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Employment Law Update

This month we talk about:

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"No deal Brexit" and workplace rights

On 23 August 2018, the government published a series of technical notices with the aim of providing guidance and information for UK businesses and citizens on how to prepare for a no-deal scenario. The technical notices were published following a speech by the Secretary of State for the Department for Exiting the European Union, Dominic Raab, outlining the government's preparations for a no-deal Brexit.

"No deal" describes the situation in which the UK and the EU fail to conclude a draft withdrawal agreement by the time of the UK's exit from the EU. This would mean no transition period and a sudden break in the application of EU rules to the UK at 11pm on 29 March 2019.

The technical notice on workplace rights if there's no Brexit deal states that the European Union (Withdrawal) Act 2018 will convert EU law as it stands on exit day into UK law and preserve UK law that implements EU obligations. The notice advises that this means that workers in the UK will continue to be entitled to the rights they have under UK law derived from EU law, including rights relating to the following areas:

- Annual leave, holiday pay and rest breaks.
- Family leave entitlements, including maternity and parental leave.
- Health and safety of workers.
- Discrimination and harassment on the grounds of sex, age, disability, sexual orientation, religion or belief, and race or ethnic origin in the workplace, and any resulting victimisation
- TUPE.
- Agency workers.
- Posted workers.
- Part-time, fixed-term and young workers.
- Most information and consultation rights for workers, including for collective redundancies and insolvency.

The notice points out that domestic legislation already exceeds EU-required levels of employment protection in a number of cases. The government intends to make small amendments to the language of UK employment legislation to reflect the fact that the UK is no longer an EU country post Brexit. These amendments will not change existing employment rights, but are intended to provide legal certainty and allow for a smooth transition on exit day.

HMRC now enforcing TUPE transferors' national minimum wage liabilities against transferees

HMRC has announced that it has changed its policy in relation to the enforcement of national minimum wage penalties where there has been a TUPE transfer.

HMRC has advised that where there has been a TUPE transfer of employees, all national minimum wage liabilities, including the full penalty amount, will now be enforced against the transferee employer

HMRC previously charged the transferor for all or part of the penalties where they were triggered by arrears that accrued before employees transferred under TUPE.

This change applies from 2 July 2018.

Brooknight Guarding Ltd v Matei - employee on a zero hours contract was an agency worker

The Employment Appeal Tribunal has held that an employee on a zero hours contract was an agency worker due to the temporary nature of his assignment. Mr Matei was employed by Brooknight Guarding Ltd on a zero hours contract for 21 months. A flexibility clause in his contract enabled Brooknight to assign him to different sites as required, although he was generally supplied to Mitie Security Ltd, providing security services to Citi Group.

Following his dismissal, the Claimant claimed that he was an agency worker, and therefore entitled to the same basic working conditions as the Mitie staff after 12 weeks' service. The tribunal agreed, on the basis that he had been supplied to work temporarily for the hirer (Mitie) and worked under their supervision and direction. His employer appealed.

The employer argued that the fact he worked on a zero hours contract did not necessarily mean he could not be a permanent employee. The EAT rejected this.

The EAT held that the key issue in determining agency worker status under the Agency Worker Regulations 2010 (AWR) was the nature of the work carried out by Mr Matei and whether it was on a permanent or a temporary basis, not the type of contract he worked under or the length of his employment.

Although the tribunal had considered the nature of Mr Matei's contract and relatively short period of employment to be relevant, it had not treated those factors as determinative, but focused on the nature of the work. The tribunal had found that Mr Matei was supplied to provide cover for Mitie as and when required, rather than on a permanent or indefinite basis. The EAT held that the tribunal had therefore reached a permissible conclusion that Mr Matei was an agency worker.

This case provides useful guidance to employers in relation to the potential application of the AWR.

Colino Sigüenza v Ayuntamiento de Valladolid and others - Did a five month suspension of an undertaking's activities preclude a TUPE transfer?

In this case, the Claimant was employed as a music teacher at a music school in Spain. The school's management had been assigned by the local authority to a contractor. Due to a dispute, on 27th March 2013 the contractor collectively dismissed all the school's staff. On around 1st April 2013, two months before the academic year ended, the contractor ceased its activities. In August 2013, following a tendering process for the new academic year, the local authority assigned the school's management to a new contractor which started activities in early September 2013. The new contractor did not engage any of the staff, including the Claimant, that had been dismissed on 27th March 2013.

Following claims by the staff who had been dismissed, the Spanish appellate court referred the following question to the ECJ for a preliminary ruling: Was there a transfer of an undertaking for the purposes of the Acquired Rights Directive (which is implemented by TUPE 2006 in the UK) in these circumstances?

The Acquired Rights Directive (ARD) protects employees' rights on a transfer of an undertaking, business or part of an undertaking or business. A transfer occurs when there is "a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary"

The ECJ held that a situation such as this was capable of being a transfer within the scope of the ARD. In particular:

1. The economic activity in question was the management of the music school. It was the material resources, such as musical instruments, facilities and premises, that appeared to be essential to the conduct of the economic activity. It was common ground that the all the material resources which it had previously assigned to the outgoing contractor were being used by the new contractor. As this was an "asset reliant" case, the fact that the new contractor did not take on the workers from the previous contractor did not preclude the existence of a transfer within the meaning of the ARD.

2. The fact that an undertaking is temporarily closed at the time of the transfer, and has no employees, is a relevant factor, but not determinative. It was particularly relevant that three of the five months' closure in this case were school holidays in any event.

In light of these considerations, the court concluded that it was possible that there had been the transfer of an entity within the meaning of the ARD. The final decision on this point lay with the Spanish courts.

Although this issue would fall within the provisions of TUPE 2006 relating to service provision change, this case usefully reiterates that the cessation of activities prior to the transfer does not necessarily preclude a transfer taking place for the purposes of the ARD or TUPE 2006, especially where the activities before and after the cessation are very similar or the same.

Sickness absence at lowest rate since records began

The latest figures from the Office for National Statistics show a significant fall in the number of days employees are taking off work due to sickness. The figures reveal employees to have taken an average of 4.1 days off in 2017, compared to 7.1 in 1993, the year records began.

According to the data, the sickness absence rate started gradually decreasing in 1999 and continued to fall following the 2008 economic downturn. The overall decrease could be attributed to an increase in healthy life expectancy. However, there have also been suggestions that a rise in presenteeism, whereby people still come into work when they are ill, could also be a contributing factor.

If you have any questions about these or other employment issues please call:
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