

## EMPLOYMENT LAW UPDATE

### AUTUMN 2011

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## INTRODUCTION

In this ever evolving area of law there are always new hurdles for employers to negotiate, emanating from European and domestic legislation and case law. It is crucial that employers keep abreast of developments and tailor their workplace practices accordingly in order to reduce the scope for disputes. In this Update we set out short summaries of some of the most important recent developments.

Please contact Charlotte Davies, Katy Carr or your usual Ince contact if you have any queries or would like to discuss these or any other employment law matters in more detail.

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## LEGISLATIVE CHANGES

### The Agency Workers' Regulations 2010

From 1 October 2011, agency workers are entitled to equal treatment in relation to basic employment conditions, such as pay, working time, night work, rest periods and holidays, after they have worked in a role for 12 weeks. They are also entitled to the same access to job vacancies and collective facilities and amenities, such as staff canteens, childcare facilities and transport services, as permanent members of staff from the first day of their assignment.

From an employer's perspective, the regulations create a tension between the previous flexibility of hiring temporary workers for an indefinite period and the vesting of automatic rights in favour of a worker as if they had been hired as an employee. The changes may make it less attractive for employers to engage agency workers. Nevertheless, there are still some options available to employers who wish to hire temporary workers without the risk that they will incur liabilities, for example they can ensure that temporary workers are never retained for longer than the 12 week qualifying period or increase the use of self-employed workers or those employed under managed service contracts (both of which are outside the scope of the regulations).

### Maritime Labour Convention 2006

The Maritime Labour Convention 2006 ("MLC") aims to achieve worldwide protection for all seafarers in areas including conditions of employment, health protection, medical care, welfare and social security protection, and accommodation.

In addition to consolidating 68 existing maritime labour instruments, updating them and introducing new requirements in certain areas, individual seafarers' terms of employment will be required to be in a single document (a seafarer's employment agreement, or "SEA"), rather than in a crew agreement and a separate employment contract as is presently the case. Seafarers will also have the benefit of a formal complaints procedure in respect of their employment (similar to a 'grievance procedure' on the UK mainland).

At the time of writing, the MLC has already been ratified by 15 countries including the major shipping nations of the Marshall Islands, Panama, and Liberia. The MLC is likely to come force in the UK as early as October 2012.

In the meantime, the Maritime & Coastguard Agency ("MCA") has begun publishing draft guidance on its website about how ship-owners can start preparing for compliance with the new rules in advance, and is expected to continue updating the guidance over the coming months.

### Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011

These regulations came into force on 1 April 2011. Previously seafarers who applied for, or were engaged to, work outside Great Britain could be remunerated differently from those working in Great Britain on the grounds of nationality. The

European Commission requested that the UK remove this exception to race discrimination law, which it considered breached the obligation to treat EU workers in the same way as national workers. Under regulation five, differential treatment in pay due to nationality is lawful only where a person applied for, or was recruited to, work as a seafarer outside Great Britain and is not a British Citizen or a national of another EEA state.

### National Minimum Wage Increases

From October 2011, the standard adult national minimum wage increased from £5.93 to £6.08 per hour.

## NEWS

### Chancellor's Announcement on Unfair Dismissal

On 3 October 2011 the Chancellor, George Osborne, stated during a speech at the Conservative Party Conference that the qualifying period for unfair dismissal claims is to be increased to two years. A Department for Business Innovation & Skills press release subsequently confirmed that the change will take effect from 6 April 2012. No further details or information on transitional provisions has been given. However the press release estimates that there will be a reduction in unfair dismissal claims of about 2,000 per year, saving businesses some £6 million per year.

## RECENT CASES OF INTEREST

### Employment Status

#### *Autoclenz v Belcher & Ors*

The Supreme Court has upheld a Court of Appeal decision that in determining employment status, tribunals and courts should look at the reality of the relationship between the parties and disregard express contractual terms which are inconsistent with that relationship.

The case concerned the employment status of car valeters engaged by Autoclenz Limited. Their contracts described the valeters as self-employed, contained a substitution clause, and expressly provided that the parties had no obligation to work or be provided with work, all of which terms indicated that they were not employees of Autoclenz. They paid their own tax and had to purchase their own uniforms, materials and insurance. HMRC had also concluded that the valeters were self-employed for tax purposes.

The central issue was in what circumstances an employment tribunal or court could disregard terms of a contract on the basis that they do not reflect the actual agreement between the parties. The Court expressly approved previous authorities which held that the tribunal/court should adopt a test which focuses on the reality of the situation, rather than any common intention of the parties to mislead HMRC. The focus of the enquiry must be to discover the actual legal obligations of the parties from inception throughout the course of the contract. This involves examination of all the evidence, including the written terms, evidence of how the parties conducted their relationship and what their respective expectations were.

The decision confirms that in determining an individual's status, employment tribunals and courts can set aside express contractual terms which are inconsistent with the reality of the relationship of the parties. The decision also illustrates that it is technically possible for an individual to be self-employed for tax purposes but an employee or worker under employment law. Consequently employers should be very careful that if workers are intended to be self-employed, they do not act in a way that is inconsistent with that relationship, otherwise they risk an inference that there is an employment relationship with all the obligations that entails.

## Arbitrators Not Employees For Discrimination Purposes

### *Jivraj v Hashwani*

The parties in this case entered into a joint venture contract including an arbitration agreement providing that any dispute should be determined by three arbitrators who should be members and high officeholders within the Ismaili community. There followed a dispute over the appointment of a non-Ismaili arbitrator and Mr Hashwani, who appointed that arbitrator, argued that the arbitration clause, though lawful when agreed, had been rendered unlawful and void under the provisions of the Employment Equality (Religion or Belief) Regulations 2003 ("the regulations") which make it unlawful for an employer to discriminate against a person on the grounds of religion or belief, save where being of a particular religion or belief is a genuine occupational requirement.

At first instance, Steele J held that arbitrators were not employed within the meaning of the regulations. He also found that even if the appointment of arbitrators did fall within anti-discrimination law, the requirement that arbitrators be Ismaili was a genuine occupational requirement which it would be lawful to apply.

The Court of Appeal overturned this decision, finding that the appointment of an arbitrator involved a contract for the provision of services which constituted a contract personally to do any work, thus falling within the definition of employment. Therefore the arbitration agreement fell foul of the regulations and was discriminatory and void unless the requirement was a genuine occupational requirement for the job. On this question, the Court of Appeal held that being a member of the Ismaili community was not a genuine occupational requirement because the arbitration agreement provided that the arbitrators should determine the dispute in accordance with English law.

On appeal to the Supreme Court, it was held that arbitrators are not employees within the meaning of the regulations. This conclusion made it unnecessary to consider the question of genuine occupational requirement although Lord Clarke did comment briefly that Steele J was justified in concluding that this could be regarded as a genuine occupational requirement as it was both legitimate and justified.

This is a welcome clarification of the application of anti-discrimination law and the nature of the arbitrator's role. The Supreme Court provided important clarification of the personal scope of UK employment equality law. As well as the

ramifications for those appointing arbitrators, this is also a welcome decision for London as a seat of international arbitration.

## Discrimination and Harassment

### *Grant v HM Land Registry*

In this case the Court of Appeal held that an employee who told his colleagues that he was homosexual had not been discriminated against or harassed on the grounds of sexual orientation.

Mr Grant worked for HM Land Registry at its Lytham office and during his employment told his colleagues that he was homosexual. He was subsequently promoted to a post in Coventry and wished to tell his colleagues of his sexual orientation in his own time. However, his new line manager made references to his homosexuality to his new colleagues. Mr Grant brought a claim for sexual orientation discrimination and harassment.

The Tribunal found that six incidents involving the line manager amounted to direct sexual orientation discrimination. The Land Registry appealed and the Employment Appeal Tribunal found that the Tribunal had failed to have regard to the fact that Mr Grant had been open about his homosexuality in Lytham and the Coventry supervisor knew this, so that her references were not necessarily acts of discrimination. The case was remitted back to the Tribunal to reconsider the six complaints. Mr Grant appealed.

The Court of Appeal held that the crucial fact was that Mr Grant had chosen to reveal his sexual orientation to his colleagues at Lytham. This was not a secret and at any time one of the Lytham employees could have revealed the position to one of their Coventry colleagues on the assumption that Mr Grant would have no objection. In light of that fact, there cannot have been any intention to harass Mr Grant by revealing his sexuality. However, the Court accepted that the fact that an employee has come out does not mean that subsequent remarks or references to their sexuality cannot amount to discrimination or harassment. This will depend on the facts of each case, including to whom remark was made in what terms and for what purpose.

If you wish to discuss any of the issues raised above or if you would like advice and assistance with any employment issues please contact: [Charlotte Davies \(charlotte.davies@incelaw.com\)](mailto:charlotte.davies@incelaw.com), [Katy Carr \(katy.carr@incelaw.com\)](mailto:katy.carr@incelaw.com) or [Nick Wilcox \(nick.wilcox@incelaw.com\)](mailto:nick.wilcox@incelaw.com).

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