CARSON McDOWELL

Employment Law Update.

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Agency Workers Regulations: please mind the gap?

The Agency Workers Regulations (Northern Ireland) 2011 have been in force now for almost three years and, as those businesses which regularly use agency workers and temps will know, the regulations have undoubtedly increased the complexity and (often) the cost of using temps.

The regulations apply to the tripartite relationship between "temporary work agencies", agency workers and hirers (or end users). If the regulations are engaged, then they give the agency workers certain rights, principally:

- "Day 1 rights" (access to collective facilities and amenities like staff canteens etc and details about the hirer's vacancies); and
- "Week 12 rights" (right to the same basic working and employment conditions as the hirer's direct recruits).

However a very recent Employment Appeals Tribunal decision in GB (which has identical regulations – the Agency Workers Regulations 2010) appears to have driven a coach and horses through the protection afforded by the regulations, by adopting a narrow interpretation of who counts as an "agency worker".

The regulations define an "agency worker" as a person who is:

- supplied by a temporary work agency; and
- **works temporarily** for and under the supervision and direction of the hirer; and
- has a contract with the temporary work agency which is either a contract of employment with the agency or any other type of contract to perform work/services personally.

The issue in the case (**Moran v Ideal Cleaning Services Ltd and Celanese Acetate Ltd**) was on the meaning of "works temporarily", for the purpose of deciding whether a person is an "agency worker". A group of cleaners were employed by an agency (Ideal Cleaning) and supplied to the agency's client, the hirer (Celanese). The cleaners worked for Celanese for between 6 and 25 years and the arrangements between the agency and the client/hirer had no specific end date – they were open ended. The cleaners were eventually made redundant by Ideal Cleaning, after Celanese reduced its cleaning budget. The cleaners then brought claims against both Ideal Cleaning and Celanese, arguing that their rights under the Agency Workers Regulations 2010 had been breached.

The tribunal decided that the Agency Workers Regulations 2010 (the GB regulations, identical to the NI regulations) were not applicable, because those regulations only apply to the supply of "temporary" agency workers. In this case, because the cleaners were supplied on an open ended basis, the tribunal said that the cleaners did not meet the definition of agency workers. The case was appealed to the Employment Appeal Tribunal (EAT) which agreed with the tribunal's conclusion.

If the EAT decision is correct, this means that it appears possible to circumvent the regulations by engaging/supplying all agency workers on a "non-temporary" basis – i.e. on open-ended "rolling" assignments terminable on notice. That leads to the conclusion that, provided the open ended arrangement is genuine, and provided that is properly documented in the contractual arrangements between the temporary work agency and the hirer, there is a huge gap in the protection for agency workers. In its judgment, the EAT specifically acknowledged this but said that it was not for the courts to "fill the gap", but for the legislators.

For the meantime, it appears that a significant proportion of "agency workers" might not therefore have the protections they thought (or indeed, that the hirers and temporary work agencies are paying for), and in light of that conclusion we recommend that our clients look again at their contracts with their agency suppliers.

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