

# EMPLOYMENT LAW BULLETIN

October 2011

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# IN THE NEWS

## AWR in force

The Agency Workers Regulations are in force from 1 October 2011, giving temps the right to the same pay and basic working conditions as permanent staff doing similar jobs.

There had been rumours that the Government was considering watering down the regulations or delaying implementation, due to concerns the regulations had “gold-plated” European law. However, the regulations came into force on 1 October 2011 as planned.

This means that:

- employers must now provide agency workers, from day one of an assignment, with the same access to collective on-site facilities as permanent staff, eg canteen, car parking, prayer room, on-site gym or crèche facilities
- employers must also provide agency workers, from day one of an assignment, with the same information about permanent vacancies as that given to permanent staff
- after 12 weeks in a role, agency workers are entitled to equal pay and basic conditions as permanent employees doing similar jobs.

“Pay” includes basic salary, overtime, shift allowances, commission payments and bonuses linked to individual performance but not other benefits like pension, company sick pay, profit-sharing arrangements or bonuses based solely on company performance. The “conditions” covered are those relating to working time, overtime, breaks, rest periods, night work, holidays and public holidays.

Employers who have not already done so should:

- review their use of temporary workers, including casuals, contractors and consultants to decide who is covered
- review their collective facilities to see which of these should be offered to agency workers
- consider how information about permanent vacancies is communicated to staff to see if any changes should be made for agency workers and
- consider training for staff involved in recruitment so they are aware of the new rights.

## Riots – how should employers respond?

The riots across London and the UK in August caused disruption to many employers through damage to property and employee absenteeism.

Fortunately, most of the disruption has subsided but the riots raise the question of how employers should deal with public disturbances of this nature.

In terms of absenteeism, employees who are unable to make it to work – whether because of travel disruptions or safety fears – are not strictly entitled to be paid. Employers are, therefore, entitled to require staff to take the time as paid holiday or unpaid leave. However, given the extreme circumstances, many employers choose to offer flexibility, which is obviously preferable from an employee relations point of view.

On the flipside, employers who were forced to close temporarily due to damaged property are still obliged to pay employees that turn up ready to work. Unless there is an express contractual right to lay employees off temporarily, which is very rare, a failure to pay would constitute a breach of contract.

Whether disciplinary action can be taken against employees who participated in the riots will depend on the circumstances. If the employee should otherwise have been working, then disciplinary action will be justified. However, where the conduct took place in the employee’s own time, disciplinary action will only be justified if there is some impact on the employer’s business – eg if it damages the employer’s reputation or where the employee’s role involves an element of trust or honesty.

# CASE WATCH

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## Case study 1

### [A warning on emails – pass it on](#)

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The employee, who worked for a charity assisting drug-users, was assigned to work in a prison. One weekend, outside working hours, he forwarded an email from his home computer to the personal email address of a co-worker at the prison. The email was part of a chain that encouraged recipients to pass it on. It also contained highly sexist and racist material, including pictures of naked women. The employee's co-worker then forwarded the email on to another colleague at the prison and so the email entered the prison service's system. The employee was dismissed following a disciplinary hearing. He argued that the dismissal was unfair because he had sent the email from his personal email address outside of working hours.

The Employment Tribunal ruled that the dismissal was fair. The email was highly offensive and was sent to one of the employer's biggest clients, the prison service. It therefore had the potential to cause enormous damage to the employer's reputation. Although it was sent from the employee's personal email address outside working hours, the email encouraged recipients to forward it on.

The employee had no control over where it would end up, and so could not say that it was clearly intended to be private.

*“The case is a reminder that, whilst employees are entitled to a private life, the employer can take disciplinary action if what they do in their own time impacts the workplace. The reminder is timely given the increasing use of social media such as Facebook and Twitter, on which comments posted in the employee's own time can reach a wide audience. Where employees post inappropriate material on social networking sites that can be seen by colleagues, clients or members of the public, disciplinary action is likely to be justified because of the potential to bring the employer into disrepute. Offensive comments about a co-worker could also constitute harassment even if posted outside working hours using the employee's personal computer.”*

**Gosden v Lifeline Project Limited**

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## Case study 1

### [Badmouthing ex-employees](#)

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The employee was originally a teacher at a college but left to work elsewhere. Six years later, he took up a role at a university which involved dealing with and visiting his old college. Shortly after his appointment, the Director of Human Resources at the old college sent a disparaging email about the employee to the university. The email said that the college would not allow him on the premises because it had concerns for its students and also because he had had serious relationship problems with staff during his time there. The employee was subsequently dismissed by the university. He brought a negligence claim against the college in relation to the email.

The employee won his claim. The High Court ruled that the allegations were false and, although not necessarily deliberate, were negligent. The email was not a reference, as it played no part in the employee's appointment, but it was similar to a reference because it had the power to cause him damage.

Even though six years had passed since his employment there, the college owed the former employee a duty to take reasonable care in any comments made about him to a new employer.

*“Employers have always had a duty to exercise reasonable skill and care when giving a reference. References which are untrue, inaccurate or misleading could expose the employer to a claim for negligence from either the former employee or the new employer. This case sets new ground by making it clear that employers can be on the hook for any false or misleading comments about a former employee whenever they are made, not just when contained in a reference. Employers should, therefore, carefully check the facts before passing on information about ex-employees or making any other comments that could adversely affect their career. In many cases, it may be safer to say nothing at all or give only limited factual information, taking care not to leave out important information in a way that would be misleading.”*

**McKie v Swindon College**

# NEW LAW

## **Bribery Act**

The Bribery Act came into force on 1 July 2011, creating new offences, including the corporate offence of failing to prevent bribery. Employers are liable for bribery by persons acting on their behalf – including employees, agents and service providers – unless the employer has “adequate procedures” in place to prevent bribery. For a list of steps employers might consider taking, see our April newsletter. Government guidance makes it clear there is no “one size fits all approach” to preventing bribery – this depends on the size and resources of the organisation. Contrary to many media reports, the Government guidance also confirms that “reasonable and proportionate” corporate hospitality – eg taking clients to dinner or a sporting event – will not constitute an offence unless it comes with “strings attached” or is designed to induce improper behaviour.

## **National Minimum Wage**

On 1 October 2011, the national minimum wage increased from £5.93 to £6.08 per hour for workers aged 21 and over. The national minimum wage also increased from £4.92 to £4.98 per hour for workers aged 18 to 20 and from £3.64 to £3.68 per hour for workers aged 16 to 17. The apprenticeship rate for apprentices under 19 or in the first year of their apprenticeship also increased from £2.50 to £2.60 on 1 October 2011.



# WATCH THIS SPACE

## Shared parental leave

The Government is considering introducing a new system of flexible shared parental leave. The idea is to give parents greater flexibility to split parental responsibilities between them and to choose who takes the leave and when. Mothers would be entitled to an initial period of maternity leave but the remainder of “parental” leave would be available for either parent on an equal basis. As with the current system, a mother who chooses to take the full entitlement could take up to 52 weeks’ leave with 39 weeks of statutory pay. Any changes are unlikely to be introduced before 2015.

## Women on boards

The UK may come under increased pressure from the European Union to boost the number of women on boards of listed companies. Members of the European Parliament have adopted a non-binding resolution urging the European Commission to introduce mandatory quotas for women on boards if voluntary measures fail to reach the desired targets of 30% by 2015 and 40% by 2020.

In the UK, the Government has relied so far on voluntary measures in preference to setting quotas. The Government has written to FTSE 350 companies urging them to follow recommendations made earlier this year to set targets for the percentage of women they aim to have on boards by 2013 and 2015 respectively. Leaders of some of the biggest companies in the UK have formed the “30% Club”, a group committed to bringing more women onto boards and executive search firms have also launched a voluntary code of conduct to improve gender diversity in boardrooms by setting out best practice guidelines.

This Employment Law Bulletin has been produced with the assistance of the London law firm, Travers Smith LLP. If you have any queries about the Bulletin, or employment law generally, please contact Travers Smith LLP employment law specialists **Ed Mills on 020 7295 3424** or email **ed.mills@traverssmith.com** or **Adam Rice on 020 7295 3224** or email **adam.rice@traverssmith.com**.

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