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earwiggin : employment law update

STATUS OF CASUAL WORKERS

Little v BMI Chiltern Hospital

The issue of the employment status of casual workers has produced more than its fair share of employment tribunal claims over recent years. The nature of casual work is that the employer is not obliged to offer work and the worker does not have to accept it. Although this lack of mutuality of obligation often prevents the creation of an employment relationship, there have been a number of cases where individuals who worked on a casual basis for a single employer on a series of successive engagements were found to be employees. However, a recent decision by the EAT suggests that there may be scope for employers to avoid such a finding.

Mr Little worked at Chiltern Hospital as a Bank Theatre Porter for over 15 years. Although his written agreement stated that there was no guarantee that he would be offered work and that he had the right to refuse any work offered to him, he generally worked 20-30 hours per week and he carried out the same work as two full-time theatre porters who were employed under contracts of employment. When the hospital dispensed with his services, Mr Little brought a claim for unfair dismissal. The hospital argued that he was not an employee and was therefore not eligible to bring such a claim.

The Employment Appeal Tribunal accepted the hospital's argument and dismissed Mr Little's claim. According to the EAT, what did it for Mr Little was the fact that the hospital could and did send home bank workers halfway through a shift when they were no longer required without the need to pay them for the remainder of the shift. This meant that there was no mutuality of obligation during each individual engagement and therefore there could be no contract of employment.

In light of this decision, employers who engage casual workers on a regular or long-term basis (and who want to minimise the risk of them acquiring employment status) may wish to consider reviewing their casual contracts to incorporate a specific right to send the casual worker home (without pay) if they are not required at any given time. Provided that such a provision is not a sham (e.g. because there is never any intention that it would be operated in practice), it appears that it will be sufficient to avoid the creation of an employment contract.

PATERNITY LEAVE

Government shelves proposal for extended paternity leave

Lord Mandelson has recently confirmed that the proposals to extend paternity leave to enable fathers to take up to 6 months leave have been put on hold due to the continuing difficult economic conditions.

In 2005, Alan Johnson (when he was Trade Secretary) announced a plan to allow mothers and fathers to share a year of parental leave. The proposal was that mothers who returned to work early would be able to transfer their outstanding maternity leave and pay entitlement to the child's father, effectively enabling the father to take up to 6 months' paid paternity leave.

The fact that the proposals have now been put on hold mean that we are unlikely to see any change to maternity or paternity rights this side of the next election (whenever that may be).

SICKNESS ABSENCE

New "Fit Note" revealed

The Government has recently announced details of the new "fit note" which will replace the current MED3 doctor's certificate. It is intended that the new fit note will help to reduce the sick note culture - instead of giving doctors a simple choice between fit and unfit, it will require the employee's G.P. to give suggestions as to how the individual can be eased back to work. It is hoped that this will help employees return to work rather than drift into long-term sickness absence.

The design of the new fit note will now undergo a 12-week consultation period with a view to the new systems being introduced in the Spring of 2010. The Government has indicated that the goal is for the new fit notes to be computer-generated, replacing the current handwritten version.

WORKPLACE STRESS

New guidance published

Already one of the highest causes of sickness absence, stress related illnesses are predicted to increase as a result of the current recession.

In an effort to provide employers with practical guidance on how to reduce stress levels at work, the Chartered Institute of Personnel and Development has joined forces with the Health & Safety Executive and Investors in People to publish guidance on the management of workplace stress.

The advice is split into four categories: (i) Managing Emotions & Having Integrity; (ii) Managing & Communicating Existing & Future Work; (iii) Reasoning/Managing Difficult Situations; and (iv) Managing the Individual within the Team.

With all due respect to the nice people who wrote the guidance, it appears to us that it is nothing more than a statement of the blindingly obvious. Nevertheless, if you are interested in reading it, it can be accessed here:

http://www.cipd.co.uk/subjects/health/stress/_Instrswrk.htm.

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