



EMPLOYMENT LAW UPDATE

September 2011

Welcome to the September issue of the Moore Blatch Employment Law Update. This monthly bulletin will keep you updated with the latest happenings and legislative changes in the world of employment law.

We hope that you have all enjoyed the summer break despite the weather! It is now time again to focus on work and we therefore resume our usual monthly employment law updates by taking a look back over the last few weeks at what has been happening and looking ahead at what's on the horizon.

Agency Worker Regulations

As a further reminder to you all the Agency Worker Regulations 2010 ('the Regulations'), are due to come into force on 1 October 2011. They will affect your business if you hire temporary or casual staff through an agency. The Regulations give agency workers the entitlement to the same treatment as other employees with respect to basic working and employment conditions after they have completed a 12 week qualifying period in a particular job.

These conditions include pay, overtime, shift allowances, duration of working time, night work, bonuses for the quality and quantity of work, rest breaks and annual leave.

The agency workers will also be entitled to be made aware of job vacancies within the hirers business. They will also be entitled to access to communal facilities such as staff canteens, toilets and showers, car parking and crèche facilities.

If you do use or supply agency workers you need to be prepared for the changes that the Regulations

Effective date of termination

In the recent case of M-Choice UK Ltd vs Aalders the Employment Appeal Tribunal (EAT) considered the effect of a summary dismissal during the notice period. Ms Aalders was employed by M-Choice on 1 February 2010 and was contractually entitled to six months' notice. On 26 July 2010 Ms Aalders was placed on garden leave and given a letter which stated that her employer was ending the work relationship with effect from 1 February 2011 at the latest. Ms Aalders presented a claim for unfair dismissal on 11 January 2011.

Ms Aalders received a letter on 21 January 2011 informing her that her employer no longer required her to be on garden leave and that her employment was being terminated on that day with immediate effect. Ms Aalders changed her claim form to state that her dismissal was automatically unfair as the reason for her dismissal was because she had asserted her statutory right to present a claim for unfair dismissal.

The case was first considered by the Tribunal who held that Ms Aalders had acquired the requisite one years service to bring an unfair dismissal claim and that the letter she received on 21 January 2011 did not bring forward the effective date of termination (EDT). M-Choice appealed the Tribunal decision.

The EAT looked at the facts and decided that where an employer dismisses an employee with notice, then summarily dismisses them during the notice period, the EDT of the employee's employment is the date of the summary dismissal. The employer had therefore terminated Ms Aalders employment before she had completed a year's service which resulted in her not having the length of service necessary to present a claim for unfair dismissal.

The case does not change the existing law. It is however a useful reminder that if an employer gives notice of dismissal to an employee they can at a later date decide to change the end date by bringing it forward. It appears in this case that the employer realised that the employee would obtain a year's service if the notice were to run and decided to dismiss immediately to avoid that happening.

No such thing as "self dismissal"

In the case of Zulhayir vs JJ Food Service Ltd the EAT specifically disapproved of the idea of "implied termination" and "self-dismissal".

Mr Zulhayir had been absent from work due to ill health for some time. He then stopped providing his employers with sick notes. His employer, JJ Food Service LT (JJ), wrote to him claiming that they had tried to contact him but were unsuccessful, and asked him in their letter to confirm whether he still wanted to work for JJ. The letter, which was sent in June 2006 stated that if he did not provide confirmation within 7 days he would be confirming his termination of employment. The letter was returned unopened to JJ, which made no further attempt to contact Mr Zulhayir. In fact, Mr Zulhayir had moved in January 2006, but had not informed JJ of his new address.

Mr Zulhayir was in direct contact with JJ's insurer's solicitors from 2006 to 2009 as he was claiming for personal injury against JJ. In May 2009 JJ's insurer's solicitors sent a copy of JJ's letter to Mr Zulhayir at his new address. This was the first time Mr Zulhayir had seen this letter. He subsequently lodged a claim of unfair dismissal, disability discrimination, breach of contract arising from non-payment of notice pay, and unpaid holiday pay with the Tribunal.

The Tribunal found that his failure to inform JJ of his change of address, as well as his failure to arrange for his mail to be forwarded, amounted to an implied termination by him of his employment contract and as such that his resignation had taken effect by 31 January 2006. Mr Zulhayir appealed.

The EAT concluded that no effective steps were taken by either party to terminate the employment contract until the letter from JJ's insurers solicitors in May 2009 reached Mr Zulhayir. The EAT set aside the strike out order and ordered that all of Mr Zulhayir's claims proceed to a full merits hearing before the tribunal.

This is a reminder to employers that if they wish to bring the employment relationship to an end they need to make that very clear and take positive steps to effect the termination.

Is there an entitlement to the National Minimum Wage during layover periods?

The EAT has recently considered whether an employee who is on a "layover" period is entitled to receive the National Minimum Wage as their minimum payment. Ordinarily, workers are entitled to receive a minimum hourly rate of pay, the National Minimum Wage. In deciding whether or not a worker has received the National Minimum Wage their average hourly rate is calculated. This is done by dividing their wages earned over a reference period by the number of hours that they worked during that period.

In the case of *Baxter v Titan Aviation Limited*, Mr Baxter worked as a casual driver. His duties included picking up holiday makers from their home and dropping them off at airports and other departure points. Sometimes he was asked to stay in overnight accommodation between jobs so that he was able to pick up clients the following day. This time was referred to as "layover time". He received an hourly rate of pay for normal hours but a reduced flat rate of £1.57 was introduced for layover periods. Mr Baxter claimed that when you took into account the layover periods his average hourly rate of pay was less than the National Minimum Wage. When his claim went before the Employment Tribunal it was dismissed. They did not consider that the layover time was working time and therefore that time did not count towards the National Minimum Wage calculation. They considered that during this layover time Mr Baxter was free to do as he wished and there was no requirement that he should be available during that period. Mr Baxter appealed to the EAT.

The EAT agreed with the Tribunal's decision and dismissed his appeal. They considered that Mr Baxter was clearly not working during his layover periods. He was not at his place of work, neither was he performing any tasks or had any responsibilities. He was only required to spend the night in the accommodation in order to get to work the following morning.

Whilst this case centred around National Minimum Wage the issues entailed similar considerations to those that would be looked at when determining whether the layoff period was working time. Many employers will find this a useful confirmation that time spent by an employee in this way will not count as part of their working time.

Long Term Sick workers right to claim payment in lieu of holiday and right to take accrued holiday.

This is an area that we have been reporting on over the last year.

There have been two recent cases dealing with long term sick workers and their rights to accrue and take holiday:

KHS AG vs Schulte: In this German case questions were referred to the European Court of Justice (ECJ) for a ruling in respect of holiday rights under the Working Time Regulations during a period of long-term sick leave.

The Advocate General has stated that whilst workers on long-term sick leave do accrue the right to paid annual leave during sick leave they do not do so indefinitely and indicated that member States may legitimately stipulate that holiday entitlement accrued by workers on long-term sick leave will expire 18 months after the end of the holiday year in which the leave accrued.

Whilst the Advocate General's opinion is not binding on the ECJ when it comes to make a decision in the case, it will no doubt be persuasive.

NHS Leeds vs Larner: The EAT ruled that a worker on sick pay for a year was entitled to payment in lieu for the holidays she was unable to take because of her illness. In this case the EAT had to consider whether a worker who had been off sick for an entire holiday year without requesting any statutory holiday was entitled to a payment in relation to that year's holiday entitlement when her employment terminated.

The reasoning behind judgment was made up of the following points:

- The ECJ made it clear in the earlier case of *Stringer and others vs HMRC* that sick workers continue to accrue holiday leave, regardless of how long they are on sick leave.
- In the case of *Pereda vs Madrid Movilidad* the ECJ ruled that workers unable to take their full holiday entitlement because of sick leave must be entitled to have their unused leave entitlement carried in to the following holiday year.

- As Ms Larner was signed off sick for the whole of the pay year 2009-2010 she was presumed not to have been well enough to exercise what the ECJ had described as her 'right to enjoy relaxation and leisure'.
- The right to be paid for annual leave crystallised on the termination of her employment

Unfortunately the EAT's decision has failed to address many of the important grey areas and issues that the recent cases on this topic have left unanswered. We will report on further cases that may assist employers faced with these issues.

These decisions relate to "rights" under the Working Time Directive. Only public sector employees may claim rights under the Directive. Private sector workers derive their rights from the Working Time Regulations which do not confirm the rights that these decisions suggest. As a result private sector workers may not benefit from these decisions.

Contact Us

If you require any further advice on any of the issues contained in this update, please do not hesitate to contact us.

Katherine Maxwell
Partner & Head of Employment
Direct Dial: 023 8071 8094
Email: katherine.maxwell@mooreblatch.com
www.mooreblatch.com

MOORE BLATCH
solicitors

Moore Blatch is the trading name of Moore Blatch LLP, which is a limited liability partnership registered in England and Wales, registration number OC335180. The registered office is 11 The Avenue, Southampton SO17 1XF. The firm is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of the Law Society. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide.

Regulated by the Solicitors Regulation Authority. The information contained in this update is correct as at September 2011.