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Your legal bulletin on news & views from Moss Solicitors LLP

UBER DRIVERS WIN FIRST ROUND OF EMPLOYMENT BATTLE

In a ground-breaking decision, the Employment Tribunal (ET) has ruled that Uber drivers are workers, rather than being self-employed, and thus had the right to be paid the National Minimum Wage (or the National Living Wage where applicable) and to receive holiday pay.

The case was brought by a number of past and present Uber drivers, who argued that they were entitled to protections under the Employment Rights Act 1996, the Working Time Regulations 1998 and the National Minimum Wage Act 1998.

Uber argued that it merely provided, through its smartphone app, a means for drivers to facilitate running their own business and that it did not run a transportation business. Uber also emphasised that drivers were free to decide when they worked and were not obliged to be logged on to the app at any given time or to accept any specific driving assignment, maintaining that this freedom was incompatible with the existence of any form of employment.

The ET dismissed these arguments, commenting that 'the notion that Uber in London is a mosaic of 30,000 small business linked by a common "platform" is to our minds faintly ridiculous'. The ET found that drivers were under a 'worker' contract for the time they were in the area where they were allowed to work, were using the app and were able and willing to accept assignments. The documentation governing Uber's relationship with its drivers contained 'twisted language' and 'brand new terminology', and went to great efforts to stress that Uber did not provide transportation services. The ET commented that in considering Uber's arguments, it could not help but be

reminded of Queen Gertrude's most celebrated line: 'The lady doth protest too much, methinks', and found that it was 'unreal' to deny that Uber was a transport business.

This ruling could ultimately lead to all of Uber's 40,000 UK drivers, and those who work on similar terms, being classified as 'workers' entitled to certain employment rights. However, this ruling is at ET level, and therefore not binding, and Uber has announced its intention to appeal.

The Government has launched an investigation into the so-called 'gig economy', to examine whether on-demand workers have adequate employment rights.

HM Revenue & Customs are also launching a specialist unit to investigate companies which avoid giving employment protections to their staff by using agencies or classifying them as self-employed.

We can provide you with expert advice on any aspect of your contractual relationships with the people who work for you.

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MOSS SOLICITORS UPDATE

FAILURE TO KEEP TENANT INFORMED MEANS NOTICE VALID

Landlords can often move their offices several times during a long lease, meaning that the original address for service of documents on them becomes obsolete.

When a landlord does so, it is important for them to inform their tenant(s) properly and not rely on the fact that communications may have subsequently passed between them originating from the landlord's new address.

A recent case illustrates the point. It involved a tenant that wished to exercise its right to break its lease and so gave notice to that effect to the landlords at the address set out in the lease.

The landlords did not want to accept the break of the lease and used as their argument that they had moved premises. They relied on the rule set out in the Law of Property Act 1925 that a notice is validly served if it has been delivered to the 'last-known place of abode or address'. As the address in the lease was no longer the address of the landlords, they argued that the notice was invalid.

The High Court took the tenant's side, ruling that it was reasonable for the tenant to assume that the address on the lease (which had not been changed in the property register at the Land Registry) was a valid address for service of the notice.

Landlords should ensure that when they move premises, they inform their tenants and change the relevant address at the Land Registry. We can assist you in the completion of the necessary formalities.

WHEN IS A LOSS NOT A LOSS?

Capital Gains Tax (CGT) is a complex tax, but the guiding principle is straightforward. It taxes gains on the disposal of non-trading assets. For a person, profits on trading transactions are taxed to Income Tax. Losses on non-trading disposals can normally be set against capital gains made in the same tax year or carried forward to be set against gains in future years…but not, it seems, all losses.

A recent case dealt with the situation in which a man paid a deposit of £72,000 on a property, but was subsequently unable to complete the purchase, with the result that he lost the deposit. He claimed that the forfeited deposit was a loss for CGT purposes and so would be available to be set against a future capital gain. Not so, said HM Revenue and Customs (HMRC). He had never completed his contract and therefore there was no 'disposal' – there was no transaction for CGT purposes at all.

The Upper Tribunal accepted HMRC's argument, leaving the lost deposit as a pure loss which cannot be used to mitigate the tax on a future gain.

INSOLVENCY NO BAR TO LIABILITY FOR SUPPORT PAYMENTS

A recent decision of the High Court will come as a comfort to those whose ex-spouses have fallen into arrears with their child maintenance payments.

It involved a man who was behind with child maintenance payments payable to the Child Support Agency when he died. He had also agreed to maintain a life assurance policy which would provide for his ex-wife and child in the event of his death. Without telling his ex-wife, he stopped making payments so it lapsed. Had she known, she could have paid the premiums herself. His estate was insolvent if the maintenance liabilities were recognised as liabilities of the estate. The man's executors went to the High Court to obtain a ruling

on whether or not they were. The case effectively arose out of the legal definition of a 'provable debt', which exempts certain debts from having to be accounted for after a living bankrupt is discharged.

The two liabilities above appeared to meet the statutory definition which stipulates that 'in bankruptcy…any obligation arising under a maintenance assessment made under the Child Support Act 1991' is not a provable debt. A living bankrupt, on discharge, is discharged from liability for provable, but not non-provable debts.

So were the debts recoverable from the man's estate? In a judgment that sought to preserve common sense and a fair outcome rather than adopt an overly literal approach to the law, the judge ruled that the debts were, for different reasons, recoverable in each case. The decision will give comfort to those who could find themselves in a similar position.

For advice on the financial aspects of marriage breakdown or assistance in negotiating a fair settlement, contact us.

CONCURRENT DELAY PLEA FAILURE ENDS SAGA SAGA

Concurrent delay is a common problem in construction contracts. It arises when a delay in one area of work causes a delay in another. The result can be a cascading of delays, which normally means losses and disputes.

In a recent case involving the refurbishment of a cruise ship for Saga, the High Court had to consider the extent of the respective parties' liabilities when completion of the work was delayed.

The background was that engineering work had to be done to Saga's ship before the internal refurbishment could be completed. Various glitches occurred in the engineering work, which meant that this was finished two weeks behind schedule.

The shipyard that carried out the engineering work argued that Saga had contributed to the delay, because there were change orders issued for work to be done by Saga's contractors which had to be completed before the shipyard could continue its work. This, argued the shipyard, had held up progress on the engineering work until four days before the eventual completion of the work.

However, the Court found that, on the facts, the delays caused by the actions of the owners of the vessel had been subsumed within those which were the responsibility of the shipyard and therefore did not add to the delay. The delay attributable to the shipyard was already going to result in a later completion date and the extra work caused by the change orders did not extend that timeframe, despite the fact that some of that work was itself delayed.

Construction disputes can be complex. Our expert guidance will help you steer a successful path through the potential minefield of issues.

MY HOME IS MY PENSION

Returns on private sector pensions have been in the doldrums for a long time, and with interest rates (on which annuity rates depend) firmly stuck at historically low levels, an increasing number of people are unable to rely on their pension savings to secure their post-retirement lifestyle. However, for property owners, continuing increases in house prices over time, plus low mortgage rates, have meant that many have steadily built up equity in their homes. Indeed, a substantial majority of homeowners now have more wealth tied up in property than they do in their pensions.

According to insurer Aviva, half of all people in the UK over 45 see their home as being a source of income in retirement, with an average expectation that downsizing will release £57,000 of capital.

Aviva also revealed that more than a million people over the age of 65 are still working and that two thirds of retirees who have insufficient savings to fund their retirement lifestyle only realised that after they retired.

The ramifications of the changes in the economy over the last two decades in particular have been considerable. There are also substantial generational differences, with many young people struggling to save enough money to finance a house purchase. These have a significant social impact and pose formidable problems for families as a whole.

For advice on safeguarding family wealth or helping a family member onto the property ladder, please contact David Wright, Senior Financial Planner and Director of WOODGATE FINANCIAL PLANNING

WILL PLANNING MUST BE COMPREHENSIVE

The dangers of making a will on the basis of less than full knowledge were clearly illustrated in a recent case in which a will was drafted in 2011 for a woman who died in 2013.

The woman had left legacies for the children of her late husband's nieces, for whom she had previously set up trusts. Her intention was to provide them with a total of £200,000 each on her death and, following advice from financial advisers, legacies were set up in the will of £54,000 each to accomplish this.

Due to a drafting error by the will writers she employed, the trusts she had created did not pass to them on her death but passed into the 'residue' of her estate to be divided among the beneficiaries generally. Legal action was necessary to remedy the position.

The expertise of a qualified solicitor means that the likelihood of error is very small, but in the unlikely event that a mistake is made, a solicitor has indemnity insurance to provide recompense for loss: unqualified will writers often do not.

COMPENSATION-SEEKING JOB APPLICANT UNSUCCESSFUL

In *Kratzer v R+V Allgemeine Versicherung AG*, the Court of Justice of the European Union (CJEU) has ruled that a German man who applied for a job with the essential aim of not taking up the post but of seeking compensation for discrimination was not entitled to the protection afforded by EU Directive 2000/78 (the Equal Treatment Directive) and the related Directive 2006/54 (on equal opportunities and equal treatment of men and women in matters of employment and occupation).

In March 2009, Nils-Johannes Kratzer replied to a job advertisement for a graduate trainee position with R+V Allgemeine Versicherung AG (R+V), which provides reinsurance services worldwide. He emphasised that not only did he fulfil the criteria set out in the advertisement but he also had extensive management experience in the insurance industry. His application was unsuccessful. Herr Kratzer then sent a written complaint to R+V demanding 14,000 euros in compensation for age discrimination.

R+V replied to Herr Kratzer inviting him to attend an interview with its head of human resources and stating that its rejection of his application had been automatically generated and was not

in line with its intentions. He declined the invitation and suggested instead a discussion of his future with the company once his compensation claim had been settled.

When the company failed to accede to his request, Herr Kratzer proceeded to bring a claim of age discrimination. When he discovered that R+V had awarded the four trainee posts to women, although the more than 60 applicants were divided almost equally between men and women, he claimed a further sum of 3,500 euros in compensation for sex discrimination. His case was twice dismissed. When he appealed to the German Federal Labour Court, the Court decided to stay proceedings and refer to the CJEU for a ruling on whether a person who is not seeking to obtain the post advertised but only the formal status of applicant, with the sole purpose of claiming compensation, qualifies for protection under the Directives.

The CJEU ruled that the objective of the Directives is to ensure equal treatment 'in employment and occupation' by offering protection against certain forms of discrimination, in particular concerning 'access to employment'. A person in Herr Kratzer's situation does not fall within the definition of someone seeking 'access to employment, to self-employment or to occupation' and cannot be regarded as a 'victim' for the purposes of the Directives or as someone who has suffered 'loss' or 'damage'. Such a job applicant cannot, therefore, benefit from the protection afforded by the Directives.

Ideally, in order to ensure that job applications are dealt with fairly and without discrimination, the process of identifying which applicants best meet the needs of the job description and the person specification should be carried out by two or more people, so that it is as objective as possible. If you are faced with a vexatious applicant, contact us for advice on how to proceed.

NEW MINIMUM WAGE RATES

The following changes to the National Minimum Wage (NMW) rates for workers aged under 25 came into effect on 1 October 2016:

- The NMW rate for workers aged 21 to 24 increased from £6.70 to £6.95 per hour;
- The NMW rate for workers aged 18 to 20 increased from £5.30 to £5.55 per hour;
- The NMW rate for 16- and 17-year-olds increased from £3.87 to £4.00 per hour; and
- The apprentice rate of the NMW, which applies to apprentices aged under 19 or 19 or over and in the first year of their apprenticeship, increased from £3.30 to £3.40 per hour.

The hourly rate of the National Living Wage, which was introduced on 1 April 2016 and is payable to workers aged 25 and over, remains unchanged at £7.20 per hour.

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