Because Recruitment Matters

Legal bulletin

What's in your Legal bulletin?

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Battle of the introduction fees

It can be rather frustrating when agencies find themselves in a position where introduction fees are disputed with their clients. This commonly occurs where an agency sends a candidate's CV to a client and then other agencies send the same CV to the same client and it is not clear who is entitled to receive the fee or depending on the terms of business agreed between the parties the client might have to pay more than one fee.

The misconception that the first agency to submit the candidate's CV gets the fee is not correct. This issue has been addressed in recent case law and it was established in the Foxtons Ltd v Pelkey Bicknell and another 2008 case (discussed further below) that the introduction by the agency must result in the engagement.

Under basic contract law, there are certain elements an agency has to establish in order to prove that there was an intention for the parties to enter into a legally binding contract. The agency has to demonstrate the following:

1. They made an offer to the client to do business on certain terms. It could be the client's terms or the agency's terms.

2. The client accepted the agency's offer on their terms or both parties agreed to change the terms.

3. There is consideration or an exchange of promises where one party gives something and the other party gets something else in return.

4. There is a clear intention to create legal relations between the parties.

It is essential that agencies send their terms of business and agree the terms with the clients before or at the very latest when they send a candidate's CV. Although, terms are sometimes agreed orally which often happens particularly when time is of the essence and a client requires a candidate as soon as possible, agencies should ensure that the terms are agreed in writing and executed by the parties.

Under the Conduct of Employment Agencies and Employment Businesses Regulations 2003, after 1 October 2010, it is no longer a requirement for agencies that introduce permanent candidates to clients to agree terms before providing work-finding services. However, the REC Code of Professional Practice requires our members to be transparent in their dealings with both clients and candidates therefore terms of engagement must be clearly and fully disclosed to clients prior to the acceptance of work being undertaken for the client. As stated above under contract law, an agency may not be able to charge a fee if they cannot prove that the terms were received and indeed agreed between the parties. The agency has to demonstrate that the client has accepted the terms and that their introduction of the candidate to the client together with all the steps taken, i.e. arranging interviews, providing feedback, liaising with both parties throughout the process was the effective cause of the engagement of the candidate.

The "effective cause" has been reviewed in great detail in a few cases recently. The Foxtons Ltd v Pelkey Bicknell and another 2008 case sets a good precedent for the agencies that charge a commission as this case provides more clarity on the "effective cause" principle. In this case, Mrs Bicknell instructed Foxtons to sell her house and they were the sole agent marketing the property for sale. She agreed to pay Foxtons 2.25% commission on the sale price if contracts were exchanged between her and a buyer.

Foxtons showed the property to Mrs Low who at the time did not wish to proceed with the purchase of Mrs Bicknell's property. Mrs Bicknell then terminated the sole agency agreement with Foxtons and instructed other agents one of which was Hamptons on a multiple agency agreement to sell her property. Mrs Low was registered with Hamptons and they showed her Mrs Bicknell's property. She agreed to purchase the property and Hamptons was paid the commission in the usual way. Foxtons issued proceedings for the commission fee based on the fact that they had previously shown Mrs Low the property during the sole agency agreement and this was therefore the "effective cause" of the agreement. The Court of Appeal disagreed and ruled that the introduction alone was not sufficient to warrant payment of the commission, it must go beyond that to result in the sale of the property.

This case will assist agencies as the Courts may apply the same principle to agencies, where it is the agency that is successful in not only introducing a candidate but the introduction resulting in the engagement of that candidate by the client.

Here are some practical tips for securing the introduction fee:

1. Send your terms either by registered post, email using the read receipt function or fax.
2. Keep a record of the fact they were sent together with a copy of any confirmation that the email has been read or fax transmitted.
3. Telephone your client after the terms have been sent and obtain confirmation that they have been received and are agreed.
4. Record the fact they have been received by the client and details of the person you spoke with including the date and time of the conversation.
5. The terms must clearly state what constitutes an introduction and when the fee becomes due.
6. The client having agreed terms with you must notify any other agencies that you have been instructed by them.
7. If any amendments are made try to incorporate them into the same document or put it in writing and state 'as agreed between the parties'.
8. Name the authorised signatories i.e. directors, company secretary, company lawyer and state who has the authority to amend the terms.
9. The fee structure must be clear.
10. Include exact payment dates and any interest on late payments.
11. The terms should include cancellation fees i.e. where the client makes an offer to the candidate and the offer is subsequently withdrawn or if the candidate is subsequently engaged by the client at a later date.
12. Ask the work seekers to notify you if they are subsequently directly engaged by the client.

In order to minimise the risk of losing an introduction fee and avoid the costs and time involved to purse clients for introduction fees, notwithstanding the break down in the commercial relationship with your clients, it is advisable to take the above steps. If you are faced with pursuing a claim against your client, you must ensure that you can demonstrate that there were agreed terms and your introduction of the candidate together with all the steps taken after the introduction resulted in the engagement of the candidate and that was the effective cause of the engagement.

FAQs

Carla Feakins, Legal Advisor at the REC, brings you a sample of your questions posed to the Legal Helpline

Q: When should I issue assignment confirmations for temporary workers or offer confirmations for permanent candidates?

A: Under the Conduct of Employment Agencies and Employment Businesses Regulations 2003, ("Conduct Regulations") employment businesses and employment agencies are obliged to provide certain basic information about the assignment or permanent position. This basic information will include the client's details, pay rates, hours of work, health and safety information etc. The REC has prepared two forms which are tailored to capture the specific information which has to be provided to either a temporary worker or permanent candidate.

These are: Document A - Assignment Details Form for temporary workers and Document F - Offer Confirmation for permanent candidates. Both are available in the REC Model Document Library.

The obligation to provide this information arises at the point that the employment agency or business proposes an individual to a client. This information can be confirmed orally to start with, but must be confirmed in writing as soon as possible and by no later than the end of the third business day following the offer.

There are two exceptions for this rule that apply to employment businesses only when supplying temporary workers. Firstly, where the worker has been in the same assignment with the same hirer in the previous five business days and the worker has already received a complete assignment details form as above; the agency does not need to confirm again. However, where any of the information has changed or the worker or client requests a new form, the agency will have to send out in full again. Secondly, where the length of the assignment is five business days or less and the worker has already received a complete assignment details form as above; the agency only needs to confirm the dates of the assignment and the identity of the hirer. If at any stage the information contained on the assignment details form changes, the agency should issue a new one. This will be particularly important for agency workers who complete their qualifying period under the Agency Workers Regulations.

Q: What is a 'fixed-term' employee and what rights do they have?

A: A fixed-term employee is an individual whose contract of employment has a termination clause which means that their contract will expire either on a fixed date, on completion of a certain task, or on a specific event, e.g. another employee returning from a period of maternity leave. As these individuals have contracts of employment they will be entitled to all the normal rights that employees receive.

In addition, under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 fixed-term employees are protected from less favourable treatment. This means that fixed-term employees are entitled to receive the same contractual terms and benefits as a comparable permanent employee. These benefits are subject to the 'pro rata principle' that means the fixed-term employee is entitled to such proportion of the pay or other benefit as is reasonable in the circumstances, having regard to the length of the contract and any other terms. For example, a fixed-term employee with a six month contract would be entitled to 50% of the annual salary of a comparable permanent employee.

This right of fixed-term employees is not absolute as an employer is able to provide less favourable treatment in relation to a specific provision in the contract if there is objective justification. This could be because there is an objective reason for not providing a particular term or benefit. Alternatively the employer may be able to demonstrate that the contract, taken as a whole, is not less favourable. For example, if the employer offers a comprehensive private healthcare scheme to permanent employees, the entitlement cannot be pro-rated and the fixed-term contract is only for three months the employer may choose to enhance the pay instead of offering this benefit.

Q: How can the agency ensure that limited company contractors or "LCCs" receive equal treatment in terms of holiday pay once they have reached their qualifying period under the Agency Workers Regulations 2010 (AWR)?

A: From the 1 October 2011 agency workers can start accruing weeks to count towards their qualifying period. Once the qualifying period has been completed all agency workers will be entitled to equal treatment in terms of holiday pay and annual leave. For those agency workers working via limited companies they will also be entitled to these rights.

At present all workers, including those who work via limited companies are entitled to receive at least the statutory minimum amount of holiday under the Working Time Regulations 1998, as amended, which is currently 5.6 weeks. Their employer is responsible for accruing holiday pay on their behalf and paying it out when the worker takes their leave. After the qualifying period the agency workers are entitled to what they would have received, had they been recruited directly. Therefore, if the client would have given more than 5.6 weeks the limited company will be responsible for accruing this additional amount as well.

So, to ensure your agency is compliant you will need to ensure that you provide information to the limited company about the number of additional days annual leave the worker will be entitled to. Also you need to ensure that the rate paid to the limited company includes a sufficient amount to cover the additional holiday. Where the client pays their direct recruits a salary, to work out equal treatment you will just need to pro-rata the salary down to a daily or hourly rate and inform the limited company that this rate includes the pay and holiday pay elements.

Q: Can I still charge my client transfer fees if they engage an agency worker directly after informing them of a vacancy under Regulation 13 of the Agency Workers Regulations 2010 (AWR)?

A: As of the 1 October 2011 all clients will have an obligation under Regulation 13 to inform agency workers of any relevant vacant posts they have available. The client is under no obligation to actually offer any permanent positions and they do not have to treat agency workers more favourably than their own employees or external candidates in the recruitment process.

Your right to charge clients transfer fees arises from the clauses in your terms of business. The AWR do not affect your ability to charge these fees. As long as your transfer fee clauses are compliant with the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Conduct Regulations) you can charge the client a transfer fee if they engage your agency worker directly. This applies even where the worker applies for the permanent position, without the agency's knowledge, as a result of receiving information directly from the hirer.

The Agency Workers Regulations 2010 come into force on 1 October. Click here for the AWR Toolkit.

The new candidate briefing document is now available.

Lorraine Laryea, Solicitor and Commercial Advisor, REC

Legal round up

Amendment to the Agency Workers Regulations 2010

The amendments made to the Agency Workers Regulations which were published in August came into force on 1 September 2011. The three amendments that were made mainly amend drafting errors and provide clarification.

One of the amendments clarifies that the pay between assignments obligation (contained within Regulation 10 (the "Swedish Derogation")) does not apply until after the first assignment under a Regulation 10 contract has been completed. Therefore the obligation does not apply where someone has been employed on that contract but has not yet been supplied to a hirer.

A further amendment was made to the definition of an 'agency worker' to make it clear that the agency worker just has to perform service personally rather than having to perform services personally for the agency.

Finally the amendment to Regulation 14 (which deals with liability) clarifies the information that a temporary work agency is required to seek from the hirer in order to avail of the defence against an allegation of failure to provide equal treatment.

Wray v JW Lees & Co
What constitutes Working Time?

In the case the Employment Appeal Tribunal (the EAT) considered an appeal from an employment tribunal on the issue of whether the time that a worker was required to spend overnight in her place of work should be taken into account when considering whether the duty to pay National Minimum Wage (NMW) was discharged.

In the case Ms Wray was a pub manager who, while temporarily managing a pub, worked a set number of hours when during the pub's opening times. The pub had accommodation which came with it and she was required to sleep in the accommodation overnight.

In the first instance the employment tribunal ruled that she had been paid more than the NMW, taking into account the hours that she worked when the pub was open. However she appealed to the EAT claiming that the hours she was required to spend in the pub overnight should also be considered as part of her working time , which would mean that there had been a failure to pay her the NMW.

The EAT considered a number of cases involving workers who work 'on call' or who have responsibilities to undertake work overnight as night watch staff or care home staff. Ultimately it concluded that Ms Wray's case could be distinguished from those case because she was only required to sleep at the premises as a 'minimum security or preventative measure' but she was not restricted from, for example, leaving the pub during periods in the evening or overnight. Essentially the EAT concluded that Ms Wray was not require to do any work during the period that she was in the pub overnight, other than perhaps contacting the emergency services in the event of a fire or break in. This case will be of interest to employers who engage workers to carry out work with night duties.

NHS Leeds v Larner
What happens when annual leave clashes with sickness absence?

Here, the EAT considered the issue of how a workers right to annual leave should be tackled when sickness absence prevents the taking of annual leave.

In this case the worker, Mrs Larner was absent from work for an entire leave year and was unable to take her leave. When she was subsequently dismissed from her employment on ill health grounds, her employer refused to make any payment to her in lieu of the annual leave she had not taken on the basis that she had not made any application to take the annual leave.

The EAT disagreed with the employer's argument and agreeing with the line of thought in an earlier case of Pereda v Madrid Movilland SA, it found that as sickness absence had prevented Mrs Larner from taking her leave, she retained the *"right to enjoy a period of relaxation and leisure"*, or alternatively, to receive a payment in lieu of her leave at the point at which her employment was terminated – albeit that this was in the following leave year.

NMW Reminder	Current rates	New rates from 1 October 2011
Workers 21 and over	£5.93	£6.08
Workers 18 – 20	£4.92	£4.98
Workers 16 -17	£3.64	£3.68
Apprentices	£2.50	£2.60

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