Vol FIVE // Summer 2012

upfront

the employment edition

ILLEGALITY – AU PAIR BEWARE!

An illegal worker was barred from bringing a discrimination claim, in a recent decision of the Court of Appeal in *Hounga v Allen*.

> The Court of Appeal stressed that focus ought to be on the claimant's conduct and whether this is inextricably tied up with the illegality. In this case the answer was of course, 'yes'.

Ms Hounga was from Nigeria. She had assumed a fake identity, representing herself as a member of the Allen family in an affidavit to the Nigerian High Court, in order to obtain a passport and a visa. Both she and her employers knew that her employment was not lawful. She was employed as an au pair by the Allen family for 18 months. When she was later dismissed, she brought claims of unfair dismissal, breach of contract, unpaid wages, unpaid holiday pay and race discrimination in the Employment Tribunal.

At the Tribunal, her contractual claims fell away, owing to the illegality of her contract of her employment. However, her claim for race discrimination remained, as the basis for a discrimination claim is not contingent upon a legal contract of employment.

The Court of Appeal was asked to consider whether Ms Hounga could bring a race discrimination claim, despite the illegality of her contract of employment.

The Court of Appeal held that although the Allen family played a larger role in the illegal acts, Ms Hounga was aware of, and played an active role in the illegality. On the grounds of public policy, she could not therefore pursue her claim, as the court could not condone illegality.

The Court of Appeal stressed that focus ought to be on the claimant's conduct and whether this is inextricably tied up with the illegality. In this case, the answer was of course, 'yes'.

It is vital that employers carry out the appropriate checks on their employees to ensure that they are legally able to work in the UK. Although on the face of it, illegality of a contract of employment may provide an escape route for employers in terms of any Employment Tribunal claim, it is a criminal offence knowingly to employ a foreign national who has not been granted leave to enter or remain in the UK, or who does not have permission to work in the UK.

From an HR practitioners point of view:

When recruiting new staff, in addition to ID, ask for other documents to be brought to the interview:

- Exam results - evidence of these is required if employees are going to be taken on as an Apprentice, as the Training Provider will require documentary evidence of qualifications;
- Driving licence - if the position involves driving and the new employee will be required to use their own car for business purposes you will also need to see evidence of their Insurance Certificate to ensure it covers business mileage.

If you require any assistance from a HR point of view please contact Joanne Pickering on 01254 580000 or email **joanne.pickering@forbessolicitors.co.uk**

For further information please contact Peter Byrne on 01254 54374 or email **peter.byrne@forbessolicitors.co.uk**

(LAP) DANCING TO VICTORY AT THE EAT!

The recent Employment Appeals Tribunal (EAT) decision in the case of *Quashie v Stringfellows Restaurants Limited*, whilst fact-sensitive, provides a stark reminder to employers that the label placed on an employment relationship is not always definitive of an individual's employment status.

The EAT heard how Ms Quashie, a lap dancer at Stringfellows night club, was dismissed following alleged drugs offences. She sought to bring a claim for unfair dismissal.

The Employment Judge hearing the case in the Employment Tribunal rejected Ms Quashie's claim for unfair dismissal, on the basis that she was not an employee. She appealed to the EAT.

Despite Ms Quashie being labelled as self-employed under a standard contract, having examined the relationship between Ms Quashie and Stringfellows, the EAT held that she was in fact an employee. Ms Quashie worked on a rota, which required her to work at least two Mondays and two Saturdays each month; she had an expectation of regular work and she also had to attend compulsory staff meetings on a Thursday, for which she did not receive additional pay. She was paid in "heavenly money" vouchers, which were converted into cash after Stringfellows had made various deductions, in respect of fines and other payments. She also had to notify Stringfellows of any intention to go on holiday.

The EAT held that Stringfellows exercised a high level of control over Ms Quashie whilst she was working. Furthermore, the EAT was satisfied that there was a mutuality of obligation between the parties. Taken together, these factors led the EAT to conclude that a contract of employment existed.

The facts of this case are somewhat unusual, but nevertheless demonstrate that in determining employment status, the Employment Tribunal will look beyond what is contained in any written documents, to ascertain the reality of the relationship between the parties.

For further information or advice please contact Jonathan Holden on 01254 222359 or email **jonathan.holden@forbessolicitors.co.uk**

From an HR practitioners point of view:

A reminder that Contracts of Employment need to be issued within 8 weeks of an employee commencing employment. Should an employer fail to issue a contract, if the employee later brought an Employment Tribunal Claim, the Tribunal could award an additional 2 or 4 weeks gross pay for failure to provide a written contract.

If you require any assistance from a HR point of view please contact Joanne Pickering on 01254 580000 or email **joanne.pickering@forbessolicitors.co.uk**

EVENTS

Employment Law Update & Mock Tribunal

Stanley House - 11th October 2012
PNE - 6th November 2012

Employment law is fast moving and ever changing. At Forbes we aim to keep you informed and up to date enabling you to take a pro-active approach to employment law issues, avoid costly litigation and reduce staff turnover.

We invite you to the Annual Employment Law Update 2012 where the experienced team will host an interactive seminar covering the latest changes in employment legislation and a Mock Tribunal. The Mock Tribunal will be played out by the Employment Team and will give a realistic insight into the workings of an Employment Tribunal case for unfair dismissal; highlighting potential pitfalls and traps to avoid.

09.00	Registration
09.30	General Employment Update
10.00	Discrimination Update
10.30	Coffee Break
10.45	Mock Tribunal
12.45	Question & Answers
13.00	Lunch

The cost of the seminar per delegate, including lunch is £45.00 + vat.

Early registration is recommended, as reading material is to be sent out prior to the seminar.

To reserve a place for the seminar please book online at:

www.forbessolicitors.co.uk/stay-informed/events/

Or alternatively, please contact Rachael Hull:

Telephone: 01254 222388
Email: Rachael.Hull@forbessolicitors.co.uk

SETTING UP A RIVAL BUSINESS - TANTAMOUNT TO GROSS MISCONDUCT?

Planning to set up a rival business in direct competition with your employer may not amount to gross misconduct, following the recent decision of the Employment Appeal Tribunal (EAT) in the case of *Khan & Anor v Landsker Child Care Ltd.*

When two employees were discovered to be in advanced stages of plotting to set up a rival business, they were summarily dismissed, having allegedly breached the fundamental term of trust and confidence. The employer in this case provided residential care home services for children in social care through contracts with local authorities.

Mr Khan and Mr Hemming had been working for at the children's care home for over 7 years when, by chance, an email was discovered, containing their detailed business plans to set up a children's care home, in competition with their employers. Following a disciplinary hearing, during which they were confronted with the business plans, they were both dismissed on the grounds of gross misconduct. The Employment Tribunal dismissed their claims for unfair dismissal. They then appealed to the EAT.

The EAT overturned the Tribunal's decision, stating that the employees' initial plan to set up a business in competition with their employers, using company resources to assist them in doing so, may not, in itself, amount to gross misconduct. Relying on an earlier decision in, the EAT referred the case back to the Employment Tribunal, to be re-heard in light of Laughton. The EAT also warned that not every piece of information that an employer has, of which an employee is aware, may be regarded as confidential and thereby protected by law.

It is evident that the Tribunal is keen to draw a distinction between knowledge and expertise which is accrued throughout employment over a number of years, and information which, as a matter of law, can be described as confidential. Employers should therefore be careful when considering whether information is genuinely confidential to their business, before deciding on the appropriate sanction to impose in circumstances such as these.

For further information or advice, please contact Amy Crabtree on 01254 222309 or email **amy.crabtree@forbessolicitors.co.uk**

PENNINE LEAP – FREE BUSINESS START UP SUPPORT

Pennine LEAP provides intensive start up support to individuals and non retail enterprises across Pennine Lancashire - involving intensive training, mentoring, HR coaching, social enterprise and international trade support. The programme also provides finance support and the benefit of an experienced business mentor for up to two years.

The programme offers support to individuals in Pennine Lancashire, including Blackburn, Darwen, Hyndburn, Burnley, Pendle and Rossendale.

For more information please call Jo Hacking at Community & Business Partners on 01254 505050 or email jo@cbpartners.org

LANCASHIRE HR EMPLOYERS' FORUMS SUPPORTED BY FORBES

Forbes is proud to be supporting the Lancashire HR Employers' Forums for the second year. The forums are organised by Community and Business Partners and held at Clayton Park Conference Centre. The forums are open to HR Practitioners along with Business Owners/Directors/Managers across Lancashire, are free of charge and include a complimentary buffet lunch.

Dates of future events -
Wednesday 14th November 2012
Wednesday 6th March 2013

For further information please contact Amin Vepari at Community and Business Partners on 01254 505050 or email amin.vepari@forbessolicitors.co.uk

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For legal advice that is straight to the point:

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Preston Office t: 01772 220022
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HOLIDAYS AND SICKNESS – MORE BAD NEWS FOR EMPLOYERS...

There has been a further development in the long-running saga surrounding the relationship between sickness absence and annual leave.

Following a number of decisions of the European Court of Justice (ECJ), it is clear that a worker's right to take annual leave is distinct from their need to take sickness absence, in the event that they are unwell. This is because the purpose of annual leave is to allow a worker to enjoy a period of relaxation and leisure, whereas the purpose of sick leave is to allow a worker to recover from an illness that has rendered them unfit for work. This distinction led the ECJ, in the case of *Pereda v Madrid Movilidad SA* (reported in an earlier edition of this newsletter), to rule that a worker whose sickness absence coincides with a pre-booked period of annual leave, has the right to request to take that leave at another time (i.e. if a worker falls sick before a period of holiday, they can reschedule their holiday so that it does not clash with sickness).

Until recently, it was not, however, clear whether an employee who falls sick during a period of annual leave can also request to take the corresponding period of holiday at a later date.

The European Court of Justice recently ruled, in the case of *ANGED v FASGA (Asociación Nacional de Grandes Empresas de Distribución v Federación de Asociaciones Sindicales and others)* that the point at which the sickness absence arises is irrelevant. A worker is entitled to take paid annual leave which coincides with sick leave, at a later point in time, irrespective of the point at which the incapacity for work arose. The new period of leave will correspond to the duration of the overlap between the period of annual leave and the period of sick leave. The ECJ also made it clear that a worker is entitled to carry the new period of annual leave into their next holiday year, if necessary.

The only saving grace is that these rules apply only to the minimum statutory holiday entitlement provided by the Working Time Regulations (for full time members of staff, 28 days per year, including bank holidays).

The *ANGED v FASGA* decision is undoubtedly bad news for employers. Without tight regulation, there is the potential for workers to abuse the system, in order to obtain additional annual leave entitlement.

From a practical perspective, employers faced with workers trying to rely on these rules should ensure that appropriate evidence of sickness is obtained. For workers whose sickness lasts for less than 7 days, this will be in the form of a sickness absence self-certification form; and for workers whose absence lasts longer, a doctor's note should be produced. Employers may also require a worker who falls ill whilst on holiday to telephone and report their sickness absence at the point that it arises (in the same way that they would if they were not on holiday). Any such requirement should be clearly set out within the employers' holiday rules, in order to avoid any ambiguity.

If you require advice regarding your sickness and holiday rules, in light of the above decision, please contact Emma Newbould on 01254 222352 or email **emma.newbould@forbessolicitors.co.uk**