

Review

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Autumn 2011

Equality for agency workers?

The Agency Workers Regulations 2010 (SI 2010/93) ('The Regulations') are due to come into force on 1 October 2011.

The Regulations are intended to give effect to the European Temporary Agency Workers Directive (2008/104/EC) and aim to ensure that agency workers are treated equally compared to colleagues who were recruited directly by a hirer.

On 6 May 2011, the Government published guidance to the Regulations (a copy of which can be found at <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/a/11-949-agency-workers-regulations-guidance.pdf>). Although the guidance is a useful tool to interpret the Regulations, it is not legally enforceable. Therefore it will be the decisions made by Employment Tribunals and courts which will confirm details of the Regulations and how they will be enforced.

The Regulations will apply to agency workers who are either workers or employees. Courts in previous cases such as *Muschett v HM Prison Service* [2010] EWCA Civ 25 and *James v London Borough of Greenwich* [2008] IRLR 302 have held that because agency workers were not 'employees', they could not succeed in claims for unfair dismissal or discrimination against their hirers or agencies. However under the new Regulations agency workers who do not meet the relevant test for employees but are able to show they are 'workers' for the purposes of the Regulations, will be able to

claim for rights that previously they were not entitled to.

The Regulations will apply to any agency workers who:

1. have been supplied by a temporary work agency ('TWA') (i.e. an agency which supplies workers to hirers for temporary work) to work temporarily for and under the supervision and direction of a hirer; and
2. have a contract of employment with the TWA or any other contract with the TWA to perform work or services personally.

Who cannot claim?

Some workers may find they are unable to rely on the rights given in the Regulations because they do not fall within the definition of 'agency worker' given in the Regulations. For example, workers will not be able to rely on the Regulations if they do not have a contract with the TWA. This would seem to exclude a vast group of agency workers from rights under the Regulations. Guidance provided by the Government since the Regulations were published indicates that workers who find work via a TWA but only have a contract to perform services with a separate 'umbrella' company will still be able to claim rights under the Regulations. However, it should be noted that the Guidance to the Regulations is not legally enforceable.

The Guidance also does not address a situation where an agency worker finds work via a TWA but only signs a contract to provide services with their hirer. Workers or employees who are unable to make a claim under the Regulations should consider whether they can succeed in alternative claims. For example, if the agency worker is an employee of the hirer, they may be able to pursue a claim against the hirer under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) if they are being treated less favourably than other permanent employees of the hirer. An agency worker who is not an employee of a hirer but who is a worker for a hirer may be able to pursue a claim for discrimination if they are discriminated against by the hirer because of a protected characteristic (e.g. race or gender).

When can agency workers make a claim?

The Regulations do not apply retrospectively. Agency workers will not be able to claim any rights under the Regulations until 1 October 2011 and agency workers who were already on assignment prior to 1 October 2011 will only start to accrue their qualifying service from that date onwards.

The Regulations state that agency workers have the rights to equal treatment which are listed on the next page.

Rights from day one:

Agency workers must be able to access the relevant hirer's collective facilities and amenities.

For example, this right could cover access to the canteen, child-care facilities and transport services.

Guidance to the Regulations state that agency workers will not be entitled to some off-site benefits (e.g. subsidised off-site gym) or transport benefits (e.g. company car allowances or season ticket loan) under the Regulations. However, the Regulations do not prevent an employer choosing to offer these benefits to agency workers as well, even though they are not required to do so. Guidance to the Regulations suggests that hirers should provide agency workers with information about these facilities as part of their induction.

All agency workers must have access to information about the relevant hirer's job vacancies.

Hirers will be able to choose how to inform the agency workers of these vacancies. The Regulations state that advertisements for vacancies can be made via a general announcement in a 'suitable place' in the hirer's establishment. If there is no single 'suitable place', Guidance to the Regulations suggests that information could be provided to the agency workers as part of their induction when they first start work. The Guidance also notes that this right will not automatically apply if the hirer is making redundancies or restructuring.

Rights after 12 weeks qualifying service

Agency workers have a right to the same basic working and employment conditions had they been recruited directly by the hirer.



When will an agency worker have continuous service?

In order to calculate their qualifying service an agency worker must start from the date that they began their most recent assignment with a hirer. If an agency worker takes a break from work, this will be a break in their continuous service and if they have not completed 12 weeks of continuous service they will not qualify for the same basic working and employment conditions under the Regulations.

Generally, in order for the service to count towards qualifying service the agency worker must be working continuously in the same role for the hirer. However, in some limited cases, an agency worker will be able to take a break from work and on their return continue to add their new service from when they start work again to their previous service with the hirer as if they did not have a break. For example, an agency worker will be able to continue to build up qualifying service if they have a break in service for up to six weeks for any reason, or take a break of up to 28 weeks because they are unable to work (for example, due to illness or planned Christmas shutdown of the work place or industrial action).

In order to continue to build up 'continuous service', agency workers must work for the same hirer for at least 12 weeks. Generally, agency workers will not be able to build up qualifying service if they start a new role with the same hirer which is 'substantively different' from the role they did previously (e.g. the new role has different salary, location or hours). However, if the TWA

informs the agency worker in writing of the new duties, the agency worker will be able to build up continuous service even though they have begun a new role which is 'substantively different'.

Agency workers and their representatives would therefore be advised to request that whenever a new role with the same hirer is started the TWA provides written confirmation of the agency worker's new duties.

Agency workers and their representatives should also be wary of work placements which exceed 12 weeks but are structured in such a way so as to prevent agency workers from ever completing a qualifying period (for example, where an agency worker is moved back and forth every few weeks between two companies which are technically separate but in fact are both owned and operated by the same company). The Regulations state that if an arrangement is made with the intention to deprive the worker from receiving equal treatment, the agency worker will in fact be entitled to build up qualifying service even though, for example, they have been moved from one place of work to another and prevented from completing sufficient qualifying service to claim rights under the Regulations. In practice it may be difficult to successfully prove to a Tribunal that the hirer and/or TWA had such an intention, however if an agency worker is successful in proving that there was such an intention, Tribunals may make an additional award of up to £5,000 to the agency worker.

What terms and conditions are agency workers entitled to under the Regulations?

The Regulations aim to provide agency workers with the same or similar terms and conditions to other comparable non-agency workers or employees who were recruited directly by the hirer within an organisation, including, for example, terms relating to pay, working time and rest periods. However, Guidance to the Regulations states that, while basic pay should be the same for agency workers and other workers or employees of the hirer, some payments (for example payments in respect of some bonuses or sick pay) are excluded from the scope of the Regulations. So agency workers will not be able to claim for these payments.

Agency workers will also not be able to make any claim for the same or similar pay as other colleagues recruited directly by the hirer under the Regulations if the agency worker has a permanent employment contract with a TWA entered into before they began the first assignment with the hirer which states the agency worker is always paid between assignments when the agency worker is not working for a hirer.

Comparable (not better) rights

Guidance to the Regulations has specifically stated that agency workers will only be entitled to the same rights as any comparable colleagues and will not be given "enhanced" rights under the Regulations. For example, if there is a waiting list for access to childcare facilities, an agency worker will be entitled to join, but not jump, the queue. Similarly, if an agency worker does not have the required qualifications or experience that a permanent worker has for a vacancy within the hirer's business, they will not have an advantage in pursuing that job compared to a permanent worker.

Who can an agency worker compare themselves to?

To pursue an Employment Tribunal claim under the Regulations, an agency worker will have to prove that they were treated less favourably than another person who is;

- a non-agency employee or worker recruited directly by the hirer (i.e. not another agency worker); and
- works for and under the supervision and direction of the hirer, and
- was engaged in the same or broadly similar work as the agency worker and,
- is based at the same establishment as the agency worker (or, if no individual is based at the same establishment, another individual who works or is based at a different establishment and satisfies all other requirements) and
- (if relevant) had a similar level of qualifications or skills to the agency worker

How can an agency worker make a claim for breach of the Regulations?

If there is a breach of the Regulations, an agency worker who is entitled to rights under the Regulations may bring a claim in the Employment Tribunal.

Who can an agency workers claim against?

The right to basic working conditions

An agency worker can sue the TWA if their right to the same basic working and employment conditions as other workers or employees recruited directly by the hirer has been breached.

The right to access to facilities, amenities and information about job vacancies

If an agency worker has been restricted in their access to facilities, amenities or information about job vacancies compared to other workers or employees recruited directly by the hirer in breach of the Regulations, the agency worker can sue the hirer. Given the potentially complex dispute that may arise, if in doubt agency workers should consider pursuing proceedings against both hirer and TWA from the outset.

[Please read our further addendum to this article at the end of this newsletter](#)



Does a Hirer or TWA have any defence to a claim?

A TWA will have a defence to a claim by an agency worker for similar terms and conditions compared to comparable non-agency workers or employees recruited directly by the hirer if it can show that it took "reasonable steps" to obtain relevant information needed to assess whether the relevant regulations had been complied with from the hirer about its basic working and employment conditions and, when it received such information, acted "reasonably". If such a defence is successful, an agency worker may be able to pursue a claim against their hirer for breaches of those rights. A hirer may have a defence to a claim by an agency worker to a right to access facilities but only if the hirer can prove that the less favourable treatment can be objectively justified by the hirer as a necessary and appropriate way of achieving a genuine business objective.

The Guidance to the Regulations notes that increased cost "may" be a factor taken into account by hirers, however it is "unlikely" that a hirer will be able to rely on cost alone to justify different treatment of agency workers. The Guidance also recommends that hirers should consider offering agency workers access to some facilities, rather than excluding them altogether. However, it remains to be seen whether hirers will follow these recommendations and whether cost alone will be upheld by Employment Tribunals as sufficient justification under the Regulations.

Time limits

The time limit for presenting claims to a Tribunal will usually be three months from the date when the agency worker's rights under the Regulations were breached.

Remedy

If an agency worker is successful in their claim, the Tribunal may make a declaration, order payment of compensation to the agency worker and/or make recommendations for the hirer or TWA to take different action in the future.



When is it fair to dismiss an employee for refusing to take a pay cut?

In the recent case of *Garside and Laycock Ltd v Booth* UKEAT/0003/11/CEA the Employment Appeal Tribunal ('EAT') considered whether it was unfair to dismiss an employee who had refused to accept a pay cut.

The facts of the case were that Garside and Laycock Ltd was a company suffering from economic difficulties. As a result, the company decided that it needed to cut the salary of employees by five per cent. Mr Booth, an employee of Garside and Laycock Ltd, refused to agree to any reduction of his salary. Garside and Laycock Ltd dismissed Mr Booth for failing to agree to the cut in pay and Mr Booth submitted a claim to an Employment Tribunal for unfair dismissal.

The Employment Tribunal held that it was reasonable for Mr Booth to try and maintain his terms and conditions and therefore decided that he had been unfairly dismissed. Garside and Laycock Ltd appealed against this decision to the EAT.

The EAT upheld the appeal and noted that the Employment Tribunal was wrong to consider whether it was reasonable for Mr Booth to reject the pay cut. Instead, the correct question was whether Garside and Laycock Ltd were reasonable in dismissing Mr Booth for not accepting the reduction in his salary. The EAT ordered the claim should be referred to another Employment Tribunal, to consider all the relevant facts, apply the correct test and finally decide whether Mr Booth had been unfairly dismissed.

When deciding similar cases in future, the EAT said that Tribunals must consider whether in all the circumstances the employer acted reasonably or unreasonably in treating the refusal to accept a pay cut as a sufficient reason for dismissing the employee. When applying this test to the particular facts of a case, Tribunals must consider all of the circumstances and whether the dismissal was 'in accordance with equity'. This may include analysing, for example, the size and resources of the employer and whether the employer has applied its rules 'fairly' (for example by asking all of its workforce including senior managers to take a pay cut as well).

In future negotiations about proposed pay cuts, employees and their representatives may find it useful to draw an employer's attention to this case when challenging a proposal to cut pay as it provides a basis on which to argue about how the pay cut is being applied and whether this is 'in accordance with equity'.

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Additional Rights for Agency Workers

In the last ELR, we reported on the new rights for agency workers brought in by the Agency Workers Regulations 2010. Other key employment rights that are already available to agency workers who are not employed by the person they work for are detailed below.

Equality Act 2010

The Equality Act 2010 gives rights to contract workers who are discriminated against by the person they work for even if they are not employed by them but by an agency who supplies them to the person they work for. This applies to discrimination, harassment and victimisation (as defined by the Equality Act in relation to a protected characteristic). It also applies to the duty to make reasonable adjustments in disability discrimination cases.

National Minimum Wage

Agency workers are entitled to receive the national minimum wage under the National Minimum Wage Act 1998. Agency workers can pursue claims for breach of the National Minimum Wage Act 1998 against the person who is responsible for paying them and/or the person who actually pays them.

Equal Pay

The Equality Act 2010 gives agency workers who have a contract of employment or a contract to do work personally the right to make a claim against the person with whom they have that contract for equal pay compared to someone of the opposite sex doing equal work in the same establishment.

Family Friendly Rights

Pay and leave

If an agency worker is an employee and an "employed earner" for National Insurance Contributions purposes, they will be entitled to claim statutory maternity, paternity or adoption pay from the person they work for provided they meet certain qualifying conditions.

Although agency workers who are not employed are not entitled to take statutory maternity leave, if they are treated unfavourably because they have taken such statutory maternity leave this may give rise to a claim for discrimination against the person they work for under the Equality Act 2010 (see above).

Pregnancy and maternity discrimination

Agency workers who are treated less favourably because of or for a reason related to pregnancy or maternity (e.g. if they are not being allowed to return to work because of pregnancy) may be able to make a claim for discrimination under the Equality Act 2010 (see above).

Flexible Working

Flexible working rights do not apply to agency workers, however if a request for flexible working is made and is refused without objective justification, this may entitle the agency worker to pursue a claim for indirect discrimination – see notes on the Equality Act above.

Working Time

Agency workers may be entitled to protection under the Working Time Regulations 1998 (SI 1998/1833) if they satisfy the requirements of those Regulations.

If the agency worker is employed, they may be able to pursue a claim against their employer for breach of the regulations. If the agency worker is not employed, they may pursue such a claim against the party who usually pays them or the party that has specific responsibility for paying them, whether that is the person they work for or the agency.

Whistleblowing

An agency worker who is supplied by an agency to the person who they do the work for and has been given a contract, the terms of which are substantially set by the agency or the person they work for, will be entitled to the same protection under the Employment Rights Act 1996 against detriment because of whistleblowing provided they meet the relevant criteria for such protection within that act.

Data Protection

Agency workers who have personal data held by the person they work for or the agency as 'data controllers' for the purposes of the Data Protection Act 1998 are entitled to protection under the Data Protection Act 1998.

Statutory Sick Pay

If an agency worker is an 'employed earner' for National Insurance purposes, the worker may be entitled to be paid statutory sick pay under the Social Security Contributions and Benefits Act 1992 and Statutory Sick Pay (General) Regulations 1982 (SI 1982/894) by the person they work for.