Because Recruitment Matters

Legal bulletin

Lorraine Laryea, Solicitor and Commercial Advisor, REC

Latest case on the Agency Workers Regulations

It will not have escaped the attention of many recruiters that there has been talk of the end of the Agency Workers Regulations 2010 following the Employment Appeal Tribunal (EAT) decision in the case of Moran and others v Ideal cleaning Services and Celanese Acetate which was handed down on 14 December 2013.

So, what is all the fuss about and what is the impact of this EAT decision?

Recap on the AWR

Let us recap on some key aspects about the legislation.

As most in the recruitment industry will be aware, the Agency Workers Regulations 2010 (AWR) came into force on 1 October 2011 to implement the European Agency Workers Directive 2008. In summary the AWR provide agency workers with the right to receive equal treatment in relation to basic terms and conditions to those they would have received if they were engaged by the end user client directly to do the same job, subject to completing a 12 week qualifying period.

The obligation to provide the equal treatment falls on both a 'temporary work agency' and the hirer to whom workers are supplied. The equal treatment entitlement applies to individuals who are 'agency workers'.

What's in your Legal bulletin?

To understand the decision, we must revisit the legal definition of a 'temporary work agency' and an 'agency worker'.

Under the AWR an agency worker is defined as:

> *an individual who is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and*
>
> *has a contract with the temporary work agency which is—*
>
> *a contract of employment with the agency, or*
>
> *any other contract with the agency to perform work or services personally*

A temporary work agency is engaged in the activity of:

> *supplying individuals to work temporarily for and under the supervision and direction of hirers; or paying for or receiving payment for, the services of individuals who are supplied to work temporarily for and under the supervision of hirers.*

As can be seen, both definitions include a reference to an individual being supplied to work 'temporarily' to a hirer, but what does **'temporarily'** or 'temporary 'mean?

Crucially, the AWR do not define these words.

Background to the case

Turning to the facts, the case itself involved a group of claimants who were employed by Ideal and supplied to Celanese and its predecessor company, for many years (since 1987 for one claimant). When they were made redundant in 2012 they brought claims under the AWR in an employment tribunal (ET).

At a preliminary hearing, the ET had to decide whether Ideal was in fact a temporary work agency under the AWR and this led to an analysis of whether the claimants came within the AWR definition of an agency worker. Each of these points rested on whether the claimants were being supplied 'temporarily' by Ideal to its client Celanese.

The ET found that the nature of the arrangements in place meant that the claimants could not be described as temporary. The contract of one of the claimants was described as 'having all the features of a contract of employment'. The ET also concluded that the contract was 'not a temporary contract' and '[i]nsofar as anything is permanent in this world, this contract provides the kind of protection that one would expect to see.'

One of the claimants himself described his work at Celanese as being 'in reality a permanent placement' and that he 'never expected to be moved elsewhere as per a temporary contract.'

The ET examined what was meant by the word 'temporary' and in the absence of any definition in the AWR, it simply applied the ordinary dictionary definition - i.e. temporary means 'not permanent; provisional' or 'lasting only a short time.'

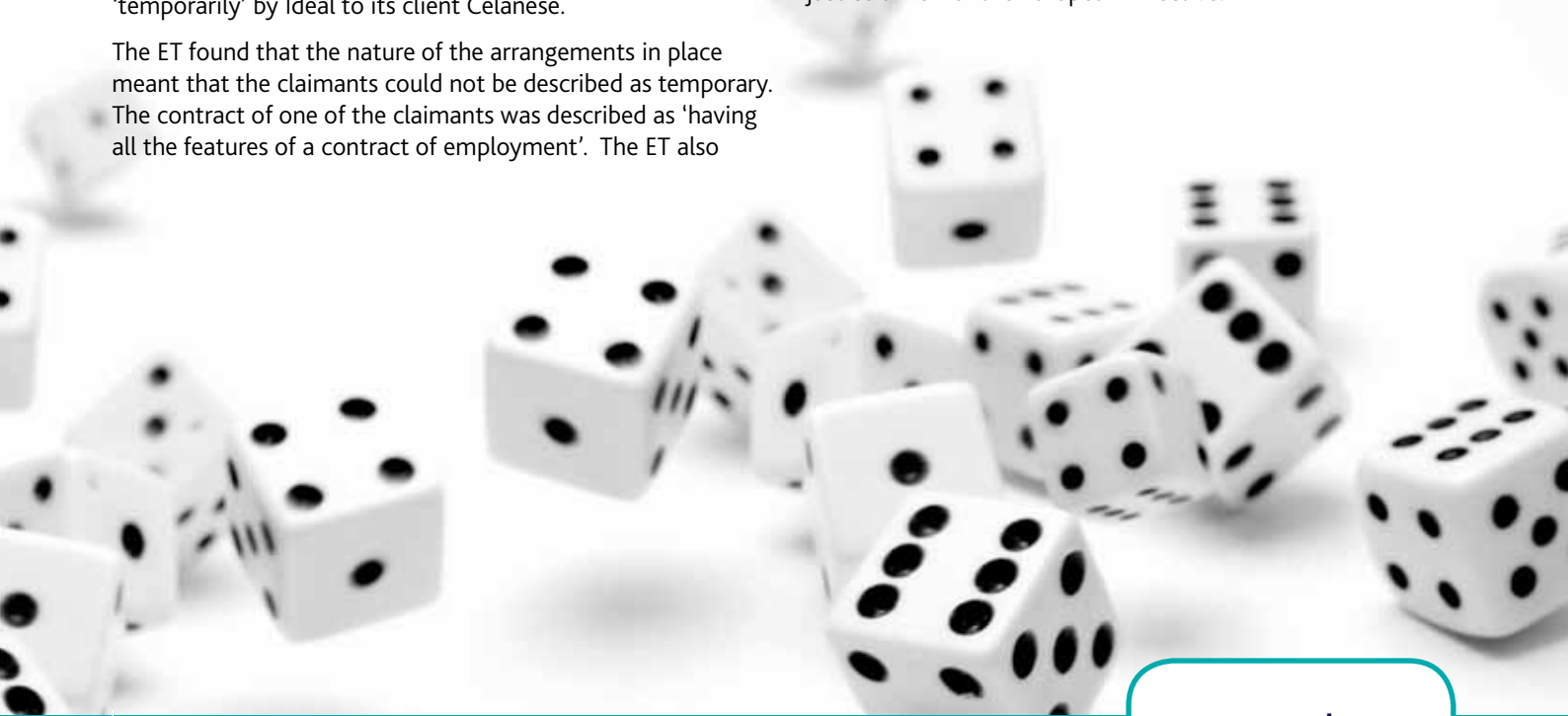
The ET's decision was that the claimants:

> *all had contracts of indefinite duration with Ideal whereby they had all been placed long-term at Celanese. It follows that I must find, and this is really the be all and end all of it, that the Claimants were not agency workers as defined in Regulation 3 because they were not supplied to work temporarily.*

EAT decision

The claimants appealed to the EAT arguing that the word 'temporary' had been incorrectly interpreted as meaning short term. In the decision given last December, the appeals were rejected on the grounds that the word temporary could mean either not permanent (being indefinite or of open ended duration) or short term. The EAT agreed that the ET had correctly concluded that because the claimants were working in arrangements of indefinite duration they were working permanently and not temporarily.

The second ground of appeal was that the ET should simply have interpreted the AWR to conclude that the claimants were agency workers in order to 'fulfil the underlying "social justice aims"' of the European Directive.



The EAT also rejected this argument principally because the Directive itself also uses the words 'temporary' and 'temporarily'. It was of particular importance that these words were specifically added to the Directive (they do not appear in the original draft) indicating that there was a deliberate rather than inadvertent decision to limit the scope of the Directive to those working on a 'temporary' basis. As such there was no need to reinterpret the AWR for the benefit of the claimants.

REC's conclusion

This decision highlights the fact that the AWR do not provide protection to individuals merely because they are engaged by one party to work under the supervision and direction of another. They must be supplied 'temporarily' and not permanently to come within the scope of the AWR. On the face of it therefore, workers who are supplied on a permanent basis (i.e. indefinite duration) are not covered by the AWR.

It should be noted that the claimants in this case were engaged under terms that were described as a contract of employment and they were contracted to work for a specific client.

There have been many queries from members whose clients in turn have suggested that amendments be made to assignments in order avoid the AWR.

Members should bear in mind that it will not always be beneficial to supply workers on a permanent basis because other benefits gained by having flexibility will be lost. For example, temporary workers employed on permanent contracts of employment and supplied to a specific client will be entitled to full employment rights, including protection from unfair dismissal and also statutory redundancy pay in the event of a redundancy dismissal.

Aside from the AWR, the Conduct of Employment Agencies and Employment Businesses Regulations 2003 require employment businesses to seek information from clients about the 'duration or likely duration' of an assignment and provide this to the work-seeker when offering an assignment.

It is not clear whether stating that the assignment is of 'indefinite' duration discharges this obligation.

AWR do not provide protection to individuals merely because they are engaged by one party to work under the supervision and direction of another

Charlotte Allery, Legal Advisor at the REC, brings you a sample of questions posed to the Legal Helpline

Q: Our staging date for automatic enrolment is coming up later this year. Will the contracts that we use with our temporary workers and our clients need to be amended to include automatic enrolment?

A: The answer to this question differs depending on whether your temporary workers are engaged on a contract for services or on a contract of employment.

Contract for services: If an employment business engages their temporary workers through a contract for services, there is no legal requirement to contain reference to automatic enrolment or pensions. The employment business will of course need to comply with the automatic enrolment legislation and perform the applicable employer duties correctly, but it does not need to be referred to specifically in the contract for services.

However, as a matter of best practice an employment business should ensure that the contract used has a provision allowing it to make statutory deductions. For example, the REC model terms of engagement for agency workers (contract for services) will not need updating because there is already provision in the contract allowing the employment business to make relevant statutory deductions, which would include deductions for employee pension contributions in line with automatic enrolment.

The REC model contract for services can be accessed here.

Contract of employment: There is no legal requirement to include any provision in a contract of employment specifically about automatic enrolment. However, all employers are required to provide employees with a written statement of particulars within two months of the commencement of employment under Section 1 of the Employment Rights Act 2006 (the ERA). Section 1 and 2 of the ERA set out what should be included in the statement and includes reference to any terms and conditions relating to pensions and pension schemes.

In addition, employment businesses should ensure that the contracts of employment they use with their temporary workers do not contain any provisions that conflict with the employer duties for automatic enrolment.

The REC legal team has amended the model Regulation 10 compliant (also known as 'Swedish Derogation') contract of employment for automatic enrolment. Since October 2012 there has no longer been a requirement to provide access to a stakeholder pension, although employers can still do so if they wish. Clause 12 (Pension) has been amended to remove the stakeholder pension provision and to include two new options (A & B). Both options outline that the relevant pension legislation for automatic enrolment will be complied with. Please see Guidance Note 40 to the contract for further information on the amendments made.

The amended REC model Regulation 10 compliant contract of employment can be accessed here.

The amended contract can be issued to new employees. For existing employees, please note that any variation must be made in accordance with the provisions of the contract. For example, the REC model Regulation 10 compliant contract of employment contains an express variation provision which allows the employer to vary the pension clause regarding automatic enrolment at clause 12.3, with clause 2.5 outlining that any variation must be set out in writing.

If you do not use the REC model terms and conditions with your temporary workers, you should seek further legal assistance to ensure that the contracts you use contain the appropriate provisions.

Clients: All REC model client terms of business already reserve the right for the employment business to vary the charges agreed with the client in order to comply with additional liability imposed by statute or other legal requirements or entitlements. This would therefore include pension contributions in line with automatic enrolment and no amendment will be required.

The REC model terms of business for use with your clients can be found in the REC model document library.

Again, if you do not use the REC model terms and conditions you should ensure that the contract you have in place with your clients allows you to vary the charges in order to comply with additional statutory liability.

Q: We engage our temporary workers through an umbrella company. Who will be the employer for the purposes of automatic enrolment?

A: To establish who the employer is it is wise to firstly understand who is a 'worker'. Section 88(3) of the Pensions Act 2008 defines a worker as an individual who works under either a contract of employment or any other contract in which s/he undertakes to do work or perform services personally for another party to the contract.

The employer is the party who has the contractual relationship with the worker. Therefore, you will be the employer for temporary workers that you engage with directly on a contract for services or a contract of employment (i.e. your PAYE temporary workers).

However, where you supply temporary workers who are engaged by an umbrella company, or some other form of limited company, you may not be the employer for the purposes of automatic enrolment. If, as is typically the case, it is the umbrella company that has engaged the individual under a contract of employment and you have no contract with the worker and are not responsible for paying the worker, then it is the umbrella company that is the employer.

As the employer, the umbrella company will be required to comply with the employer duties in relation to these temporary workers, such as auto-enrolling eligible workers into a qualifying pension scheme and making the employer's contributions and worker deductions.

You should check whether you have a contract directly with the worker which is either a contract of employment or a contract under which they are obliged to work or perform services personally (e.g. a contract for services). If the contractual relationships within the supply chain are unclear, please contact the REC legal helpline for further assistance.

Q: Can we now freely supply Bulgarian and Romanian temporary workers to our clients?

A: The temporary restrictions on Bulgarian and Romanian nationals working in the UK have been lifted, with effect from 1 January 2014. Bulgarian and Romanian nationals now have an unrestricted right to live and work in the UK, like other EU citizens.

Previously, under the Accession (Immigration and Worker Authorisation) Regulations 2006, Bulgarian and Romanian workers needed to obtain an accession worker card before they could work for you in the UK, unless they were exempt from the need to obtain the card e.g. where the worker was genuinely self-employed. In addition, if the Bulgarian or Romanian national required an accession worker card, an employer potentially had to obtain a work permit for them before they could apply for the card, depending on the type of worker. However, these restrictions no longer apply.

When supplying Bulgarian and Romanian temporary workers to your clients, you will still be required to check the work-seeker's eligibility to work in the UK in the same way that you do with all other work-seekers. The REC legal guide contains further information on checking an individual's right to work in the UK.

Bulgarian and Romainian nationals now have an unrestricted right to live and work in the UK, like other EU citizens

Legal round up

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Case law

Halawi v WDFG UK Ltd & CSA Ltd

In this case the Employment Appeal Tribunal (EAT) examined whether an individual working through a personal services company had protection from unlawful discrimination under the Equality Act 2010.

Ms Halawi had set up her own limited company and used CSA to find work as a consultant at a beauty outlet at Heathrow Airport, which was managed by World Duty Free (WDF). Her company invoiced CSA for work done.

When her security approval was withdrawn by WDF (meaning that she could no longer work within the airport) she sought to bring claims of unfair dismissal and discrimination against CSA and WDF.

To succeed with the unfair dismissal claim she had to show that she was an employee of CSA or WDF. To succeed with her discrimination claim she had to show that she was either an employee of CSA or WDF or a contract worker as defined in the Equality Act 2010.

The EAT found that the fact that she provided her services through a limited company meant that she failed on both counts. She was unable to show that she had a contract of employment or any contract under which she was required to provide her services personally, with WDF or CSA. The contractual relationship was between Ms Halawi's company and CSA.

The EAT was clearly concerned about the possibility of the claimant being subjected to unlawful discrimination but having no redress under this type of contractual arrangement. Nevertheless, the decision was that on proper application of the law, she was unable to pursue her claims.

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ZJR Lock v British Gas

Should commission payments be taken into account when calculating holiday pay?

Yes, in the opinion of the Advocate General, in response to a question referred to him from a UK employment tribunal (ET) about the proper calculation of statutory holiday pay.

Mr Lock, an employee of British Gas, received remuneration made up of two elements: Basic pay (paid at a fixed rate) and commission, which was variable depending on the number of sales contracts that he secured.

Having taken a period of annual leave (during which he was not able to make any sales) he received holiday calculated on his basic pay only and he also received commission owed to him from earlier sales. His subsequent pay was reduced in light of the commission that he could not earn while on annual leave and as a result he issued a claim for holiday pay owed from his period of annual leave.

Workers receive statutory holiday pay under the Working Time Regulations 1998 (WTR) which were brought into force to implement the European Working Time Directive 2003. The ET in which Mr Lock brought his claim, made a referral to the European Court of Justice (ECJ) for clarification as to the correct interpretation of the Directive. Specifically the question asked was whether a worker, whose pay consists of an element of fixed basic pay and element of variable commission, should have the commission element included in the calculation of his holiday pay.

The preliminary decision now given by Advocate General is that because the commission payments were intrinsically linked to the work specifically carried out by the worker, they should be taken into account when calculating his holiday pay in addition to his basic pay. The suggested method of calculating this would be to take into account the average commission received by the worker over a 12 month period.

Interestingly the Advocate General also stated his view that not including the commission in the holiday pay would deter the worker from taking his annual leave. This would result in him receiving a minimum payment for his holiday instead of taking his leave. The Directive only permits employers to make payment of holiday in lieu of annual leave on termination of employment. A parallel was drawn between this and the practice of paying workers rolled up holiday pay which is unlawful because it prevents workers from taking leave and actual rest, which is the health and safety purpose of the legislation.

We must now await the decision of the ECJ but this typically follows the opinion of the Advocate General. The matter will then be referred back to the ET.

Impact for employers

This decision could ultimately result in employment tribunals following the same view when considering other (commission) holiday pay claims.

In the UK, workers who do not have normal working hours will have commission included in their holiday pay. However, a different calculation is used for workers who have normal working hours and receive commission that varies depending on the results of the work done (e.g. how many placements a recruitment consultant makes successfully). It is common to exclude commission when calculating holiday pay based on the current application of the WTR. This is supported by the current leading UK case law.

If the Lock decision is followed in the future, it would mean that businesses will need to reconsider the basis on which holiday pay is calculated and include commission which is intrinsically linked to a worker's work.

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Consultations

Zero hours employment contracts

After much public debate and frenzy, the Department for Business Innovation and Skills (BIS) finally launched its consultation on zero hours contracts last month (December 2013).

While not proposing to ban such contracts, BIS has identified two areas that in its view give rise to concerns: Exclusivity clauses and a lack of transparency about the contracts. As such the consultation is seeking views on the following:

- *Legislating to ban the use of exclusivity clauses in contracts that offer no guarantee of work;*
- *Government issuing guidance on the fair use of exclusivity clauses;*
- *Encouraging the production of an employer-led Code of Practice on the fair use of exclusivity clauses, with an additional option to seek Government sponsorship of that Code; or*
- *Rely on existing common law redress which enables individuals to challenge exclusivity clauses.*
- *To improve transparency over zero hours contracts, the Government is seeking views on:*
  - *Improving the content and accessibility of information, advice and guidance;*
  - *Encouraging a broader, employer-led Code of Practice which covers the fair use of zero hours contracts generally; and*
  - *Whether and how Government could produce model clauses for zero hours contracts.*

It is interesting to note that much of the debate about zero hours contracts has been in relation to individuals who are engaged directly by the business/organisation that they are working for rather than agency workers who are engaged by employment businesses and supplied to work for a third party.

Yet, worryingly, the consultation identifies a zero hours contract as:

> *an employment contract in which the employer does not guarantee the individual any work, and the individual is not obliged to accept any work offered.*

This definition is broad enough to cover the type of contracts that the most employment businesses use for their temporary workers. Although the concerns raised with these types of contracts do not appear to relate to the recruitment industry, there is the potential for recruiters to bear the brunt of any changes made which could restrict the use of flexible contracts. The REC will make clear representations to Government that steps should not be taken that will inadvertently damage the recruitment industry's ability to supply a flexible workforce.

The consultation closes on 13 March 2014.

Onshore Employment Intermediaries: False Self-Employment

HMRC launched its consultation on onshore intermediaries on 10 December 2013.

As set out in the introduction to the consultation, the Government is concerned that:

> *there is increasing evidence that some companies and Employment Businesses are using employment intermediaries to disguise the employment of their workers as self-employment primarily to avoid employer National Insurance and reduce the costs associated with workers employment rights.*

The consultation identifies that these types of arrangements were initially prevalent in the construction sector but have now spread to driving, catering and security and result also in individuals losing out on statutory rights such as National Minimum Wage and statutory sick pay.

HMRC propose to amend the agency sections of the Income Tax Earnings and Pensions Act 2003 (ITEPA) which currently set out the circumstances in which an employment business is required to treat monies paid to individuals as taxable earnings. Currently this is limited to arrangements under which individuals provide or are required to provide their services personally. Under the proposals, monies paid to individuals will be taxable where an individual either provides services personally or has personal involvement in providing services. This is an attempt to make it more difficult to avoid the agency provisions of ITEPA.

Also where the amended provisions apply, individuals will be treated as employees of the employment business for income tax purposes, even if the individual is engaged by another party (an intermediary).

This is a short consultation closing on 4 February 2014 with the proposed amendments to the legislation due to come into force on 6 April 2014. The REC has arranged a series of meetings with HMRC and all relevant stakeholders throughout January. To help inform those meetings and our response to the consultation we are holding a free member webinar on 20 January 2014 at 1pm. We encourage members to register for the webinar here. For more details on the proposals please see here.

Consultations

Romanian and Bulgarian workers – opening up the borders

1 January 2014 saw lifting of the provisions which had limited the type of employment that nationals of Bulgaria and Romania were able to take up in the UK.

The two countries joined the European Economic Area (EEA) in 2007 and their nationals have been free to travel to and reside in the UK since then, but unlike nationals of other EEA countries, temporary restrictions were placed on Bulgarians and Romanians which meant that they required work permits for most work and were subjected to quotas for low skilled work.

Those restrictions no longer apply and Bulgarians and Romanians are now free to take up employment in the UK in the same way as workers from France, Spain and Germany for example.

Much has been said in the press about the numbers of workers that will arrive in the UK, but others have commented that many of those who would choose to come to the UK are already here. A number of workers have been working on a 'self-employed' basis but will no longer be prevented from taking up employment.

Employers will need to take care moving forward not to offer work to Bulgarian and Romanian workers on less favourable terms than other those offered to other nationals who are able to work without restriction in the UK, to avoid discriminating under the Equality Act 2010.

Bulgarians and Romanians are now free to take up employment in the UK in the same way as workers from France, Spain and Germany

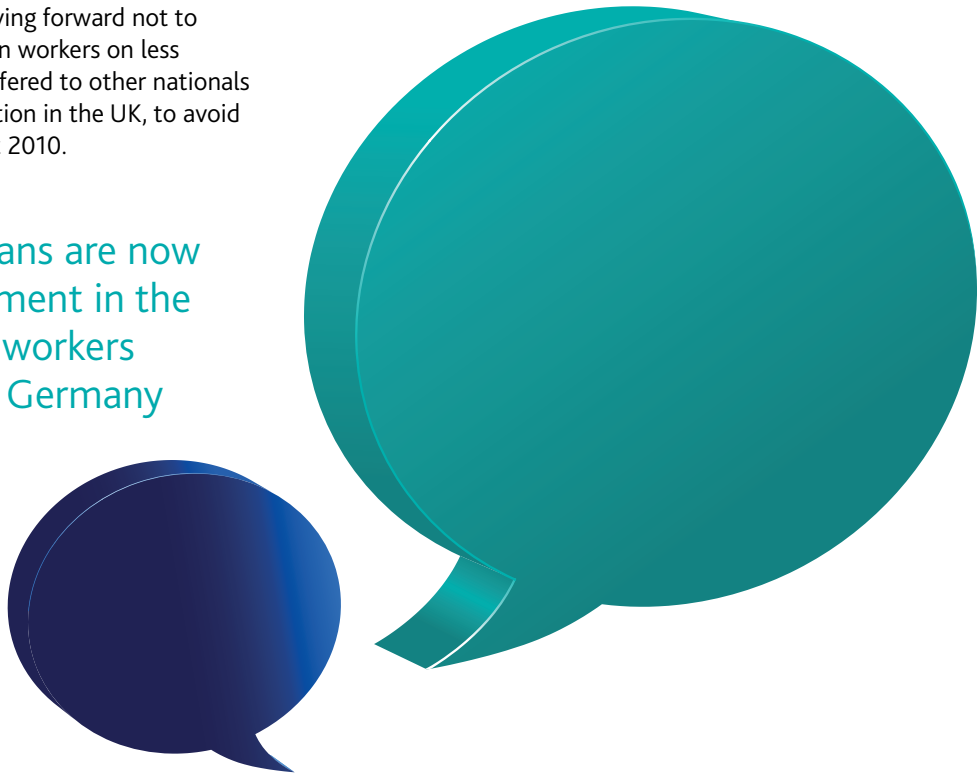
New legislation

Following the Government consultation on proposed changes to the Transfer of Undertakings (Protection of Employment) Regulations (see Legal bulletin March/April 2013), the amended legislation will now come into force on 31 January 2014.

Contrary to initial proposals, the Government will not now repeal the service provision changes and will retain the requirement for a transferor to provide the transferee with employee liability information; the timescale for providing this is to be extended from 14 to 28 days.

Other changes include:

- Allowing employers to vary the terms and conditions of employment agreed as part of collective agreements one year after the TUPE transfer, provided that the changes are overall no less favourable to employees.
- Clarification that in order for a service provision change to take place, the service to be provided post transfer must be 'fundamentally or essentially the same' as the service provided before the transfer.
- Limiting the circumstances in which dismissals will be deemed to be automatically unfair.



HAVE YOU TAKEN THE REC COMPLIANCE TEST YET?

The REC introduced the Compliance Test to assess a member's knowledge of the relevant industry legislation and the REC Code of Professional Practice. By doing this the REC can determine if new applicants can become full members and existing members may renew their membership. New members have six months to pass the test and existing members must pass the test every two years.

From January 2013 the REC has required all existing REC members to take the test and they must pass the test by the end of 2014 to renew their membership at the next renewal point.

The Compliance Test is an online test made up of questions in a multiple choice format, which cover the key requirements of industry legislation and the REC's Code of Professional Practice.

The test has been designed so that members only answer questions that relate to the type of business they operate in, for example, if an agency only acts as a permanent recruiter, they will only answer questions that relate to permanent recruitment.

Members have three attempts to pass the test and there is a range of support available to help members pass the test:

- a training test (this can be taken as many times as the member wants and gives an idea of both the format and types of questions);
- two guidance documents on the test site, which cover the Compliance Test processes and areas covered;
- a webinar explaining the content of the test;
- REC Compliance Executives, who are on hand to answer questions about the test and offer assistance to members.

All of this support is available when you access the test. Please click here to find out more.

There are also regular Compliance Workshops which will provide you further assistance. Just check the REC events page for the next available dates.

And of course REC members can also access the REC Legal Guide or call the Legal Helpline (corporate members only) 0207 009 2199 for any legal queries.

So, if you are an existing member that has not already taken the test, please click here to find out more. Alternatively, please contact the REC on **0207 009 2100** or email **info@rec.uk.com**. For further information about the Compliance Test.

REC Dorset House 27–45 Stamford Street London SE1 9NT
t: 0207 009 2199 e: legal@rec.uk.com w: www.rec.uk.com/legal