

UK Update

Agency workers – a Tribunal’s decision on the Swedish derogation

The Agency Workers Regulations 2010 came into force in October 2011, but there have been very few cases on them so far. One key issue on which employer hirers and agencies have been waiting for clarity is how the courts will interpret the rules around the exception to equal pay for agency workers who have completed the 12 week qualifying period (known as the ‘Swedish derogation’ exception). The Employment Tribunal’s decision in *Bray & others v Monarch Personnel Refuelling (UK) Limited* is the first decision we are aware of which has considered this issue.

The ‘Swedish derogation’ exception – what is it?

Agency workers must be paid the same as the hirer’s employees who do the same job, or a comparable job, once they have completed a 12 week qualifying period. However, the exception gives hirers the option of not paying agency workers the same as their employees if the agency workers are employed directly by the agency on a **permanent contract**, providing that:

- the contract was entered into at the **beginning of the first assignment** under the contract
- the contract meets certain requirements, principally that the agency must pay the agency workers a minimum amount between assignments, and for at least four weeks

The Bray case

In this case, Monarch (the agency) supplied the Claimants to BP as agency workers, working on a long-term assignment. They worked as tanker drivers, alongside BP employees who carried out the same role but were paid 70p more per hour than the agency workers. They were on an assignment which was initially due to end in June 2011 but was extended to 31 August 2011, and then to 30 November 2011.

When the Agency Workers Regulations came into force, BP was concerned that if the agency workers were paid the same as its employees, this would lead to a perpetual cycle of pay increases because BP would be under pressure from its unionised workforce to be paid more than the agency workers, and this would then lead to further claims by the agency

workers. So BP wanted Monarch to put all agency workers onto permanent contracts which came within the exception. By 30 November 2011, Monarch had terminated their temporary assignments and replaced these with permanent contracts. Monarch made it clear that the new contracts would apply to their new assignment, starting on 1 December 2011, but they would still be working as tanker drivers for BP. Monarch told the agency workers that if they didn't sign up to the new contract, they couldn't continue to work for BP. The agency workers were consulted about the new contracts.

The agency workers subsequently brought claims on the basis that the new permanent contracts did not comply with the requirements of the Swedish derogation exception because they had not been entered into before the beginning of their first assignment with BP. Therefore, they claimed they were entitled to equal pay.

– although the circumstances in this case were unusual because the agency workers hadn't had a gap between assignments, this didn't change the fact that they had been engaged on a series of separate assignments. As such, the agency workers had given up their right to equal pay when they accepted the new permanent contract

What this decision means for employers

This decision means that the exception can apply to existing agency workers who are working on a long-term contract for the same hirer even where there is effectively no gap between assignments. However, care needs to be taken to ensure that one assignment is ended and a new one is commenced under a contract that meets the terms of the exception.

Employers will take comfort from the clarification which this decision gives. However, it should be treated with some caution because it is only an Employment Tribunal decision, so other Tribunals are not compelled to follow it, and we understand it is the subject of an appeal. Given the implications of this decision for employers which use agency workers on permanent contracts, the Employment Appeal Tribunal decision in this case will be awaited with considerable interest.

Further information

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What did the Tribunal conclude?

Rejecting the claims, the Tribunal concluded that the contracts had been entered into before the beginning of the first assignment under the contract, even though the agency workers had actually worked for BP throughout. The assignment which started on 1 December 2011 was the "first assignment" under the new contract because:

– "assignment" does not mean the entire continuous period that an agency worker works for a hirer – it means the particular time that the agency worker is hired out to the hirer