MOORE BLATCH

UPDATE

Employment - December 2019

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WELCOME TO DECEMBER'S EMPLOYMENT LAW UPDATE

In this edition we cover some unusual employment law cases; that of an employee who mistakenly handed over £200,000 to a fraudster and a head teacher awarded £700,000 after winning his discrimination claim at an employment tribunal.

As 2019 comes to a close, we look ahead to employment law changes coming into force in 2020, outline the new IR35 legislation as well as new guidance from the ICO. You can also learn how best to support employees going through menopause (a topic that has been much covered in the news) as well as when holiday pay can be rolled over.

Following a flurry of enquiries from employers who provide accommodation to employees, we are also pleased to have a guest article from Real Estate solicitor Jack Keats about things to consider when this type of arrangement arises. If you have any queries regarding the topics covered, or would just like some general advice, please don't hesitate to get in touch.

Otherwise, have a merry Christmas and a Happy New Year from us all here at Moore Blatch.

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QUICK NEWS: PREPARING FOR IR35

There is a lot of buzz around the new IR35 legislation that is due to be introduced in April 2020.

IR35 is being introduced to tackle a particular form of perceived tax avoidance, whereby individuals may seek to avoid paying employee income tax and national insurance contributions by supplying their services through an intermediary and paying themselves in dividends.

The new rule will mean that payments made to personal service companies will be treated as payments of employment income on which the client (or third-party intermediary) must account for tax. Essentially, the responsibility for IR35 tax compliance will shift from the personal service company to the client or third-party intermediary.

The legislation will apply to medium and large companies in the private sector from April 2020.

Companies who currently engage with contractors through service companies should consider reviewing the format of these relationships to determine whether changes need to be made in light of IR35.

The rolling out of IR35 in the public sector demonstrates the importance of preparing for these changes as early as possible.

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QUICK NEWS: ICO UNVEILS NEW GUIDANCE

The Information Commissioner's Office (ICO) has published new guidance about 'special category data' for persons with data protection responsibilities in larger organisations.

The guidance includes details about what is regarded as 'special category data', the rules on special category data and the conditions for processing it and can be found on the ICO website. It is a useful read for data protection officers.

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QUICK NEWS: CHANGES TO WRITTEN STATEMENT OF TERMS

As 2019 draws to a close it's worth looking ahead to those employment law changes coming into force next year.

Of particular interest is the right to a written statement of terms. Currently this right is only afforded to employees, but the government will legislate to extend this right to workers as well. At present, the right must be given within two months of employment starting. However, under the new legislation the terms must be made available on the first day of work, if not before.

Additionally, the required information will be extended to include information on the length of time a job is expected to last, the notice period, eligibility for sick leave and pay, any probationary period, all pay and benefits, specific days and times of work, and other rights to leave.

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£700,000 AWARDED TO HEADTEACHER SACKED FOR HAVING SEX WITH 17-YEAR-OLDS

A primary school headteacher who was sacked for having sex with two 17-year-old boys has won nearly £700,000 in compensation.

Matthew Aplin successfully took his employer to an employment tribunal claiming unfair dismissal and sexual-orientation discrimination. The school appealed, though the employment appeals tribunal upheld the original decision, finding that Aplin had been constructively dismissed. However, they found that he would not have been treated differently if he was a woman or heterosexual.

Importantly, the original tribunal noted that there had a been "a number of procedural errors amounting to a breach of the implied term of trust and confidence in the investigation and disciplinary hearing". The Employment Appeal Tribunal found that the governors "effectively abdicated their roles" with the investigating officer taking decisions "by proxy".

LEGAL OPINION

This case highlights the importance of ensuring that a proper disciplinary process is followed and that any disciplinary decisions are just and reasonable. It also highlights the importance of taking legal advice in cases such as this, not least as discrimination claims are uncapped meaning compensation payments can be significant.

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WHEN CAN HOLIDAY PAY BE ROLLED OVER?

The European Court of Justice (ECJ) recently heard two combined Finnish cases concerning employees who hadn't been able to take full annual leave due to sickness absence.

Under the Working Time Directive (WTD) all employees are entitled to minimum four weeks annual leave. Many countries (including the UK which has an extra 1.6 weeks' leave) offer an 'extra' amount of annual leave above the four week minimum.

Key to these cases was whether untaken annual leave in excess of the four week minimum could be rolled over; the ECJ ruling that this was a matter for domestic law.

One of the employees in these cases was entitled to 5 weeks annual leave per year and the other was entitled to 7 weeks. Finnish law stipulates that untaken annual leave in excess of the 4 weeks minimum offered by the WTD cannot be rolled over, even in the event of sickness. The CJEU had to decide whether this national law was permissible.

The ECJ confirmed that this was permissible and that whether employees can roll over holiday in excess of the 4 weeks' minimum was a matter for domestic law.

The ECJ ruling therefore confirms the decision made in the UK case ***Sood Enterprises Ltd v Healey*** that the initial four weeks of annual leave can be carried over to the next year if the reason the leave cannot be taken is due to sickness. However, there is no obligation for the employer to roll over any more than that.

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SUPPORTING EMPLOYEES DURING MENOPAUSE

With symptoms including hot flushes, mood swings, anxiety, difficulty sleeping and feeling lethargic, menopause can be a difficult time for many women.

During menopause (which lasts approximately four years) women are expected to continue with life as normal which, of course, includes going to work. Over the past year there has been much coverage in the press about the support (and lack of) that employers offer women during this time

ACAS has recently set out helpful guidance for employers which includes reviewing health and safety policies and implementing changes to help those going through menopause to manage their symptoms whilst at work. They also provide advice on how to train managers and supervisors to support workers going through menopause.

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EMPLOYEE LOSES COMPANY £200,000 IN FRAUD

An employee who was a victim of a £200,000 email scam has been told she does not have to repay £108,000 to her employer.

Patricia Reilly, a credit controller working for Peebles Media Group, mistakenly transferred a total of £200,000 to a fraudster. The company was refunded £85,000 by the banks, but sued Reilly for the remaining sum.

The Court of Scotland has now ruled in favour of Ms Reilly, not finding her in breach of obligation in what they described as a "tragic case". The scam itself is known as 'whaling' where fraudsters deliberately target junior employees. Key to this case was the fact the Reilly's manager was responsible for the first payment which had been made by Reilly using her manager's security details.

The Judge, commenting on the case and the fact that Reilly ignored a fraud warning, said "The fact that she [Reilly] was holding the fort for more experienced members of staff put her at a significant disadvantage. I do not consider that the defender was in breach of her implied obligation of reasonable skill and care in failing to read the fraud warning, nor do I consider that it would have made any difference had she read it."

LEGAL OPINION

Scammers are becoming more sophisticated – in this case deliberately targeting a junior employee holding the fort on behalf of more senior members of staff. Scams such as these are also becoming ever harder to spot. It is therefore important to ensure staff are trained on how to spot cyber-attacks and scams and that this training is updated regularly as fraudsters' methods evolve.

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EMPLOYEES LIVING ON SITE

Many roles in the UK require employees to live close to their place of work.

Sometimes, employees are required to live on site. In these circumstances, it is not uncommon for an employee to be offered accommodation as part of their overall work package.

If you are considering providing accommodation for your employees, it is likely to be through a service occupancy or a service tenancy, though there can be exceptions to this. We have outlined both below, outlining which circumstances are best suited to which agreement.

Service occupancies arise when an employee is required to live at the employer's property in order to best perform their work duties – for example a housekeeper or hotel manager. A service occupancy provides a personal licence to that employee to live at the property designated by the employer. Service occupancies do not require the normal four week notice period to be given before taking back possession of the let property, they terminate automatically when an employees employment come to an end. For this reason, they can be particularly useful for employers.

Service tenancies arise when providing accommodation is less important for enabling an employee to perform their duties at their best. A tenancy may be offered rent free but the employee's services to their employer will be taken into consideration. The crucial difference between a service occupancy and a service tenancy is that the tenancy provides an interest in the property to the employee as opposed to a licence to occupy. A service tenancy will therefore not automatically end on termination of the employee's employment contract, meaning that the employer will need to follow the normal procedures to regain vacant possession of the property.

If the employee is not provided with exclusive possession of the accommodation (i.e. the employer is retaining a level of control over the accommodation and how it is used) then a tenancy cannot exist. In these circumstances it is more appropriate to draft a licence to manage the terms upon which the employee will occupy the property.

If you are considering offering accommodation to an employee or have already done so and would like advice on which agreement is right for you, please do not hesitate to get in touch, we'd be delighted to help.

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