Businesses to include in its agreement, a term stating whether the work seeker is employed under a contract of service (i.e. employed), apprenticeship or a contract for services (self employed independent contractor). However it is clear from recent decisions of the Employment Appeal Tribunal and the Court of Appeal, that these regulations are unlikely to have the desired effect and it would be unsafe to assume that simply by describing a work seeker as an "independent contractor" in a "temporary worker agreement" will be sufficient to avoid the Courts treating the work seeker as an employee, either of the hirer or of the Employment Business.

7. Information Gathering and Obligations

Part 4 of the Regulations impose onerous obligations upon Employment Agencies and Businesses, with the objective of ensuring that work seekers are suited to the hirer's requirements and vice versa. For example, Agencies and Businesses must not introduce or supply a work seeker unless they have obtained information about the identity of the hirer, the nature of the hirer's business, the start date, likely duration, position, type of work, location, hours, experience, training and qualifications sought by the hirer, and in the case of an Agency minimum rate of pay and length of notice.

The Agency or Business must inform themselves about any health and safety risks known to the hirer and must ensure that a thorough risk assessment of the site, equipment and working conditions has been undertaken by the hirer, before the introduction takes place.

It is unlikely to be sufficient to rely upon a term in the contract with the hirer. We recommend the use of questionnaires for each vacancy that arises and that agencies or Businesses request copies of any documented risk assessments from the hirer.

Similarly the Agency or Business must confirm the identity of the work seeker and document the same, ensure that the work seeker has proper experience, training and qualifications and is willing to undertake the work.

Regulation 20 provides that no introduction may be made unless the Agency or Business has carried out checks to ensure that the work seeker and the hirer are aware of any legal or professional requirements that need to be satisfied before the assignment or engagement can take place. Evidence of the checks carried out should be retained by the Agency or Business to show compliance.

However, the regulation goes even further by requiring the Agency or Business to ensure that it would not be detrimental to the interests of either party for the placement to go ahead. This is more than a health and safety issue and the DTI guidance suggests that it could cover situations where the Business suspects the hirer is in severe financial difficulties or is engaged in immoral or illegal practices.

It is not difficult to envisage situations where workers are recruited to a Business that the Agency suspects is insolvent and the Agency is subsequently found liable for any wages or benefits that are not paid to the worker, when the company goes into liquidation. The DTI give no guidance on how agencies and businesses can discharge this obligation but as a minimum we recommend that credit checks are carried out on potential hirers before work-seekers are supplied to them.

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The Employment Business is also under an obligation to the hirer to inform them of any information that it becomes aware of that suggests that the work seeker is or may be unsuitable for the hirer's purposes.

In the case of an Agency, this obligation remains for a period of three months after the engagement of the worker. Regulation 22 provides additional requirements, where professional qualifications are required or where work seekers are to work with a vulnerable person including anyone under the age of 18, the elderly infirm or anyone in need of care and attention.

In addition to meeting all of the above requirements, the Agency or Employment Business must obtain copies of any relevant qualifications or authorisations the work seeker needs to take up the position, two references from persons not related to the work seeker, who agree to disclosure of their references to the hirer and confirmation that the work seeker is not unsuitable to work with vulnerable people. The Agency or Business must take reasonable, practicable steps to obtain this information and if they have been unable to comply fully, they must inform the hirer of this fact and of the steps that they have actually taken.

8. Special Situations

Regulation 26 provides the only circumstances in which an Employment Agency can charge a work seeker for a fee and this is limited to the occupations listed within schedule 3 to the Regulations, mainly comprising jobs in the entertainment and modelling industry.

In these situations the Agency is still prohibited from charging a fee to the work seeker if it is also charging the hirer who is engaging the work seeker. Any fee that the Agency does charge the work seeker must be payable out of the work seeker's earnings for work actually done, rather than as a signing-on fee. Where an Agency does receive money on behalf of a work seeker, it must place the money on client account and hold it on trust on the work seeker's behalf.

There are extensive rules within the Regulations governing the setting up and running of client accounts in such situations the details of which are beyond the scope of this guide.

Regulation 27 sets out minimum criteria for every advertisement an Employment Agency or Employment Business makes. Regulations 28 and 29 cover such matters as confidentiality and record keeping within the Business. In short, the records must be kept for a minimum of one year.

9. Sanctions

It is important to remember that a breach of these Regulations is actionable by the DTI as a criminal offence and may be prosecuted through the Criminal Courts. However, in addition to that, Regulation 30 provides that if the failure of an Agency or Employment Business to comply with these Regulations causes damage or loss to any other person, that person can sue the Agency or Business for any damages arising.

With this in mind it is absolutely essential that the information gathering requirements mentioned above are fully complied with and documented

10. Contact Us

We recommend that anyone, who thinks that they might be operating an Employment Agency or Employment Business, carry out a full review of their contracts and procedures and audit them against these Regulations.

At Gaby Hardwicke we are able to offer your business expert advice on all of the matters contained in this guide. Further details of our commercial lawyers are attached.

APPENDIX 1

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Contracts with Work Seekers - Matters to be Included

Whether operating as an Employment Agency or an Employment Business. The type of work that will be sought on the work seeker's behalf.

In The Case Of Employment Businesses:

Whether the work seeker will be employed under a contract of service (contract of employment) or apprenticeship or contract for services (independent contractor);

The terms of employment or engagement that will apply;

An undertaking that it will pay the work seeker for all work done regardless of whether it is paid by the hirer;

The length of notice the work seeker is entitled to give and entitled to receive;

The rate of pay or the minimum rate of pay reasonably expected to be achieved;

Intervals at which remuneration will be paid;

Amount of paid holiday to be given.

In the case of Employment Agencies permitted to charge a fee (e.g. the modelling and entertainment industry):

Full details of the work finding services to be carried out by the agency;

Details of the agency's authority, if any, to act on behalf of the work seeker;

Statement as to whether the Agency is authorised to receive money on behalf of the work seeker;

Details of any fee payable by the work seeker to the Agency; including method of calculation, description of service to which the fee relates, circumstances of any refunds and method of payment.

APPENDIX 2

Information to be Included in Contracts with Hirers

- Confirmation as to whether services are provided in the capacity of Employment Agency or Employment Business.
- Details of any fee payable to the Agency or Employment Business by the hirer, including amount or method of calculation, circumstances giving rise to refunds or rebates and scale of the same
- Procedure to be followed if the work seeker proves unsatisfactory, including time limits for notification of the Employment Business that the worker is unsatisfactory and what the Employment Business will do as a consequence.
- In the case of an Employment Agency, details of its authority to act for the hirer in entering into contracts with work seekers.

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