Employment Law update June 2016

Contract of Employment or Contractual Agreement - which is best for you?

Increasingly businesses are engaging workers in a variety of different ways and differing contracts, to give flexibility and minimise costs. There can be risks of mixing types of contractual agreement, particularly if the contract does not reflect the working arrangements accurately. There can also be tax consequences. We explain below:

As short-term contracts and flexible working become increasingly popular options, it has never been more important for businesses to ensure that someone working for them is correctly categorised, as mistakes can be viewed dimly by a tribunal.
Businesses should consider the appropriateness of contracts. There are three basic options: the recruit is an **employee**, a **worker**, or a **self-employed contractor**.

Employees have extensive legal protection, including against unfair dismissal. Businesses should use this option if they need the individual to accept work at all times that it is offered to them – and this may include a zero-hours employment contract which imposes no obligation on the business to offer work.

Workers (e.g. casual workers and freelancers) are obliged to carry out work personally and they have some key employment rights, such as the minimum wage, paid holiday, whistleblowing and discrimination protection.

They must also be paid via PAYE. Compared to an employee, a worker is not **obliged** to accept work offered. A worker's contract should specify that the business is not required to offer them any work and that the worker may work for other organisations when not carrying out work under the agreement. There should be an agreed mechanism for offering and accepting work.
The contract should include an explanation of the worker's status (e.g. that they are a casual worker, not an employee) and confirm that the employer's grievance and disciplinary procedures do not apply to them.

Holiday entitlement and pay for Workers is accrued at the rate of 12.07% of the hours worked. Businesses may not want workers to take holidays during a short-term project and can therefore pay workers in lieu of the accrued holiday when the contract terminates.

Self-employed contractors' rights are determined by their contract but their "employment rights" are limited. Self-employed contractors' contracts should specify that they are not employees and are in business on their own account, providing services to clients/customers. Having services provided through an individual's own company may protect the business against tax liability. Under this structure employers may also need a separate agreement with the individual setting out confidentiality, IP assignment and restrictive covenant terms.

The contract should specify the level of service, timeframe, key milestones for the project and include a substitution clause allowing employers to sub-contract the work. There should be an indemnity from the consultant against any tax liability, any employment or worker status-related claims, and any breaches of the agreement by them.

Employers should ask contractors to hold their own general commercial, third party or professional indemnity insurance, depending on the type of services involved.
The consultant carrying out the work should be responsible for their own equipment and expenses.

If you would like us to assist you with any contract type, contact us 0800 9995 121

Discretionary Bonus

We often come across employers who operate a "discretionary bonus scheme". The question of how much discretion an employer can exercise was touched on in a recent case in the High Court when it was considered whether an employer was in breach of contract when it awarded a smaller bonus to a financial trader, in comparison to his peers.

The employee's appointment letter stated that he was eligible to be considered for an annual discretionary incentive award, details of which were specified in the employer's handbook. The handbook stated that bonus would be subject to a number of factors including, but not limited to, the employer's performance, the specific contribution of its component business units, the individual's personal contribution and the need to be employed at the time the bonus was paid. The handbook specifically stated that employees had no contractual entitlement to receive a discretionary incentive award annually and that any such award would be at the absolute discretion of the employer.

Even if a bonus scheme is stated to be discretionary, it is commonly argued by employees that they have an implied contractual right (custom and practice) to receive a bonus where the bonus has been paid on a regular basis.

In this case the dispute focused on the amount of the bonus award made. The employee expected between 10% and 20% but was awarded a bonus of 1%. This was in comparison to two colleagues who received bonuses equating to 8% and 11% respectively. However, a distinguishing factor was that both of these colleagues were entitled to receive guaranteed bonuses, calculated based on a specified formula. They had separate agreements stating this.

The High Court rejected the claim, stating that the employer had good reason to award the two colleagues a guaranteed bonus based on a specified formula, as opposed to the discretionary bonus to which the claimant may have been entitled. It also rejected the argument that the employer had acted irrationally in only awarding Mr Patural a bonus of 1%. It explained that one bonus was not the same as another, providing rules differentiated the values.

This is good news for employers as long as "discretionary" bonuses are just that, not based on firm guidelines and performance metrics. However, if you do set out a bonus scheme based on targets and KPIs then be prepared to pay the bonus if the targets are met!

Restrictive Covenants

The Government has opened a consultation to investigate banning or severely restricting the use of non-compete clauses that specify where and how employees can work when they leave a business.

Restrictive covenants are often used to prevent former employees from setting up as, or working for, a competitor and the Government fears these are constraining entrepreneurship by preventing talented staff from striking out on their own. The consultation is inviting comments from both employers and employees, with a view to potentially outlawing the clauses entirely.

Announcing the consultation, business secretary Sajid Javid said: "I am clear that I want to see more enterprising start-ups and greater productivity in a free and fair marketplace, by making sure we take action to break down any barriers that are curbing innovation and entrepreneurship."

Employment lawyers fear that if these changes are put in place the result may be harmful for many employers as the purpose of the restrictions is to give the employer a reasonable amount of time to ring-fence their business.

There is a perception that the UK has seen a rise in "ridiculous and overly restrictive" covenants that prohibits employees from working for a broad range of competitors. However, many such clauses are not enforceable in law and may be used more as a deterrent than a legal tool.

121 have experience in advising on restrictive covenants. Contact us to let us know if you would like 121 to review yours, on 0800 9995 121

QUESTION AND ANSWER CORNER

Q: ***We have had an issue with the disappearance of stock. The items are small and relatively easy to hide. We would like to ensure that we have the ability to search our employees as they arrive and leave work to ensure they have not stolen stock. Can we implement employee searches?***

A: Legally an employer has no right to insist that their employee agrees to be searched, unless there is a specific provision contained within the contract of employment or employee handbook providing the right to search.

In these circumstances however, you may wish to discuss this with your employees and get their express agreement to the searches. If they agree, then you can conduct your searches in a fair and reasonable manner and implement a policy confirming the frequency and process of workplace searches.

If employees do not agree, refusal could be used to draw implications about their guilt which in itself gives you an indication of potential guilt.

In these circumstances, as part of an investigation, you would be entitled to insist on a search as you have "reasonable belief" of wrongdoing. Following the investigation you would then implement the policy of workplace searching going forward.

Q: ***We have an employee who has a significant proportion of their holiday entitlement remaining and we are approaching the end of the holiday year. They have put in a holiday request which, if we allow it, will mean they are not working for most of the next month, which is a busy period for us. As an alternative to allowing the holiday request, can we pay them in lieu of taking the holiday?***

A: Not if their entitlement is statutory amount of holidays, the working time regulations specifically state that an employee should not be paid in lieu of taking statutory holidays (5.6 weeks or 28 days for an employee working 5 days per week) as holiday entitlement is for employees to take time away from work and paying in lieu defeats the object.

The only exception to this rule is the payment of accrued holiday pay on termination of employment or if the holiday entitlement is more than the statutory allowance. Otherwise, employees must be allowed to take their full holiday statutory entitlement as a minimum during the annual leave year. Any holiday entitlement that an employee has not taken in a holiday leave year will be lost but you should encourage employees to take holidays throughout the leave year to avoid any claim from an employee that you prevented them from taking their full holiday entitlement.

Q: ***One of our employees resigned last year and was re-employed by us six weeks later. Has this broken the employee's continuity of employment?***

A: Yes it has. This employee would be re-engaged on a new contract as any continuity of service is broken by a gap in employment of two weeks.

If you have a particular question that you would like answered email training@scottishwholesale.co.uk or call 0800 9995 121 and we will publish next month – all names will be removed to ensure confidentiality.