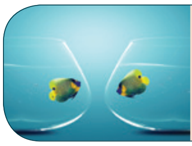
Issue 1/2012

Cumberland Ellis

Inform

INSIDE



Divorce: facing up to the double dip

A smart move for umarried couples

Independent schools win charity challenge

New agency worker rights may cause temporary blip

New Agency Workers Regulations could deter employers from taking on temporary workers. Colin Sels considers the issues.

The Agency Workers Regulations 2010 ("the Regulations"), which came into force on 1 October 2011, introduced equal treatment for agency workers (or, in the vernacular, "temps"). Whilst good news for such workers, hirers may feel they have cause to think twice before engaging temps.

The attitude of hirers towards temps is sometimes ambivalent. They can seem a breath of fresh air, emphasising failings of replaced employees. At other times, despite phenomenal expense, they may be perceived to fall short in every department compared to the now sorely missed employee. At least the hirer did not need to worry about any temp having rights at work or complaining about quotidian matters such as the quality of the paper in the washroom. The Regulations change that.

Whilst agency workers are not given full employment protection, they do now enjoy two areas of rights:

- **immediate** access to collective facilities and amenities and to information about relevant job vacancies; and
- **after completion of a 12 week qualifying period** entitlement to the same basic working and employment conditions that agency workers would have been entitled to had they been recruited directly by the hirer.

"Collective facilities and amenities" are not intended to cover all benefits that might be provided to direct workers, but rather to collective facilities (canteen, crèche, washroom facilities, car parking etc.) provided to workers as a whole or to particular groups of workers that are usually on site (so would not, for example, include access to an off-site gym). Most are unlikely to cause any difficulty and are probably no more or less than would be provided as a matter of course.

Equally, hirers may have no difficulty with the concept of providing information regarding relevant vacancies, although as a consequence more systems and procedures will probably have to be put in place. Agencies also will need to promote compliance by hirers.

Hirers may find that the situation with entitlement following a 12 week qualifying period presents more difficulty. "Basic working and employment conditions" are, where the agency worker would have been recruited as an employee, the relevant terms and conditions ordinarily included in the contracts of employees of the hirer. "Relevant terms and conditions" will include those relating to pay, duration of working time, night work, rest periods, rest breaks and annual leave.

What is "ordinarily included" will be a matter of fact, covering express

Continued on page 2

Divorce and the double dip

By Graeme Fraser and Hazel Wright, Partners, Family Law Department

The OECD forecasts that the UK will be in a double dip recession in the near future and those who need to make changes in their financial arrangements because of relationship changes should now ensure that they carefully and realistically reassess their assets and how they will fare in these unpredictable times.

A clear aim for many divorcing people is the "clean break": that is, the termination of the links in income, housing, capital/debt and pension that arise on marriage, and survive divorce. Each can then make a new life knowing that obligations of the ended marriage are severed. One popular way to achieve this is to raise capital for a lump sum to reduce or eliminate future income payments. Some use bonuses or the sale of a business, an inheritance or other major change in circumstances to reach a clean break, perhaps some years after divorce.

Investments throughout Europe and the USA have recently suffered considerable losses which may well impact on long term financial planning. Many family businesses expect sharp trading losses as consumer spending weakens, while property portfolios are generally unstable. Careful and realistic assessment and valuation of capital, pensions, and income, both now and in the future are essential to ascertain what clean break payments will be affordable, and how to minimise the future risk if the value of assets fall. Such issues as company liquidity, tax liabilities, the in-built speculative nature of some investments and adult children being unable to afford to leave home and support themselves could all play a part in such assessments.

Whilst the courts interpret the statute so as to ensure fairness, and will start by considering an equal division of assets, certain features have emerged more strongly since the banking crisis of 2008. Firstly, it is very difficult to ask a court to set aside or vary a court order because of trading losses or price fluctuations. Secondly, if share or property values have changed significantly during negotiations, then these have to be rechecked carefully as it will usually be too late to change anything once an order is made. Thirdly, if one spouse (perhaps the husband) has a greater earning capacity and can invest that to create capital, this can result in the other spouse having a greater share of the assets on divorce. Fourthly, using the other spouse's property as security for borrowings after the financial dispute has been settled may only be possible during a limited window of time.

If there is already in place a financial settlement with continuing obligations for housing, income, etc. this should be kept under review as it may be possible to vary it. This will be particularly relevant if the current economic problems have changed personal and financial circumstances.

Where a relationship is about to change, for better or for worse, legal advice should be taken and the impact of existing and future economic issues on capital assets, pensions and income should be carefully considered. If a party's financial situation is about to change then consideration must be given to the impact that this will have on the legal obligations flowing from any break-up.

Cumberland Ellis's specialist family lawyers can provide an early and confidential evaluation of what the impact of these changes might be and offer a fixed fee for a consultation. Further information can be obtained from **Hazel Wright** on **020 7242 0422**.

Continued from page 1

terms and employment contracts, staff handbooks, terms implied through custom and practice and any collective agreement. It will not include one-off arrangements. The obligation is continuing so that, for example, if pay increases for a comparable employee, it should also increase for the agency worker.

There is plenty of scope for situations arising in connection with agency workers where specific advice would be sensible and there is much more detail in the Regulations than set out above.

Hirers may well feel the need to assess carefully whether or not to continue to use agency workers. If they do, they must ensure that, where appropriate, such workers enjoy the same rights as other workers.

colinsels@cumberlandellis.com

The Employment team at Cumberland Ellis will be happy to assist by advising in detail on any matters that arise in connection with the Regulations and Mark Shulman, Suzanne Eva, Colin Sels or Rachael Taylor can be contacted on +44 (0)20 7242 0422.

CE flying high with new conveyancing kitemark

Angela Lucy explains how Cumberland Ellis are buying into the new Conveyancing Quality Scheme

The Law Society has introduced a new scheme, the Conveyancing Quality Scheme (CQS), to give confidence to buyers and sellers about the service they can expect to receive from accredited conveyancers.

Firms which comply with the rigorous CQS protocol and standards will be accredited and awarded a quality kitemark to indicate professional excellence. After accreditation, the Law Society will monitor solicitor members to ensure continued compliance. By this means clients will be able to reassure themselves that their solicitors have achieved what has been described as a "gold standard of conveyancing practice". The main mortgage lenders are also indicating that they will not instruct solicitors or legal advisers unless they are members of the CQS.

As the application process is very rigorous and firms have to demonstrate appropriate frameworks for all of the conveyancing processes, the expectation must be that a number of firms of solicitors and other conveyancers will either not be eligible or will not be able to meet the criteria.

Cumberland Ellis has now completed the application to be registered as a member of the CQS – the registration process takes a few months. Cumberland Ellis already has in place the systems and processes which comply with the requirements for membership and expects to receive notification of approval for membership of the CQS shortly. In future, therefore, Cumberland Ellis's excellence in the field of conveyancing will be apparent not only from the professionalism of their lawyers but also by the CQS kitemark appearing on its letters.

The purchase/sale of a house is often described as one of the five most stressful experiences in life. The introduction of the CQS provides clients with some assurance that if their lawyers are members of the CQS then the stress involved will be minimised. Cumberland Ellis, therefore, welcomes the introduction of the CQS as a very positive step forward for the benefit of all involved in buying and selling property.

In future prospective clients should only engage conveyancing solicitors who are members of the CQS – quite simply, nothing else will do!

angelalucy@cumberlandellis.com

Charity Commission learns a lesson

Independent Schools Council successfully challenges Commission's guidance

In October this year in the Upper Tribunal of the Tax and Chancery Chamber the Independent Schools Council successfully challenged the Charity Commission's guidance on the operation of the "public benefit" requirement under the Charities Act 2006 ("the Act") for independent schools that charge fees. The Tribunal's decision has been widely interpreted as providing a check on an overbearing attitude taken by the Commission regarding the manner in which charities (in this case independent schools) ought to apply the "public benefit" requirement under the Act.

Charitable trustees have the right to take advantage of various significant tax benefits, subject to a public benefit test. The Commission had taken on itself the role of investigating whether independent charitable schools satisfied the public benefit requirement by, for example, requiring two schools to introduce bursaries for children from "poor" families. Prior to the Tribunal's decision, it was widely believed that subsidised provision (i.e. bursaries) was the best way to satisfy the public benefit test.

The Tribunal analysed public benefit as having two aspects:
(i) "Public benefit in the first sense" – the nature of the purpose itself must be such as to be a benefit to the community; and
(ii) "Public benefit in the second sense" – those who benefit have to be a sufficiently broad section of the public.

While provision of bursaries is important, there are other ways in which independent charitable schools can achieve a broadening of access and it is a matter for their trustees to determine how the charity achieves this.

The Tribunal gave the following list of benefits which schools might provide, in addition to scholarships and bursaries, so as to satisfy the public benefit test:

- arrangements under which students from local state schools can attend classes in subjects not otherwise readily available to them;
- sharing of teachers or teaching facilities with local state schools;
- making available (whether on the internet or otherwise) teaching materials used in the school;
- making other facilities available to students of local state schools and the community as a whole such as playing fields, sports halls, swimming pools or sports grounds.

The Commission has stated that it will amend the relevant parts of its public benefit guidance in the light of the Tribunal's decision.

This decision provides a welcome clarification for charities that in the first instance it should be a matter for the charity's trustees rather than the Commission to decide the kind of public benefit offered and how it is to be provided so as to satisfy the public benefit requirement for a charity. It may well be that in the future more varied and creative ways to satisfy the public benefit test will be adopted by charitable schools.

richardcollierwright@cumberlandellis.com

If you require any further information about the application of charity law to schools you can contact the author or Simon Howell on 020 7242 0422.

A smart move before living together

Unmarried couples should consider formal agreement before setting up home

If you are not married, how do you control the risks of having a fight about the ownership of your home should you break up? In November, the Supreme Court came to a decision in the case of *Jones* v *Kernott* that co-owners can change the proportions in which they share property proceeds during or at the end of the relationship and the court can also in certain situations impose what it considers is a "fair" result where such a change has taken place.

In divorce law, factors such as fairness and future needs are relevant, and these can be assessed and property provision altered at the time of divorce. That is not so for unmarried couples; a court cannot automatically impose a fair solution at the end of a relationship.

For several years now, the transfer deed by which homes are transferred has included boxes to be ticked to show how the ownership is shared. But many, particularly if they have not discussed this with their conveyancer, do not really appreciate what a difference this may make several years down the line.

Time should be taken to consider and agree the terms on which the property is to be owned in advance of any changes that may occur – it is easier and less expensive to arrange property ownership in advance than to try to negotiate when the relationship is in difficulty. The safest course of action for an unmarried couple is to enter into a properly drafted declaration of trust or a living together agreement when buying a home together.

Cumberland Ellis has a special website at **www.living-together.co.uk** which provides more information on this issue.

Brief lessons

Don't believe the hype

Levi Roots, who found fame after pitching on Dragon's Den, won his High Court battle with a former business associate over the ownership of the "Reggae Reggae BBQ/Jerk Sauce" special recipe. When giving evidence, Mr Roots (whose real name is, rather disappointingly, Keith Graham) admitted that statements he had previously made indicating the sauce was based on his grandmother's secret recipe, had been "voted the best and tastiest jerk barbecue sauce in the world" and had been tested for 15 years at the Notting Hill Carnival were untrue but explained that this was "marketing". Even more disappointingly, the Judge found that there was "nothing special either about the ingredients or the methodology of making them into a sauce".

Quit while you are ahead

In 2006 Freeman & Co solicitors (whose principal is frequently referred to in the media as "Mr Loophole", a cognomen he is said to have registered as a trade mark) secured an order for the payment of their client's costs after he was found not guilty of speeding charges in the Magistrates' Court. The defence put forward was that notices of intended prosecution had not been sent by Gwent Police to their client within the prescribed timescales.

Having won the case the solicitors sent their file to the Magistrates' Court for their costs to be assessed and then paid. During this assessment process a court official noticed evidence on the files of the notices being received by the client within the required timescales. This discovery led on to a new prosecution against the client and his wife and son and in due course, convictions for perjury and perverting the course of justice for which they each received three month sentences.

The solicitor with conduct was also prosecuted for perverting the course of justice but found not guilty. Not willing to let matters lie, he then brought civil proceedings against Gwent Police for malicious prosecution. In November, the High Court ruled against the solicitor who will now have to pay the police's, no doubt very substantial, legal costs.

CE helps college to land brand new campus

Cumberland Ellis advised the University of East London and Birkbeck College, University of London on agreements with the London Borough of Newham for the creation of a new university campus on former car park land in Stratford town centre. The new building should be ready to receive students in summer 2013. The signing of agreements successfully concluded negotiations between the parties which began in 2008. Cumberland Ellis advised UEL and Birkbeck on land ownership and leasing arrangements, assessment and mitigation of risk and on the operational arrangements agreements between the two universities

Mediation Podcast an undisputed success

Mark Shulman, head of the Employment department at Cumberland Ellis and an Accredited Employment and Workplace Mediator, recently recorded a podcast with Clive Lewis OBE, Director of the Globis Mediation Group, about workplace mediation. The podcast provides useful information on how mediation differs from other forms of dispute resolution and what happens during a mediation session. It can be downloaded from the following web address: http://www.employmentcasesupdate.co.uk/site.aspx?i=ed8966

Charity fundraising efforts sparkle

On 24 November, the Family team invited contacts and staff to a jewellery sale held in aid of The Maytree Respite Centre. The charity offers short stay respite care in a residential setting for people who are experiencing thoughts of suicide and provides residents with the chance to talk, to reflect, rest and restore hope. The jewellery was kindly donated by designer Angie Gooderham and the event raised £667 for the charity.

The annual Jeans for Genes day and Macmillan Cancer Support coffee morning took place in October.

Like Minded Business bowls 'em over

On 8 November, Cumberland Ellis's entrepreneur network, Like Minded Business (LMB), co-hosted a bowling evening with patent and trade mark attorneys Reddie & Grose LLP. LMB members were able to network, do business and swap contacts in the relaxed setting of the Holborn All Stars Lanes private bowling room however competitive feelings ran high as the teams battled it out for the position of best and worst bowlers! RBS will be hosting the next LMB networking event on 24 January. For further details please contact **helenrobinson@cumberlandellis.com**

Webinar

In November, Graeme Fraser, a partner in the Family department, presented a live webinar for Central Law Training to over 60 delegates on the topic of "Who Owns the House – *Jones* v *Kernott* in the Supreme Court".

2012 Happy New Year

Happy New Year from Cumberland Ellis

Cumberland Ellis send best wishes for the New Year to all our clients and contacts. Rather than sending greetings cards, Cumberland Ellis will again be making donations to charities supported by the firm. Cumberland Ellis's supported charities include Find Your Feet (a charity working to tackle hunger, poverty and discrimination in India and Malawi), Help for Heroes, Macmillan Cancer Support and Breast Cancer Care.

Office news

Staff news

Cumberland Ellis is delighted to announce the promotion of Mayuri Shah and Sarah White to the roles of Director of Finance and Director of Human Resources and Operations respectively. The new roles for Sarah and Mayuri reflect the strategic development of the firm's business.

We are pleased to announce that James Singleton has joined the firm's Commercial Property department as an associate. James was previously an associate at Sprecher Grier Halberstam Solicitors.

We are delighted to welcome Jade Campbell as a legal assistant starting in the Family department in the new year.

We also warmly welcome Rebecca Connelly who recently joined Company Commercial group as a legal administrator.

Cumberland Ellis

Atrium Court, 15 Jockey's Fields, London WC1R 4QR England
Telephone +44 (0)20 7242 0422 Facsimile +44 (0)20 7831 9081
contact@cumberlandellis.com DX: 250 Chancery Lane

www.cumberlandellis.com

Contacts:

Charities: **Simon Howell** Commercial Dispute Resolution: **Jeremy Lederman** Commercial Property: **Michael Sinha** Company/Commercial: **Helen Robinson** Employment: **Mark Shulman** Family: **Hazel Wright** Private Client, Personal Taxation, Trusts and Estate Planning: **Ann Stanyer** Property Litigation: **Chan D'Souza** Residential Property: **Angela Lucy**

Our house style for email address is first name and surname run together e.g. adamcolenso@cumberlandellis.com