

What is the employment status of an employee on secondment?

In a typical secondment an employee will be seconded by their employer ("A") to a third party ("B"). The usual intention is that the employee will remain employed by A for the duration of the secondment, and will return to A's business at the end of the period of secondment. In addition, the employee usually continues to be paid by A, and continuity of employment with A remains unaltered.

However, an interesting secondment issue has recently been considered in the case of *Fitton v City of Edinburgh Council*. In this case the question arose as to whether the Claimant was employed by the Council or the Edinburgh Lifelong Partnership ("ELLP") to which she had been seconded.

The Claimant advanced constructive dismissal and sex discrimination claims against the Council when her employment with ELLP terminated. The Employment Appeal Tribunal held that the Claimant was in fact employed by ELLP, and not the Council, despite the fact that she was on secondment from the Council.

The reason for doing so was that, upon a proper examination of the relationship between the parties, it was clear that the Council was not the Claimant's employer at the relevant time. The Claimant had relinquished her role with the Council, and was thereafter managed and controlled by ELLP. She was not therefore the Council's employee.

This case is a little unusual in that the nature of the secondment was such that the Claimant retained less contact with the original employer that would usually be expected. As a result, her employer was held to be ELLP.

Points to consider

When seconding staff there are a number of issues to consider, some of which are summarised below:

- Who is to be the employer during the secondment?
- If there is a risk that the secondee company could be the employer will that company require an indemnity from the original employer to cover claims consequential upon termination of employment at the end of the secondment?
- Similarly, who is liable for claims arising out of the actions of the secondee company and their staff? Should the original employer be indemnified?
- Who controls the secondee day to day?
- How integrated is the secondee to be to the secondee company's business? This will impact upon employment status.
- Is continuity of employment to be broken?
- Have the secondment terms been agreed in writing between the original employer and the employee, and also as between the original employer and the secondee company?
- Is there a risk of a TUPE upon the secondment? If so, that will mean that consultation obligations will apply.
- Will the secondee employer require the employee to undertake a wider range of duties than are set out in the employment contract? If so, this should be recorded in writing.

We can help!

We can help employers on both sides of the secondment arrangement in the drafting of the relevant documents and advising on associated risks. We can provide you with precedent documents that can be used now and in the future. Given the nature of this advice, we would normally charge on a competitive fixed fee basis. Please contact us for more details.

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