

Welcome to your Autumn 2005 edition of Spotlight.

In this edition, you will find a number of articles relating to employment law and its consequences for you, as an employee or as an employer in Northern Ireland. In addition, you will find some useful websites in relation to a number of areas of employment law to help support you in both your personal and business dealings.

If you have any queries on how any of the issues affect your particular circumstances, feel free to contact me or one of my colleagues on 028 9023 4629.

Dan Fitzpatrick, Partner



USEFUL EMPLOYMENT LAW SITES

www.delni.gov.uk

Department for Employment and Learning Northern Ireland

The site of the Department for Employment and Learning contains publications on employment rights and industrial tribunals.

www.cipd.co.uk

Chartered Institute of Personnel and Development

The site of the Chartered Institute of Personnel and Development.

www.dti.gov.uk

Department of Trade and Industry

The DTI site contains publications, fact sheets on employment rights and employment legislation, some of which also applies to N Ireland.

www.dwp.gov.uk

Department of Work and Pensions

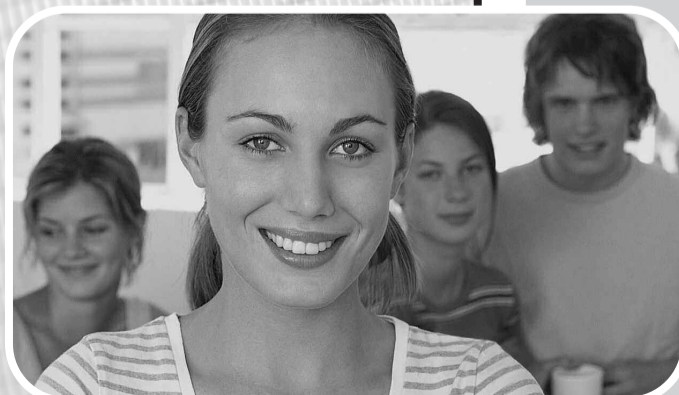
Department of Work & Pensions is committed to providing people of working age, pensioners and children with the advice and help they need to

achieve financial independence and make the most of life. General enquiries about benefits, pensions or allowances are best dealt with by contacting your nearest Social Security office.

www.fsb.org.uk

Federation of Small Businesses

The UK's leading political lobby group promoting and protecting the interests of all whom own and/or manage any small or medium sized business in the UK. The FSB provides a 24-hour legal advice line to its members on all aspects of employment including answering questions on Statutory Sick Pay and other issues on absence leave.



THE AGENCY DILEMMA... WHO EMPLOYS WHOM?

Advice for clients who employ agency workers...

If you use employment agencies or plan to use them in the future, there are a number of decisions of the Court of Appeal and the Employment Appeals tribunal (EAT) over the last year which has had a significant impact on this area of employment law.

A high profile case was that of *'Dacas V Brook Street Bureau (UK) Ltd'*, where Mrs Dacas was a cleaner engaged by the employment agency, Brook Street and working for Wandsworth Council.

Although she was not 'directly' employed by Wandsworth, she worked for them as a temp through Brook Street for more than four years. She was claiming for unfair dismissal.

'To be employed by nobody is 'simply not credible'

The Employment Tribunal followed a number of previous decisions and found that Mrs Dacas was not an employee of Wandsworth because there was no direct contractual agreement between them and therefore no contract of employment.

However, they also held that she was not an employee of Brook Street. Due to their lack of control over her activities, neither could they be deemed as her employer. Her claims for unfair dismissal initially failed against both the agency and the end user.

However, when Mrs Dacas later appealed against the finding, the Court of Appeal said that for an agency worker such as Mrs Dacas to be employed by nobody is 'simply not credible'.

'An Implied Contract of Employment'

It concluded that the fact an individual is hired through an employment agency does not mean they can avoid an employment relationship with the end user. As a result of this case, The Court of Appeal states that you have to consider the possibility of there being an *'implied contract of employment'* between the agency worker and the end user, even if the worker's contract with the supplier employment business states that there is no employment relationship between the worker and the end user.

The Court of Appeal also cited that the **first twelve months** of an agency agreement is a crucial period in determining if the worker became an employee of the end user.

In the light of such cases, it is almost inevitable that an employment tribunal will *'imply a contract of employment'* between a temporary worker and the end user client where the assignment is **long term** and where a worker is to all intents and purposes **treated as an employee** within the client's organisation.

If you use agency workers, ensure you take the following key points into consideration:

- Ensure you fully understand written contracts and agreements before you sign
- Consider the possibility of an implied contract between the worker and the end user
- Examine the day to day activities of the agency worker at the end user's premises and the relationship between the two parties

In the interest of consistency and predictability, employment tribunals, professionals and employers need clear guidance as to the issue of the employment status of agency workers.

For further information on employment law or if you would like to discuss anything in particular, call Dan Fitzpatrick on 028 9023 4629 or email solicitors@comerton.co.uk

MANAGING LONG TERM SICKNESS ABSENCE

Long term sickness absence can have a devastating effect on the productivity and competitiveness of your business.

High levels of absence including certified and uncertified sick leave can result in a loss of productivity, low morale and dissatisfaction. However, if this turns into long term absence, the consequences can be overwhelming for a business.

The statistics are clear.

Long term sickness absence:

"costs UK business over £3.8 billion a year"

Types of absence

'Authorised absences' relate primarily to certificated illnesses, where an employee has obtained medical proof to legitimise their absence.

'Unauthorised absences' relate to self-certificated illnesses, where the employee makes their own prognosis. Such absences are uncertified.

Reasons for absenteeism

The most commonly reported reason for short term absences is minor illnesses such as a cold or a flu. However, for absences of more than five days, stress is quoted to be the main cause.

'What is stress?' The Oxford dictionary's definition of stress is "that stress is a demand upon physical or mental energy". However what we usually mean by stress is an excessive demand upon our energy, one that we find hard to cope with, which calls on our reserves and which cannot be sustained indefinitely without relief.

Although stress appears to be a product of modern day life, it was in existence centuries ago, although it did not have the same press coverage it demands today.

What are the legal requirements?

You are liable to pay employees' statutory sick pay for certain periods. Contact the **Employers Helpline on 0845 7143143** for more information. Otherwise, there are no legal requirements, but, if you handle absence problems badly, it is more likely that employees could make successful claims to employment tribunals for unfair dismissal.

How do I get it right?

You should have clear guidelines in place to enable you to manage long term sickness absence and to help those returning to work after a lengthy absence. Expectations should be outlined, such as when people have to phone in if they are unable to work or when a doctor's note is required.

Steps to ensure more effective work absence management:

- **Measure and monitor absence**
 - find out how much time is lost
 - where absence occurs and when
 - look for patterns in individuals' absenteeism
- **Keep in regular contact with your employee when they are off work**
 - ensure regular contact in a sensitive and non-intrusive manner

- **Ask for professional help and advice if needed**
 - occupational health professionals should be able to play a major role in evaluating the reason for the absence
- **Implement a 'Return to Work' interview and plan**
 - should be an effective method to reducing short term sick leave and identifying underlying reasons for absence

Remember that long term absence of an employee needs to be dealt with in the appropriate manner to ensure you are complying with the relevant employment legislation.

For more information on how to manage long term sickness absence, contact Dan Fitzpatrick on 028 9023 4629 or email solicitors@comerton.co.uk



PROFILES

Name: Nicola Sinnamon

Position: Solicitor

Qualifications: Qualified as a solicitor in 2003. Joined Comerton & Hill in 2004 and is now an assistant solicitor in the firms conveyancing department.

Outside work: Getting married in February. Enjoys reading, the gym and catching up with friends over coffee.

Contact: solicitors@comerton.co.uk

Name: Cathy Devlin

Position: Apprentice Solicitor

Qualifications: Educated at St. Catherine's College Armagh, and University of Ulster. Is now attending Queen's Institute of Professional Legal Studies, Belfast.

Outside work: Enjoys socialising, listening to live jazz bands and is currently taking salsa dance classes.

Contact: solicitors@comerton.co.uk



Personal Injury Trusts

Personal injury claimants are often on benefits due to disability and incapacity for work. There are a number of levels of benefits payable. However, under the Income Support (General) Regulations 1987, a person who has a capital of more than £3,000 is not eligible to claim maximum means tested benefits.

If you have more than £8,000 of capital, you cannot claim means tested benefits at all. Consequently, if you, as a claimant, receive more than £3,000 in damages, this would forfeit your eligibility for benefits under the benefit scheme. Such an outcome could quickly mean that the award in damages was eaten up in living costs and / or that a claimant would be tempted either to refuse a reasonable settlement or not make a claim because of its effect on their benefits.

What is the Solution?

A trust is a way round this problem. However, this rule does not apply in the case of a trust derived from a payment made in respect of personal injury.

If damages paid to the claimant in settlement of a personal injury claim are held in trust for the claimant, then this sum will not be taken into account under the Income Support (General) Regulations 1987 when assessing means tested benefits. As a result, the claimant can have their award and their benefits too.

So, if you are in receipt of means tested benefits (or are likely to claim means tested benefits in the future) and you are likely to recover more than £3,000 in damages, it is necessary to consider the creation of a Personal Injury Trust.

However, it may not be appropriate for all claimants. Some prefer to have control of their money despite the loss of benefits. In other cases, the cost of setting up and maintaining the trust outweighs the likely loss of benefits (especially if the claimant is likely to improve in the short term, get back to work etc.).

You want to set up a trust... what happens next?

The trust must be recognised as genuine by the benefit agency. Therefore, it is advisable to have the trust deed in place before any settlement is made so speed is important.

Once the trust is in place, it is important that any money received by way of damages does not pass through your hands. Damages should be paid directly into the trust. Also, once the trust is in place and the damages have been paid into it, any payments out of the trust for

capital amounts for purchases should be paid directly to the third party and not via you, the claimant (i.e. straight to the vendor).

The claimant is allowed sums of money to be paid out from the trust but not on a regular basis as this will then be classed by the benefits agency as 'income'.

In conclusion, you should always consider the setting up of a Personal Injury Trust where a claimant is or is likely to be in receipt of benefits and where damages exceed £3,000 but whether or not it is appropriate will depend on the individual facts of each case.

For further information on personal injury trusts or any other aspect of employment law, call Dan Fitzpatrick on 028 9023 4629 or email solicitors@comerton.co.uk

Comerton & Hill Solicitors: AT A GLANCE

- An established and independent law firm specialising in Northern Ireland corporate legislation
- Over 38 years experience advising local, regional and international companies, and professional advisers on all areas of corporate law
- An extensive local network of high-quality legal and corporate contacts throughout Northern Ireland, Southern Ireland and the UK
- Act for a number of Northern Ireland's top companies including HSBC, NIIB (Bank of Ireland), Maxol & Lombard North Central (NatWest)

- Σ ISO 9001 accredited
- Σ Home Charter Scheme member

OTHER SERVICES OFFERED

- Insolvency & Bankruptcy
- Employment Law
- Landlord & Tenant law
- Property Law
- Corporate Legal work, including shares and corporate securities
- Probate
- Personal Injury Litigation