Employee Management Limited

Human Resource and Health & Safety Consultants

EMPLOYMENT REVIEW

In this issue…

Agency Worker Regulations 2010 – Are you prepared? 1

Additional Paternity Leave – Q&A 4

Next steps in review of employment law announced by Government 6

Case Law Update 6

Health & Safety 9

Recruitment – Top Tips for Interviewers 10

Right to reply 11

AGENCY WORKERS REGULATIONS 2010 – ARE YOU PREPARED?...

The Agency Worker Regulations 2010 (AWR) implement the Temporary Agency Work Directive which was formally adopted by the European Council in November 2008 and came into effect on 5 December 2008, following on from an agreement that was reached earlier in the year between the UK Government, the CBI and the TUC. Despite employer organisations lobbying the new coalition Government to consider amending the Regulations, it was confirmed in October 2010 that they would not be amended and they will become law on 1st October 2011.

Yet according to a new survey carried out by the Recruitment and Employment Confederation (REC) only 10% of employers are prepared for the impact the AWR could have.

Under the AWR rules, agency workers will have certain rights from their first day on an assignment with the organisation who is hiring them, as well as an entitlement to the same basic working and employment conditions as comparable regular employees at the hiring organisation, after a 12-week qualifying period.

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Who is affected

Organisations will be affected according to the type of agency workers that are supplied to them. While some organisations may have a straightforward supply of the same type of worker who will all be subject to the Regulations, others may be supplied with a variety of workers, not all of whom will fall within the scope of the Regulations.

Types of ‘agency worker’ who fall within the scope of the Regulations include ‘PAYE temps’, workers who supply their services through an ‘umbrella company’ that employs the agency worker, and other types of worker who supply their services on a temporary basis via a ‘temporary work agency’ (as defined in the Regulations) to work under the supervision and direction of the organisation who is hiring them.

Falling outside the scope of the Regulations will be those who are genuinely self-employed or working under the supervision and direction of the supplier rather than the hirer. Managed service arrangements, although not expressly excluded, will fall outside the scope of the Regulations, unless, in reality, the hirer, rather than the managed service provider supervises and directs the worker.

It is important that organisations act now to consider the types of workers that are supplied to them on a temporary basis, so that they can understand and be prepared for the impact that the Regulations may have on their organisation.

Equal Treatment

Following the completion of 12 weeks’ continuous employment by the agency worker with the hiring organisation he or she will be entitled to equal treatment as if he or she was engaged directly by the hiring organisation in relation to:

- pay (including overtime, shift allowance, bonus, commission payments)
- hours of work (including rest breaks)
- night work
- annual leave

In addition, under the Regulations pregnant agency workers will be entitled to take paid time off work to attend ante-natal appointments after the 12-week qualifying period and hiring organisations will be required to carry out risk assessments for pregnant agency workers.

There are some benefits that the regularly employed comparator at the hiring organisation receives, which the agency worker is excluded from receiving. These include:

- occupational sick pay
- company pension schemes
- share options schemes
- loans
- expenses
- health/life insurance
- financial participation schemes
- family-leave related pay above the statutory minimum

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Organisations who operate flexible benefits schemes may need to review the wording of the scheme regulations.

It should be noted that although the Regulations only confer entitlement on an agency worker after 12 'continuous' weeks in the same role with the same hirer, some breaks during or between assignments will not trigger a new qualifying period, provided the break is for one of a series of specified reasons eg any break for less than 6 weeks, sickness (for up to 28 weeks), any statutory or contractual entitlement to time off, temporary cessation of work etc

The Regulations contain a complex set of provisions designed to make it difficult for hiring organisations and supplying companies to construct assignments in such a way as to get round the qualifying period, and employers breaching these provisions could be liable for a penalty of up to £5,000 on top of any compensation payable in respect of the breach of the equal treatment rule.

While the Regulations extend the rights of agency workers, they do not give agency workers employee status at the hiring company. Only if an agency worker can establish that he or she is the hiring company's employee, will he or she have the right to claim unfair dismissal, statutory notice or statutory redundancy pay from the organisation.

Definition of Comparator

In determining what equal terms he or she is entitled to, an agency worker can compare his or her terms with those of an employee or worker employed directly by the hiring organisation. The 'comparable employee' need not necessarily be doing exactly the same job as the agency worker. Someone undertaking a broadly similar role as the agency worker will be deemed to be a sufficient comparator.

'Day one' rights

In addition to the equal treatment which agency workers are entitled to following the 12-week qualifying period, they will also be entitled to certain rights from day one of an assignment with the hirer. These include:

- the same access to collective facilities as equivalent regular staff eg use of canteen, childcare facilities, car-parking, transport services etc
- the same opportunity to apply for relevant vacant posts with the hiring company – unless the organisation is undergoing an internal reorganisation of its staff and there is a headcount freeze
- the right not to be subjected to a detriment by the hiring company for asserting (or being perceived as having asserted or being likely to assert) their rights under the Regulations

Liability

Agency workers will be able to bring claims of breach of the Regulations through an employment tribunal. Claims will have to be submitted within three months of the alleged breach.

Whether or not the agency, hiring company or another party will be liable for a breach of the Regulations depends on the nature of the alleged breach. It will be the hirer that is solely liable for any breaches that occur in relation to 'day-one rights'. In the case of post-qualification-period breaches the temporary work agencies will primarily be liable, although they will have a defence if they can demonstrate that they have taken all reasonable steps to obtain the information required to comply with their obligations from the hiring company, and, if they have obtained relevant information, that they have acted reasonably in setting the agency worker's post-qualification-period terms.

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If a claim succeeds, the employment tribunal can award compensation, taking into account the losses suffered by the worker and the tribunal's assessment of what is just and equitable. This is subject to a minimum award of two weeks' pay. Both agencies and hiring companies could be liable for substantial awards.

Key points

- Agency workers will be entitled to equal treatment rights after a 12-week qualifying period
- Equal treatment rights cover pay, hours of work, night work and annual leave
- Agency workers will be entitled to certain rights from day one of the assignment
- Hiring Companies and agencies will be responsible for a failure to provide equal treatment rights to the extent that they caused the failure
- The Regulations contain anti avoidance provisions designed to make it difficult for hirers and agencies to get round the 12 week the qualifying period

Preparation for implementation of Regulations

The AWR will give agency workers unprecedented new rights and both temporary work agencies and hiring Companies will have to be proactive in terms of how they will share information. By meeting with and talking to the supplying companies well in advance of the implementation of the AWR, organisations will be able to identify if they are at risk of breaching any of the Regulations and deal with any pay issues which might arise. From the hiring organisation's point of view pay grade scales and structured bonus schemes based on length of service could help them reduce the risk of claims by agency workers.

If you require further guidance in relation to how these Regulations could impact on your organisation, please contact one of our consultants on 01942 727200.

ADDITIONAL PATERNITY LEAVE Q&A…

The changes which were introduced in April 2011 giving extra paternity leave to fathers and partners have led to some confusion. Below we provide some answers to the commonest questions.

Q. What exactly is the father's or partner's entitlement in relation to Additional Paternity Leave?

A.The entitlement is a stand-alone right to between two and 26 weeks' Additional Paternity Leave (APL), which can be taken at any time between 20 and 52 weeks after the baby is born. The mother must have returned to work and the amount of APL is related to how much leave the mother has taken, but if for example the mother started her leave 6 weeks before the baby was born, and took her full 52 week entitlement there would still be a further 6 weeks before the baby's first birthday and the father/partner could take APL during this period. The mother does not have to have any maternity leave left when she returns to work for the father to be entitled to APL.

Q.What rights do employees who take APL have?

A.The rights of fathers and partners who take APL are similar to those of mothers who take maternity leave. These include maintaining the same terms and conditions of employment (with the exception of wages), protection from detrimental treatment or unfair dismissal as a result of taking APL, the benefit of 'keeping in touch' days, the right to return to the same job or if not reasonably practicable to a job with no less favourable terms and conditions, and the right to be offered a suitable alternative vacancy if the job is redundant.

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Q.Could there be a gap between the mother returning and the father/partner starting APL?

A.Yes. Maternity Leave and APL do not have to run back to back. For example if the mother took less than 20 weeks' leave before returning to work there would have to be a gap before the father could start APL as it cannot start before 20 weeks after the birth of the baby.

Q. What is the entitlement to Additional Statutory Paternity Pay?

A.Fathers and partners are entitled to the balance of the 39 weeks Statutory Maternity Pay (SMP) payable to the mother. For example if the mother returned after 26 weeks and the father/partner took the remaining 26 weeks as APL then for the first 13 weeks he/she would be entitled to Additional Statutory Paternity Pay (ASPP). If there was a gap between the mother returning and the father/partner starting APL this could result in some ASPP being lost.

Q.What if the mother was not eligible for SMP but was in receipt of State Maternity Allowance (SMA)?

A.The father/partner is still entitled to ASPP for the balance of the period for which SMA is payable.

Q.If we provide enhanced maternity payments for women on maternity leave, are men on paternity leave entitled to the same?

There is still some uncertainty regarding this. As both men and women can take paternity leave it would not be direct sex discrimination to pay paternity pay at a lower rate than maternity pay and it is also recognised that women on maternity leave are in a unique position worthy of special protection in law. But it will depend on how long the payments last under the enhanced scheme. You may choose either to enhance paternity pay to avoid the possibility of a discrimination claim or to pay only the statutory rate until such time as some clarity is established.

Q.Can we require confirmation from the mother's employer that she has returned to work?

A.You have the right to request the father/partner to provide a copy of the baby's birth certificate and the name and address of the mother's employer. Failure to provide this information when requested, could lead to the father/partner losing entitlement to APL and ASPP. According to the Regulations there is no obligation on the mother's employer to provide any information to the father or partner's employer.

Q.What happens where the mother takes sick leave or a period of holiday at the end of maternity leave?

A.The Regulations state that the mother is treated as having returned to work at the point at which her maternity leave has ended suggesting that if she commenced a period of annual or sick leave at the end of her maternity leave this would be classed as 'returning to work' for the purposes of the APL Regulations. The definition of what is meant by 'returning to work' remains unclear, however with some guidance suggesting that a period of annual, sick or parental leave directly after the maternity leave but during the mother's statutory maternity pay period is not a 'return to work.'

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NEXT STEPS IN REVIEW OF EMPLOYMENT LAW ANNOUNCED BY GOVERNMENT…

Last month the Government announced the latest areas of employment law which they would be reviewing in the coming year.

These were:

- collective redundancy consultation periods
- the Transfer of Undertakings (Protection of Employment) Regulations
- discrimination compensation awards

Employers' complaints which the Government has said it will examine include:

- high awards in relation to compensation for discrimination are seen by some businesses as encouraging weak, speculative or vexatious claims
- the current requirement of 90 days' collective consultation when 100 or more employees face dismissal hinders an organisation's ability to reorganise and restructure
- in terms of TUPE Regulations there is criticism that they 'gold plated' the EU Acquired Rights Directive and are overly bureaucratic

So far in its review of employment law the Government has:

- consulted on reforming the employment tribunal system and increasing the qualifying period to two years for an unfair dismissal claim
- commissioned an independent review into managing sickness absence
- launched a review of the compliance and enforcement regimes for employment law

The Government has said that if there is a case for reform, legislation will not necessarily be the route to implement any change.

The Government also plans to consult on extending the right to request flexible working to all employees and introduce a new system of shared parental leave from 2015.

CASE LAW UPDATE…

Once again we highlight recent case law decisions in order to interpret key points of legislation and identify the impact these decisions have on employers.

Chang-Tave V Haydon School and anor, EAT - Tribunal should have adjourned hearing on medical grounds

Background:

C-T was employed as a support analyst in the school's ICT department. In June 2007, he raised a grievance alleging that he had suffered racial abuse and harassment. As a result of making secret video and audio recordings of his co-workers in order to support his grievance, he was subjected to disciplinary proceedings which subsequently led to his dismissal for gross misconduct in June 2008.

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C-T presented a number of claims to the employment tribunal, including unfair dismissal and race discrimination. A case management discussion was held in order to give directions for the future conduct of the case and as well as scheduling various interim matters, the judge listed a full merits hearing for ten days. C-T did not serve his witness statement by the specified date and the deadline was twice extended by the tribunal. He finally submitted his statement on 3 September, just within the extended deadline.

In the meantime, C-T had applied to the tribunal to have the hearing date postponed on the basis that he had been diagnosed with major depressive disorders and he felt unwell. He provided a letter from one of the mental health team's doctors which stated that C-T was psychologically in a very vulnerable situation and had been advised not to attend the hearing. The tribunal requested further information from the doctor who confirmed that C-T was under his care for depression and anxiety and that his condition deteriorated significantly when he was under pressure.

The employment judge refused C-T's application to postpone the hearing date, stating that the case had been pending for a year and related to allegations going back several years before that. Furthermore, the doctor's letter did not actually state that C-T was unfit to attend the hearing, and nor did it give any prognosis that he was likely to be better at some future date.

Decision:

C-T was represented at the merits hearing but did not attend in person. A renewed adjournment application from C-T was refused on the basis that in addition to the Tribunal's earlier concerns about the medical evidence, C-T had recently written cogent letters and had produced a detailed, lucid witness statement and was therefore, in the Tribunal's opinion, capable of attending to his affairs.

The tribunal went on to consider the school's application for C-T's claims to be struck out on the grounds that his conduct of the proceedings had been 'scandalous, unreasonable or vexatious'. On the basis that C-T had acted unreasonably in this regard C-T's claim was struck out for non-compliance with tribunal orders.

C-T appealed to the EAT against both the strike-out and the tribunal's refusal to grant him an adjournment.

EAT:

The EAT referred to the Court of Appeal's decision in Teinaz v London Borough of Wandsworth - the leading judgment in relation to a litigant whose presence is needed for the fair trial of a case, but who is unable to attend through no fault of his or her own, must usually be granted an adjournment, however inconvenient that is to the tribunal or the other parties.

If there is medical evidence that a litigant is unfit to attend but the tribunal has doubts as to its veracity, it has discretion to give directions to enable such doubts to be resolved. Turning to the medical evidence in this case, the EAT noted that C-T had been diagnosed with a severe depressive disorder for which he had been under medical care for about a year, and because of which his doctor had advised him not to attend the hearing. In the EAT's opinion, fairness required that an adjournment should have been granted. Furthermore, in refusing the adjournment the tribunal had taken into account irrelevant factors – namely, the cogent letters that C-T had written and his detailed witness statement – as these factors did not bear on the uncontradicted medical opinion that had been provided. Accordingly, the EAT held that the tribunal was wrong in law to refuse C-T's application to adjourn his hearing date.

Moving on to the tribunal's decision to strike out C-T's claim, the EAT referred to the Court of Appeal's decision in Blockbuster Entertainment Ltd v James where it was said that, when considering a strike-out application, it is first necessary to determine whether the party responding to such an application is guilty of conduct amounting to a deliberate and persistent disregard of required procedural steps and/or orders of the tribunal.

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If so, the second question is whether a fair trial is still possible.

Applying this principle to the instant case, the EAT noted that when C-T had submitted his statement on 3 September 2009, he had done so in compliance with a tribunal order – to which the tribunal had not referred – which had extended the deadline for submission to 4 September. Accordingly, C-T was not in breach of a tribunal order as at that date. As to whether a fair trial was still possible, the tribunal had not answered this. However, in the EAT's opinion, a fair hearing would have been possible had C-T attended on 7 September. Further, having held that an adjournment should have been granted on medical grounds, the EAT concluded that any impediment to the school's preparation caused by the late service of C-T's witness statement would have evaporated had the case been adjourned. Accordingly, the EAT allowed the appeal, set aside the strike-out order and directed that the case be relisted for a full merits hearing before a fresh tribunal.

Comment:

There is no hard-and-fast rule that where a party is unfit to attend, a hearing will necessarily be postponed or adjourned. Previous case law has determined that this will usually be so where a party has adequate medical evidence and the claimant's presence is necessary for a fair trial of the issues to take place.

One instance in which the claimant's presence was not thought necessary was Maloney v London Borough of Hammersmith and Fulham and ors. The basis for refusing the adjournment there, despite the claimant's non-availability on account of illness, was that some of the allegations were already six years old; the 25-day hearing could not be relisted for over a year; and the continuing delay was causing considerable acrimony and disruption at the respondent's workplace. Moreover, the claimant's advisers were familiar with the case and could have called witnesses and conducted the hearing without her. The Court of Appeal declined to interfere with the tribunal's decision that the interests of justice required the adjournment to be refused, commenting that the claimant's witness statement could have been put before the tribunal in place of her oral testimony and if the tribunal thereafter thought it necessary to hear her in person, an adjournment could have been granted for that purpose.

Although this case refers to attendance at a Tribunal Hearing, the same principles can be applied to requests for employees who are signed off sick to attend internal disciplinary or grievance hearings.

If you are experiencing problems with employees declining to attend such hearings on medical grounds, please contact one of our consultants on 01942 727200 for further advice.

Hays V Ions- Former employee ordered by the High Court to hand over business contacts built up on his personal page of the social networking site LinkedIn.

Although this is not a case which was brought before an Employment Tribunal it is nevertheless an important one for employers who want to have some control over their employees' activities on line.

Background:

Mr I was a consultant working for Hays Specialist Recruitment operating in Leeds, Newcastle and Edinburgh. He allegedly used his LinkedIn network to approach clients for his own rival agency called Exclusive Human Resources, which he set up three weeks before resigning from Hays.

LinkedIn describes itself as 'an online knowledge network for professionals, built on personal networks of trust' and has 23m users worldwide. It is particularly popular with recruiters who are seeking job candidates. Mr I's solicitor told the court that Hays encouraged his use of the site and argued that once Hays' contacts accepted Mr I's invitation to join his network they ceased to be confidential as they could be contacted by anyone in his personal network.

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Decision:

Mr I was ordered to disclose his LinkedIn business contacts requested by Hays and all emails sent to or received by his LinkedIn account from the Company's computer network.
He was also ordered to disclose all documents, including invoices and emails, that showed any use by him of the LinkedIn contacts and any business obtained from them.

Comment:

This decision highlights the problems which businesses face when they encourage employees to use social networking websites for work but then claim that the contacts remain confidential information at the end of their employment. Whereas an email/internet policy used to contain simple instructions in terms of what was and wasn't acceptable use, the advances in social networking sites, and technology generally becoming more and more sophisticated, means they need to be much more than that.

If you need any assistance with the formation or update of an Email/Internet or Social Networking Policy please contact one of our consultants on 01942 727200.

HEALTH AND SAFETY...

Changes in reporting of injuries and incidents under RIDDOR

From 12 September 2011, the reporting to the HSE of work related injuries and incidents under RIDDOR (the reporting of Injuries, Diseases and Dangerous Occurrence Regulations 1995) will no longer be submitted by email , post or fax but will move to an on line system making the reporting process quicker and easier.

However, because it is acknowledged that people reporting a traumatic event need that personal interaction, the notification to the HSE of fatal and major incidents will still take place by phone.

The reporting of all other incidents will have to be submitted on the appropriate online form. The seven online RIDDOR reporting forms will be:

- F2508 Report of an injury
- F2508 Report of a Dangerous Occurrence
- F2508A Report of a Case of Disease
- OIR9B Report of an Injury Offshore
- OIR9B Report of a Dangerous Occurrence Offshore
- F2508G1 Report of a Flammable Gas Incident
- F2508G2 Report of a Dangerous Gas Fitting

The revised online reporting forms have been designed to be interactive and user friendly making it easy for them to be completed.

The HSE has also announced that in a move to improve efficiency further and deliver value for taxpayers, their info line telephone service, which currently provides a basic information service to callers, will end on 30th September 2011.

Tragic incident serves as a warning to those who complain about Health and Safety having gone too far

The recent explosion at the Chevron oil refinery in Pembrokeshire, which left four people dead and one critically injured, is a painful reminder of how dangerous some workplaces can be.

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The fatal blast happened as a storage tank was being taken out of service for routine maintenance work. Chevron have launched their own internal inquiry alongside a Health & Safety Executive (HSE) investigation, but identifying the cause of the accident is likely to be a lengthy process.

It has been acknowledged that the Company offered a safety conscious work environment, and although the result may be that this was a rare accident that no one could have prevented, fatalities in the workplace are still shocking and should act as a warning to those who complain that health and safety rules and procedures have gone too far.

Employers have a duty to safeguard employees doing their jobs and a balance must be maintained. They need to ensure that the relaxing of H&S rules - as suggested by Lord Young last year - doesn't go too far the other way, allowing attitudes to become lax thus reducing the effectiveness of procedures.

Progress has been made on workplace safety over the past decade and the latest HSE statistics for UK deaths at work show that the figure is 17% lower than the average over the last 5 years. Also the fatal injury rate for Great Britain is consistently one of the lowest in Europe. Yet there were still 171 deaths in the workplace in 2010/11, so there is clearly more work to be done. Pressure from the new corporate manslaughter law should help.

If you have any Health and Safety queries or require any further information on any of the above, please contact one of our H&S consultants on 01942 727200 for a free, no obligation discussion.

RECRUITMENT...

Top tips for interviewers

As unemployment rises, so do job applications. It is estimated that in the current year there are 60% more applications to every advertised job, and in turn the task of selecting good candidates becomes even more difficult. We hope that these tips will assist you in making the right choice for your business.

Prepare:

Write down the essential knowledge, skills and attributes the person needs to do the job: what they need to know, what they must have to be able to do the job, what behaviours are needed and what experience they will need to have - if you don't know what you are looking for, you're unlikely to find it! Take a Person Specification, Job Description and the applicant's CV or Application Form with you to the interview.

The Environment:

It is important that the interview is conducted in an environment that is suitable. This could be the applicant's first visit to your premises and first impressions count for a lot. If the skills you are recruiting for are in demand, applicants' first impressions of a business can count for a lot at the interview stage. You should:

- Look after interviewees while they wait
- Ensure privacy with no interruptions
- Arrange the seating in an informal relaxed way – rather than sitting behind a desk directly facing the interviewee - sit around a coffee table or meeting room table
- If the interview is taking place in your office, clear your desk, apart from what you need for the interview, so it shows you've prepared and are organised
- Put interviewees at ease - it's stressful for them, so don't make it any worse

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Experience:

If you decide that your ideal applicant needs to have certain experiences, don't get caught up on the time scale of those experiences. Look at the individual's quality and understanding of the job. Experience can count for a lot but it is not innate. Over time people can become complacent particularly on repetitive tasks. Sometimes a recently trained individual can be a breath of fresh air to a business.

Pre-prepared questions:

You should determine in advance the questions you intend to ask. Use a mix of questions covering background, scenario, competency and motivation to establish if the applicant meets your relevant requirements.

Grade each answer out of five at the end of the interview to help you compare applicants against each other. Remember if you don't know why you are asking the question, don't ask it – it's a waste of your time and theirs.

Keep it simple:

- Only ask one question at a time
- Don't use ten words when you can use four
- Start questions with 'how' or 'what'
- Listen and note the reply

When asking competency based questions, you want to know what they did do not what they would do. Phrase your questions in the past tense eg 'How did you' or 'What did you'. If they say 'I would'... 'I always'... 'I usually'... this is not an example of how they actually behaved ...but how they would want you to think they would behave in the future.

"We":

Most work is done with teams or with other members of a business. However, it is important to know what your applicant's contribution was – if in doubt ask them!

Listen and show you are listening:

It sounds obvious but too often interviewers are busy thinking about the next question rather than listening to and probing the answer to the current question. Show that you are listening, (eye contact, nodding, making confirmatory noises etc) but don't give effusive praise – otherwise they will think that they have got the job.

The 80/20 Rule:

The applicant should be doing most of the talking - otherwise you have no information on which to assess their suitability. Leave long explanations about the business until later; applicants will be less nervous and more receptive.

Silence:

Don't rush in if the candidate doesn't immediately answer your question. Give them time to think – if they don't understand it, they will ask you to explain further.

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Interviewees Questions:

Give interviewees opportunities to ask their own questions. Questions asked by interviewees are usually very revealing. They also help good candidates to demonstrate their worth, especially if the interviewer has not asked great questions or for whatever reason a person has not had the chance to show their real capability and potential.

Evaluation:

Assess the applicant against the essential knowledge, skills, experience and attributes you identified for the role, based on their answers to each of your questions. Use a rating scale – this enables you to identify the stronger and the weaker applicants.

Decision time:

When choosing between candidates, bear in mind that is often easier to acquire knowledge than it is to change behaviour and attitudes. You might also want to consider broader issues such as long term potential, suitability for other roles in the business or positive action.

Remember – interviewing is actually a skill, the more times that you do it the more confident and competent you will become.

RIGHT TO REPLY…

If you have any comments or feedback regarding this newsletter or wish to highlight a specific topic you would like to see covered in our next issue, please e-mail the details to us. If there are other individuals in your organisation who you feel would benefit from receiving future newsletters, please forward the details to the e-mail address below.

EML's consultants are on hand to assist you and provide a tailor made service to support your organisation in effectively managing human resource or health and safety issues. Please contact any of our consultants on the contact number below if you would like to discuss any specific problem or issue.

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