



Comings & goings...

Statistics suggest the first six minutes of life are the most dangerous - though, as one wit remarked, 'the last six are pretty dodgy, too'. The same could be said about employees. Getting it right from the very start could save you endless trouble, but it's just as important to ensure that employees who move on don't leave with information vital to your business.

So this month's issue is about comings and goings - including our own very welcome move to new premises.

Hot off the Press!

Holiday pay for long-term sick employees

The effects of the *Stringer v HMRC* case (previously known as *Ainsworth v HMRC*) have been rumbling on for nearly three years now, and the start of February saw a dramatic new twist in this ongoing saga.

By way of background, in April 2005, the Court of Appeal held that the right to four weeks' statutory paid holiday under the Working Time Regulations 1998 does **NOT** continue to accrue while an employee is off on long-term sick leave; the employee should **NOT** be allowed to take leave while on sick leave; and, if their employment was terminated at the end of the year, the employee should **NOT** be entitled to receive payment for the statutory holiday entitlement.

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In summing up, the Court of Appeal held that the practice of allowing holiday to continue to accrue and be taken while on sick leave was not in the spirit of the Working Time Regulations. If a worker was already absent, how could leave be taken? The Regulations were intended to give workers the right to take time off from the pressures of work and **NOT** to give them a financial windfall for untaken leave.

This judgement was seen by both the business and the HR community as a great victory for common sense, a fair application of the Working Time Regulations, and a way to avoid placing an undue burden on employers when the employment contract is terminated.

However, this case was referred to the House of Lords, who subsequently referred the matter to the European Court of Justice (ECJ). In the meantime, the Advocate General has handed down his opinion on the matter.

Although his opinion is not binding, it is usually followed by the ECJ. Unfortunately, he has taken a different view to the Court of Appeal, and stated the following:

- Entitlement to paid holiday **DOES** accrue while an employee is absent on sick leave;
- However, workers may **NOT** take their holiday while they are on sick leave; and
- After termination of the contract of employment, workers are

New year, new offices

We are delighted to announce that we have moved to a new office location. This move is the culmination of three years' successful trading in the Ipswich area, serving clients throughout the UK and internationally, and reflects our growing range of products, and rising demand for Pinnacle's services.

Our new accommodation will allow us to continue to support our clients to highest possible standards while being able to introduce new services to their businesses.

entitled to a compensatory payment to reflect accrued but untaken leave, even where the worker was on sick leave for the full holiday year.

So, as you can see, his opinion has muddied the waters still further. Until the decision of the ECJ has been handed down (expected some time this year), employers would be advised to follow the Advocate General's opinion.

Remember - when dealing with long-term sick leave, statutory holiday entitlement is not the only thing you must consider as an employer. You must ensure you adhere to the requirement of the Disability Discrimination Act (if it applies to the employee's illness). Failure to do so could leave you open to an award of unlimited damages from an Employment Tribunal. The maximum award last year was £138,000, *Can you afford that?*

If you need any advice or assistance to understand how this legislation could impact your business, please contact us today by e-mail on contact@pds-hr.com or phone 0800 907 1015.



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Do you really need a contract of employment?

In practice, the law only requires employers to supply employees with a written statement of particulars within eight weeks of them commencing employment with the company.

It is **NOT** a contract in itself, but is evidence that a 'contractual relationship' exists between the employer and employee, i.e. the employee agrees to work for an employer in return for pay.

The statement must include the following key information:

- Name of employer and employee.
- Date employment and continuous employment began/job location.
- Details of pay.
- Working hours.
- Holiday entitlements.
- Job title/description.
- Details of any collective agreements that directly affect the employee's condition of employment.

Contract of employment

A contract of employment is just that, a legally binding agreement between the employer and the employee when the employee agrees to work for an employer in return for pay, and must include the same key details as required in the statement of particulars.

So why not just use a statement of particular rather than a contract?

Well you can, but a contract, as stated, is legally binding and, more importantly, as well as providing details of how the employment relationship will work in practice and consequences for the



employee for not complying with them, it can provide the employer with protection after the employee has left or their employment has been terminated.

Why does an employer need protection after an employee has left?

Without a contract of employment, there is nothing to stop an employee, on leaving your employment, setting up in competition with you, poaching your clients, poaching your staff to assist them in their new venture or even using the company's confidential records to aid them in this process or maybe claiming intellectual rights for inventions made while in your employment.

With a contract of employment, you can use the following clauses to afford you greater protection:

- Restrictive covenants - restricts trade practices (must be reasonable and allow them to earn a living in their chosen profession).
- Non-solicitation - restricts them from approaching your client or employees.

- Confidentiality - defines what is regarded as confidential information and keeps it safe.
- Intellectual property rights - ensures any inventions or patents remain the property of the company and **NOT** the employee.

Having these types of clauses in a contract of employment will not prevent an employee from trying act unethically by approaching your clients or employees, but having them gives you greater protection and legal redress should the worse happen. That is why it is far better to have a full contract of employment rather than rely on a statement of particulars.

Still not convinced?

We were recently asked to draft new contracts of employment for a multimedia company after their creative director had left to join a competitor and then systematically set about recruiting his former team and approaching the

Your questions answered

This month's question ties in with our feature on contracts (above) and relates to restrictive covenants, the practice of managing an employee's post-termination actions and safeguarding such things as client confidentiality and working in competition with your business:

With the ever-changing nature of business and new technology meaning that employees can now literally work from anywhere, the old geographical limitation in restrictive covenant (such as 'you cannot compete within a 15-mile radius 'etc) may not be relevant or enforceable for many businesses now.

company clients he had dealt with. His actions were devastating for the company, costing them almost £5 million and sending them to the brink of bankruptcy.

Could your business survive a situation like this?

Want to avoid this situation in your business?

Then why not use our HR Audit Service to review your contracts of employment and human resource practices? We will provide a report detailing where you comply with employment law, and those areas where you are at risk and should consider taking action. The cost of this service can be credited against any work you engage us to undertake as recommended by the report.

If you if you are interested in our HR Audit Service or want assistance with your contracts of employment, please e-mail us today on contact@pds-hr.com or phone 0800 907 1015.



Therefore, what are the elements of a modern restrictive covenant that are likely to be enforceable?

Geographical covenants have not really been in fashion for some time now. The only industries where you can possibly still potentially use geographic covenants (say, five miles of the old business) are industries where the physical proximity is a key factor - for example, hairdressing salons, where the clients are always going to be based within a small area.

The types of covenant that courts are most likely to uphold are non-solicitation of client and employee's clauses. The more specific these clauses can be, the better and more likely they are to be upheld. For example: 'You shall not solicit or entice work from the following six key clients with whom you have contact.' This has far greater chance of being enforced, subject to it being for a reasonable period, ideally not more than 12 months.

The next best to this is to have a general non-solicitation covenant. For example:

'For 12 months following termination, you should not solicit the business of any

customer or client with whom you had sustained and substantial contact in the 12 months prior to your termination.' This is not as effective as naming the clients, but you would have to be very unlucky for it not to be upheld.

Our three top tips when deciding on covenant clauses are:

1. Ensure they are communicated to your staff and that they are fully aware of their impact on them.
2. Be as specific as you can and, if you cannot be that specific, ensure there are **NO** ambiguities.
3. Make it reasonable - if the intent of the clause feels a little unreasonable, then it is very likely a court will see it that way, and the clause will not be worth the paper it is written on and therefore unenforceable.

If you have an issue or question you'd like us to cover in a later edition of the newsletter, please e-mail contact@pds-hr.com

Further assistance

If you would like further information on any issues raised by this bulletin, or require advice or assistance with any other human resources matters, **please call us today on 0800 907 1015 or send us an email on contact@pds-hr.com.**

The information in this newsletter is of a general nature and is not intended to replace professional advice. We recommend you to ask for specific professional advice before taking any action.

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