

UK: Employment Update

Reality bites – the terms of a contract cannot disguise employment status

The Supreme Court has handed down a decision that highlights that the 'label' that a contract attaches to the individual supplying his services under the contractual arrangements will not be determinative of employment status if the reality of the relationship does not reflect that label.

Two features of an employment relationship are that it is a contract for personal service and there is mutuality of obligation between the parties; that is the employer must provide and pay for work and the employee must perform the work personally.

In a case recently considered by the Supreme Court the claimants were engaged by A as car valets. Their contracts included an express provision that it was not an employment contract, that the individuals as independent contractors were responsible for their own tax and national insurance and that the claimants could provide a substitute to perform their duties provided the substitute complied with A's requirements of subcontractors.

In practice the claimants had no control over the way in which they performed their work as they were subject to the direction and control of A's employees, they had no real economic interest in the way in which the work was organised and could not source their own work materials.

The Supreme Court considered that the terms of a written agreement can be disregarded if they do not reflect the true intentions of the parties. In the Court's opinion the facts demonstrated that the reality of the situation was consistent with an employment relationship between A and the claimants regardless of the elaborate protestations in the documents that the claimant's were self employed.

It is a common drafting technique to include a 'substitution' clause in certain contractual arrangements, for example where an individual is engaged as some form of consultant or as a 'casual' worker on an as needed basis. This decision demonstrates that an employment tribunal will go behind the written terms of the arrangement including any substitution clause to assess whether an employment relationship exists. Just because a contract labels the relationship as a consultancy arrangement this will not avoid any employment rights and obligation in relation to the 'consultant' if the reality of the arrangement has all the hallmarks of an employment relationship.

[\[Autoclenz Ltd v Belcher\]](#)

New code of practice for internships

It is currently intern season and internships have been widely discussed in the media recently. The coalition government has published its social mobility strategy, "*Opening Doors, Breaking Barriers: A Strategy for Social Mobility*". This document considers that internships provide valuable work experience for young people and appears to suggest a move away from ad hoc work experience based on personal connections, to more professional schemes which are open to all young people and abide by the national minimum wage legislation and other employment rights legislation.

Contents

- **Reality bites – the terms of a contract cannot disguise employment status**
- **New code of practice for internships**
- **Holiday accrued during sick leave is not forfeit because it is not asked for**
- **Board gender diversity – executive search firm code of conduct**
- **Agency Worker Regulations come into force imminently**

If you would like to know more about the subjects covered in this publication or our services, please contact:

Chris Goodwill
Imogen Clark
Mike Crossan
Alistair Woodland
Tel: +44 (0) 20 7006 1000
Fax: +44 (0) 20 7006 5555

Editor: **Tania Stevenson**

To email one of the above, please use
firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street,
London, E14 5JJ, UK
www.cliffordchance.com

The Gateways to the Professions Collaborative Forum, chaired by the Minister for Universities and Science has now produced a voluntary Common Best Practice Code for High Quality Internships. This provides some guidance on the content of internship documentation and an organisation's obligations in relation to the payment of the national minimum wage and the provision of paid holiday.

Regardless of whether an organisation elects to adopt this Best Practice Code any organisation operating an internship scheme need to be alert to the fact that depending on the intern's "employment" status:

- the intern may be eligible for paid annual leave or payment in lieu on termination of the internship;
- the intern may be entitled to receive the national minimum wage;
- the intern could render the organisation vicariously liable for acts of discrimination and harassment against the organisation's own employees;
- the organisation may be vulnerable to Equality Act discrimination claims by the intern;
- the intern may be privy to, and able to disseminate, the organisation's confidential information.

The Code can be found [here](#).

Holiday accrued during sick leave is not forfeit because it is not asked for

In recent years two decisions of the European Court of Justice (ECJ) have clarified that annual leave entitlement accrues during a period of sick leave so a worker may take and be paid for holiday during sick leave. However the ECJ considered that an employee cannot be compelled to take holiday during sick leave and if they so wish they may defer taking holiday until after the end of sick leave even if that means that the holiday has to be carried forward to a subsequent holiday year.

Under the Working Time Regulations 1998 a worker who wishes to take holiday must give an employer notice of their intention to do so. The EAT was asked to consider whether a worker absent on sick leave forfeits the annual leave that accrues during the sick leave if he fails to make a request for the holiday before the holiday year ends.

C was absent on ill-health grounds throughout 2009 and up to 6 April 2010 when she was dismissed on ill-health incapacity grounds. During her absence she did not ask to take paid annual leave.

C's employer argued that because C had not given notice of her intention to take holiday in accordance with the Working Time Regulations 1998 no entitlement to leave crystallised which meant that there was no leave to be carried forward to the subsequent holiday year. Accordingly on termination no payment was due in relation to the forfeit holiday.

The EAT disagreed, it held that C had the right to carry her leave entitlement over to the following holiday year without having to make a formal request for it to be carried over. The right to be paid for that annual leave crystallised on the termination of her employment.

At present the Working Time Regulations still include a "use it or lose it" provision in relation to holiday; i.e. if it is not taken in the holiday year in which it accrues it is lost. Employers may be tempted to seek to rely on this provision to argue that employees on sick leave cannot carry holiday forward to the subsequent holiday year. They do so at their peril as there has been an increasing judicial tendency to interpret the Working Time Regulations in such a way that sick leavers can carry holiday forward to subsequent years if the ill health absence is the cause of them being unable to take the holiday.

[NHS Leeds v Larner]

Board gender diversity – executive search firm Code of Conduct

Leading executive search firms have launched a new voluntary Code of Conduct covering board room appointments in response to the Davies Review of Women on Boards published in February this year.

One of the Davies Review recommendations was that executive search firms should draw up a voluntary Code of Conduct addressing gender diversity and best practice relating to Board level appointment.

The new Code of Conduct sets out seven principles of best practice under the headings succession planning, diversity goals, defining briefs, long lists, supporting selection, emphasising intrinsics and inductions.

The aim is that the Code of Conduct will either be attached to the next revision of the Combined Code following the Financial Reporting Council's consultation exercise on the Davies Report or will be appended to accompanying guidance on Board effectiveness. The Code will be reviewed periodically and amended as appropriate.

It has also been reported that the Association of British Insurers plans to publish guidelines in the Autumn aimed at promoting greater board gender diversity.

The Code may be viewed [here](#).

The Davies Review of Women on Boards can be found [here](#).

Agency Worker Regulations

The Agency Worker Regulations come into force on 1 October; businesses who make use of temporary agency workers should familiarise themselves with their obligations under the Regulations. Our client briefing on the Regulations may be found [here](#).

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ.

www.cliffordchance.com

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571.

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.