

More Holidays and Agency Workers



In this Update, we examine some significant developments since the beginning of the year regarding annual leave entitlement under the Working Time Regulations 1998 as amended (WTR) and the employment status of agency workers.

Statutory Annual Leave

On 11 January, the DTI announced its proposals to amend WTR so as to increase the statutory annual leave entitlement from 4 weeks by an additional 8 days of bank/public holidays. There is a further round of consultation on the proposals with a closing date of 13 April 2007.

The principal driver from the Government is that currently, bank/public holidays are not statutory requirements and can be included in the calculation of the minimum 4 weeks annual leave entitlement under WTR. The Government is concerned that whilst many employers do give their staff bank/public holidays in addition to WTR rights, there is no statutory right to this effect. It is further concerned that according to its research, generally the lowest paid workers tend to have bank/public holidays included within their WTR rights.

A significant amount of detail is open to consultation and employers are encouraged to review the DTI proposals and respond with their views and observations.

The current allocation under WTR is expressed in weeks ie 4. The

proposal is to increase the statutory entitlement to 5.6 weeks but further to have a *cap* on the overall statutory entitlement of 28 days per year. This will be of significance to those employees who work more than 5 days a week and furthermore will be of importance to offshore employers, of which there is further comment below. The consultation paper gives the example of a part time member of staff working 2.5 days per week. Their current entitlement to 4 weeks annual leave amounts to 10 days. Increasing that entitlement to 5.6 weeks, therefore increases the statutory right to 14 days per year. On the other hand, taking the example of an employee who works 6 days per week, their current entitlement is to 24 days holiday ie 4 x 6. On the basis of the increase to 5.6 weeks, this would normally equate to 32 days, however, the entitlement is capped at 28 days.

The Government proposes to phase in the implementation of the additional leave in 2 steps. The first is to increase the entitlement to 4.8 weeks with effect from 1 October 2007 equating to a maximum of 24 days and then to 5.6 weeks or a maximum of 28 days with effect from 1 October 2008. Views are sought on that proposal.

In addition, views are also sought on whether there should be an option to carry over some or all of the additional 8 days leave from one holiday year to the next and secondly, whether employers should be given the option to buy out some of the additional leave by making a payment in lieu. These are considered to be options on the basis that the Government's proposals are not constrained by the European Directive as they go beyond European requirements.

For offshore employers, these proposals will potentially add to the current trade union claims, in terms of which they argue that the 4 weeks entitlement to WTR must come from scheduled offshore working time. The employers submit that any annual leave entitlement under WTR can lawfully be discharged during the field break. Separate updates have been distributed in respect of that matter. It is likely that a hearing on the merits regarding these cases will be fixed during 2007. One of the key questions to be answered by the Tribunal and Appeal Courts is whether annual leave entitlement under WTR can or cannot be discharged during normal field break arrangements. There is no indication from Government that the additional proposals will not apply to offshore workers. However, there are two significant points. Firstly, the changes here do not provide any further clarity on the issue of whether annual leave under WTR can be discharged during the field break. That will require to be determined through the Tribunal and Court process. Assuming that the employers' position is correct that WTR rights can be discharged in this way, for those on an equal time rotation, there will still be plenty of time available in the field break to take account of 8 days additional leave. Furthermore, it is interesting that the proposal is subject to an overall capping of 28 days. The current trade union position under WTR is that the 4 weeks of annual leave for an offshore worker amounts to 28 days. For those on an equal time rotation, the employers argue that it is 14 days. If the capping is to remain in the legislation, this would prevent the trade union argument increasing the entitlement for offshore workers to 36 days.

Agency Workers

The thorny issue of the employment status of agency workers has been the subject of previous updates. Readers will be aware that following upon a series of Court of Appeal decisions, there is a greater likelihood that end users of agency workers will be deemed to be the employer on the basis of the establishment of an implied contract of employment. The latest case to examine the issue, *Cable & Wireless plc v Muscat 2006 IRLR 354*, expressly approved the previous decision in *Dacas* which had been subject to much criticism. In particular, the Court of Appeal stated that the longer the agency worker was engaged to work for the end user, the greater the likelihood of there being an implied contract of employment.

The EAT has now for the first time given a decision examining *Cable & Wireless* which seeks to significantly water down its effect. The case is *James v Greenwich Council [2006] UK EAT 6/06* in which the EAT President, Mr Justice Elias, gave the judgement. The EAT in this case sought to give specific guidance to Tribunals as to when it would be permissible to imply such a contract of employment.

Firstly, it was stated that where the arrangements between the agency worker and end user genuinely reflect the actual “working relationship”, it would be rare for there to be evidence to justify the implication of a contract of employment. The evidence would need to show that the worker was working pursuant to “mutual obligations” with the end user and that those obligations were wholly incompatible with the agency arrangements. It was stated that the type of situation where it would be more readily open to a Tribunal to imply such a contract was in the circumstances in *Cable & Wireless*. In that case, the individual had previously worked as an employee and the agency arrangements were then superimposed. Crucially, the EAT in this case disagreed with the Court of Appeal in *Dacas* to the effect that the passage of time increases the prospect of the implication of a contract of employment between the worker and the end user.

The case itself concerned a worker, Ms James, who was supplied through an employment agency to work for Greenwich Council. She worked for them under these arrangements exclusively for a period of 5 years. The Tribunal found that in a number of respects, there were various terms in the contracts of employment of individuals directly employed for Greenwich Council which did not apply to Ms James. These included disciplinary and grievance procedures, sick pay and holiday pay. In the event of sickness, she provided medical certificates to the agency and not the Council. The Tribunal, having heard the evidence, determined that there was no implied contract of employment between Ms James and the Council and that her supplies to the agency reflected the contractual arrangements in place between the Council and the agency on the one hand and the agency and Ms James on the other. The EAT agreed with that decision and dismissed an appeal by Ms James.

Whilst this case will be welcome news to employers, it should be treated with some caution. The thrust of the case was to the effect that it will be difficult for agency workers to imply a contract of employment with the end user but some of the comments made are inconsistent with those from the Court of Appeal. There will no doubt be further case law and we will keep you advised as to such developments. Interestingly, all judges in recent cases have been calling for Parliament to make legislative changes to cover agency workers which is also a possibility.

We would also strongly recommend that end users do obtain an acknowledgement in writing from agency workers that they are being permitted to carry out work for the end user but this is not pursuant to any contract at all, between the end user and agency worker. This should assist in the argument that a contract of employment with the

end user should not be implied.

A further useful case from the EAT on this topic is *Cairns v Visteon Limited [2006] UK EAT 494/06*. The case concerned an agency worker who worked for an end user for a period of 7 years. However, for the majority of that time, the agency worker was directly employed under a contract of employment with the agency. When the arrangements came to an end, the agency worker brought a claim for unfair dismissal against the end user. A preliminary point arose as to whether the agency worker was an employee of the end user. The Employment Tribunal held that because the individual was directly employed under a contract of employment with the agency, it was not necessary to imply a contract of employment between him and the end user. The EAT agreed with the Tribunal’s decision and dismissed the appeal. The EAT did not expressly rule out the possibility of the concept of what is known as “parallel contracts of employment”, in terms of which, an individual could be employed by two separate employers at the same time for the same work. However, in the circumstances of this case where the claimant was openly employed by the agency as an employee, the EAT agreed that the requirement to create such a parallel contract of employment was not there. The individual already had a potential remedy against the employment agency for unfair dismissal. The fact that the chances of establishing that claim successfully were greater against the end user, did not justify the implication of a contract of employment.

This case is of significant importance to businesses who enter into sub contract arrangements. Where in such sub contracts, the workers are openly employed by the sub contractor under contracts of employment, this should lead to the conclusion that they will not be held as employees also of the principal or end user. We would recommend that in such contracts, the sub contractor warrants that its workers are employed under contracts of employment and produces evidence to this effect if required. Ideally this should be backed up by an indemnity.

If you would like to discuss any aspect of this Update further, please contact one of our Team members being:-

Sean Saluja (SASaluja@paul-williamsons.co.uk)
 Margaret Gibson (MMGibson@paul-williamsons.co.uk)
 Geoff Clark (GXClark@paul-williamsons.co.uk)
 Caroline Law (CGLaw@paul-williamsons.co.uk)
 Linda Beedie (LAJBeedie@paul-williamsons.co.uk)