APSCo United Kingdom

APSCo Board Briefing Q3 2022

This Board Report aims to provide members' boards, legal and compliance teams with a steer on upcoming legal changes and guidance affecting the professional recruitment sector to enable a proactive response and potentially competitive advantage. New information on our website can be found here: APSCo What's New

Topic	Important Dates	Actions
Legislation	• The Conduct of Employment Agencies and Employment Businesses Regulations 2003 were amended to remove the prohibition at Regulation 7, which prevented agency workers being supplied to fill staffing gaps caused by industrial strike action. The amendment came into force on **21 July 2022**. • The key provisions of the Professional Qualifications Act 2022 which has already received royal assent, will come into effect by **Autumn 2022**. • The Social Security (Medical Evidence) Regulations 1976 and The Statutory Sick Pay (Medical Evidence) Regulations 1985 were amended to allow more healthcare professionals to sign 'fit notes' from **1 July 2022**.	• Read the APSCo Legal Update on Industrial Action and The Conduct Regulations to consider how these changes will impact you and your workers. • Consider any changes to your onboarding processes in light of the Professional Qualifications Act 2022, which now allows UK regulators to make mutual recognition agreements with countries to recognise professional qualifications from around the world, further information can be found on the GOV.UK website. • Review your processes in respect of obtaining fit notes now that more appropriately registered healthcare professionals will be able to issue them. • Review the updated APSCo Guidance on Statutory Sick Pay (SSP). Consider whether the wording in your contracts of employment and sickness absence policies need to be updated to incorporate this change which applies across England, Scotland, and Wales.
Future of Work & Employment Status	• The Government has commissioned a Future of Work Review into how the they can support the future UK labour market which is being conducted over **Spring** and **Summer 2022**. • The Government published new employment status guidance for employers and workers on **26 July 2022**.	• Read APSCo's submission to Matt Warman MP, who is leading the Future of Work Review. This covers the lack of clarity in law and regulation surrounding umbrella companies and evolving payroll intermediary models, as well as prioritising the funding of the Single Enforcement Body to protect workers' rights and support an agile, productive, and compliant supply chain. • The employment status guidance will assist to clarify what rights gig economy workers are entitled to ranging from the national minimum wage to paid leave.
Apprenticeships	• The Education and Skills Funding Agency have announced a number of improvements to apprenticeships that will come into force from **August 2022**.	• Consider the use of the apprenticeships in light of these changes, which will make it easier for individuals to accelerate their apprenticeships, changing English and Maths requirements and a more efficient payments service. • Review APSCo Guidance on Apprenticeship Levy.
Right to Work	• Temporary COVID-19 adjusted right to work check measures to come to an end on **30 September 2022** (inclusive).	• Create an action plan for the end of the temporary COVID-19 adjusted right to work checks and consider whether you wish to use Identification Validation Technology (IDVT) through an Identity Service Provider (IDSP) and contact IDSPs to understand the process and cost. • Carry out responsible on-boarding of your chosen provider using the list of certified IDSPs on the GOV.UK website. • Review APSCo Legal Update on Digital Right to Work.

For further information on this report please contact the APSCo Legal Helpdesk at legalhelpdesk@apsco.org.

Holiday Entitlement: Harpur Trust v Brazel [2022]

Overview: Mrs Brazel, a music teacher at Harpur Trust taught between 10-15 hours per week on a term time only a permanent contract. During the school holidays, she did not teach and was not required to work. Under the original terms of Mrs Brazel's contract, she was entitled to 5.6 weeks paid leave each year, which had always been treated as being taken in three equal tranches during the winter, spring and the summer holidays. The amount of holiday pay for each tranche was based on her average weekly pay for the preceding 12 weeks she worked before each holiday period ("the calendar week method"). From September 2011, her holiday pay calculation was changed to the "percentage method". This meant that the Trust based Mrs Brazel's total holiday entitlement and holiday pay directly on how many hours she worked in the preceding 12 weeks and then added 12.07% to that figure. Mrs Brazel raised a claim for underpayment of wages for the period of January 2011 to June 2016. The Supreme Court dismissed the Harpur Trust's appeal and agreed with the decisions of the Employment Appeal Tribunal (EAT) and the Court of Appeal. It was held that a part-year worker on a permanent contract's annual leave entitlement is not required to be pro-rated to that of a full-time worker. The Calendar Week Method therefore represented the correct implementation of the Working Time Regulations (WTR).

Impact: All workers employed under permanent contracts who work irregular hours or part of the year, are entitled to the statutory 5.6 weeks' paid leave and holiday pay should be calculated in accordance with the provisions in the WTR.

Action: Members should consider completing an audit of their current arrangements in place for calculating holiday entitlement and holiday pay for part-year and irregular hours workers on permanent contracts to ensure that they are consistent with the decision in this case. By continuing to use the 12.07% calculation method for holiday accrual and holiday pay calculations, members should be aware that they may potentially be underpaying their workers holiday pay and therefore run the risk of being non-compliant. Further information on this case can be found in our Legal Update here.

Long Covid: Burke v Turning Point Scotland [2022]

Overview: Mr Burke, was employed as a caretaker/security by the respondent, Turning Point Scotland. After contracting COVID-19 in 2020, Mr Burke initially suffered with mild symptoms and then began to develop severe headaches and fatigue. Mr Burke obtained fit notes from his doctor throughout his absence which referenced "post viral fatigue syndrome" caused by COVID-19. Two occupational health reports were obtained by the Respondent. Both reports concluded that Mr Burke was "medically fit to return to work" and that it was "unlikely" that the disability provisions of the Equality Act 2010 would apply. Mr Burke did not return to work and was dismissed on the grounds of his ill health with effect from August 2021, he also exhausted his entitlement to sick pay in June 2021. Mr Burke brought a number of claims against Turning Point including disability discrimination. A preliminary hearing was held to determine whether Mr Burke's condition should be constituted as a "disability" under the Equality Act. The Tribunal made reference to the TUC report and it was found that Mr Burke's fluctuating symptoms and physical impairment (post-viral syndrome/long covid) were in line with the report. It was also held that the physical impairment had an adverse effect on his ability to carry out day to day activities and that the adverse effect was substantial and long-term, meaning that it was likely to last for a period of 12 months or more. Therefore, the relevant tests met the definition of disability, and Mr Burke was considered as a disabled person at the time of his dismissal. As a result, he could proceed with his claim for disability discrimination (as well as his other claims).

Impact: Although long covid is not automatically deemed to meet the definition of a disability as each case will be dealt with on a case-by-case basis, the symptoms of long covid may satisfy the definition of disability under the Equality Act 2010. As such, the ruling in this case may result in several other claims from employees who feel that they may have been discriminated against due to having long-covid.

Action: Long-covid is a legitimate condition and members are advised to ensure that they are aware of the criteria for establishing whether long-covid may be considered a disability, and therefore appropriately manage employees that may be suffering from it. Any reasonable adjustments should be considered, and members should discuss with their employees any ways that they can support them as and when they return to work to avoid the risk of inadvertent discrimination claims.

Employment Status: Sejpal v Rodericks Dental Ltd [2022]

Overview: Ms Sejpal, was a dentist who began working for Roderick's Dental from August 2009. She commenced a period of maternity leave in 2018. At around this time, the respondent announced that the dental practice would be closing. Ms Sejpal brought claims against the respondent for pregnancy and sex discrimination as her contract was terminated, whereas other staff members were redeployed. In order to bring these claims, she needed to satisfy that she was a worker under the provisions of the Employment Rights Act 1996 and the equivalent provisions of the Equality Act 2010. The Employment Tribunal (ET) ruled that Ms Sejpal was not classified as a worker as she did not meet the statutory test for establishing worker status. The ET based this decision on the wording of the 'Associateship Contract' which the parties entered into. The contract stated that the agreement shall not constitute a contract of employment, it was a contract for services. Ms Sejpal was granted leave to appeal to the Employment Appeal Tribunal (EAT). The EAT ruled that the ET was wrong to give the wording of the contract primacy and should have ascertained the true nature of the arrangement. The ET also mistakenly concluded that mutuality of obligation did not exist and further that Ms Sejpal had an unfettered right of substitution, which therefore meant that the requirement for personal service was not satisfied. It was found that the ET did not properly consider whether Ms Sejpal was in business on her own account providing services to the practice or a self-employed person who provided her services as part of a profession or business. The EAT ruled that the ET did not correctly apply the statutory test and erred in law in concluding that Ms Sejpal was not a worker. Ms Sejpal succeeded on five grounds of her appeal. The EAT remitted the case to a different ET to consider the outstanding points of whether Ms Sejpal carried on a profession or business undertaking and whether the dental practice was her client or customer.

Impact: The Tribunals will focus on the practical reality of the arrangement between the parties and not overly rely on the wording in the contract that may be designed to avoid worker status being established.

Action: The employment status assessment is a 'whole picture' exercise which includes assessing both the written contract but also the working practice and the reality of the engagement. Members and their supply chains should ensure that the working practices are in line with the terms of the contract.