



SPRING 2012

### health and safety made simple

The Health and Safety Executive has launched a new website, 'Health and Safety Made Simple', aimed at making it easier for businesses to comply with the law and manage health and safety in the workplace.

The online resource brings together in one place all the basic information necessary and is primarily aimed at low-risk businesses – particularly small and medium-sized enterprises.

The site includes 'stop check!' boxes that tell you when you may need to take extra steps and provides signposts to more detailed guidance and industry-specific advice.

### Moss Solicitors LLP

80 -81 Woodgate  
Loughborough  
Leicestershire  
LE11 2XE  
Tel: 01509 217770  
Fax: 01509 233698  
Email: enquiries@moss-solicitors.co.uk web:  
[www.moss-solicitors.co.uk](http://www.moss-solicitors.co.uk)

# MOSS

S O L I C I T O R S

## LEGAL REVIEW

Your quarterly legal bulletin on news & views from Moss Solicitors LLP

### SELECTION FOR REDUNDANCY

The Employment Appeal Tribunal (EAT) has held that where all members of a 'pool' are redundant, the employer does not have to undertake a formal redundancy selection process (*Zeff v Lewis Day Transport plc*).

Mr Zeff worked for Lewis Day Transport plc, a passenger car and courier company. The services were provided through four 'desks', one of which was the chauffeur desk. Mr Zeff was a manager and before that had operated as a controller. There were two other controllers and two administrative assistants working on the desk. Following a downturn in business, a number of meetings were held with the members of staff and a decision was reached to close the chauffeur desk. Mr Zeff and the two controllers were made redundant and the two assistants were moved to the car desk and continued doing the same jobs. Although he said he was willing to do any job, Mr Zeff had not made enquiries about, nor did he apply for, any of the jobs posted as vacant at the time. He appealed against the decision to dismiss him as redundant but this was upheld.

Mr Zeff claimed that he had been unfairly dismissed, but the Employment Tribunal (ET) concluded that this was a true redundancy. Closing the chauffeur desk meant that there was no longer a requirement for a manager and two controllers working on that desk. Their roles were, therefore, redundant. The requirement for the roles carried out by the two administrators did not cease, however. They were able to continue doing the same jobs and were not redundant. The five jobs were not interchangeable and no selection for redundancy therefore arose. No selection criteria were relevant.

The ET did consider that the way in which Lewis Day had dealt with its duty to ensure



that any suitable alternative employment was made available to Mr Zeff had been lacking but this defect in procedure did not make the dismissal unfair. Mr Zeff had taken no action with regard to any vacancies. When asked why this was, he had replied that he did not know. The ET concluded that had Lewis Day followed a fair procedure and taken appropriate steps to secure alternative employment for him, Mr Zeff would not have been interested in the vacancies and would, therefore, still have been dismissed.

Mr Zeff appealed against the ET's decision and lost. The EAT held that the ET had found on the facts that this was not a case of three people being made redundant from five similar jobs. The roles for which the requirements of the business had ceased or diminished were the roles of the manager and the controllers on the chauffeur desk. There was no question of selection for redundancy and, therefore, no need for any formal selection criteria. In the EAT's view, the ET was entitled to come to that conclusion of fact. Furthermore, Mr Zeff had done nothing in respect of any vacancies and the ET was entitled to conclude that he had no genuine interest in them.

**Please contact us for advice on any redundancy matter.**

## HOUSE SALES – REPLYING TO ENQUIRIES

When a house is bought or sold, the prospective buyer makes what are called 'pre-contract enquiries' in order to establish the exact details of the property being bought. These are normally in the form of a standard set of questions with any necessary amendments.



However, the fact that the questions raised are in standard form does not mean this can be treated as just a 'form-filling' exercise by the seller, because the law of misrepresentation may apply where any response made is sufficiently at variance with the truth.

For the contract to purchase to have been procured by misrepresentation, it is necessary that the seller has made a reply which is factually untrue, as a

result of which the buyer has entered into the contact to his or her detriment.

A person induced into entering into a contract by misrepresentation may be entitled to damages or to rescind the contract. Attempts to limit liability for errors and mistakes in replies to pre-contract enquiries will normally only be upheld by the courts if the limitation is reasonable.

It is particularly common, it seems, for sellers to fail to disclose known structural defects and long-running disputes with neighbours. Knowingly making a false claim or failing to disclose a salient fact can be a dangerous strategy.

A buyer can go some way to protecting his or her position by making sure any particular questions on which they wish to have specific assurances are clearly put to the seller. Some risks (such as title defects) can be insured against.

**For advice on all aspects of the law relating to buying or selling property, please contact us.**

## FAMILY FEUD BREAKS OUT OVER DEATHBED MARRIAGE AND WILL

The combination of a deathbed marriage, a millionaire and a new will was always likely to end in a court battle, and so it proved recently when a family challenged their late father's will, which left everything to his new wife, who had been his partner for more than 30 years. The couple were married at the man's home shortly before he died in 2008. His three daughters are now contesting his will.

Under the new will, the man's wife was bequeathed his entire estate. His solicitor testified that his instructions regarding the will had been clear.

However, the man's family claim that his widow used undue influence over him, at a time when he was weak, in order to persuade him to write a new will in her favour.

This case is yet another example of how easy it is for acrimonious disputes to develop in families when arrangements are left to be dealt with at the last minute.

**Please contact us for advice on any will or probate matter.**

## NEW MINIMUM WAGE RATES

Employers are reminded that new National Minimum Wage (NMW) rates came into force on 1 October 2011.

The revised rates are as follows:

- The adult hourly rate of the NMW increased from £5.93 to £6.08;
- The development rate (which covers workers aged 18-20 years) increased from £4.92 to £4.98; and
- The rate for workers aged 16 and 17 increased from £3.64 to £3.68.

The apprentice rate, for apprentices under 19 or those aged 19 or over and in the first year of their apprenticeship, increased from £2.50 to £2.60 per hour.

From 1 October 2011, the accommodation offset rose from £4.61 per day to £4.73.

Following a recommendation from the Low Pay Commission, the Government has issued guidance for employers on the payment of the NMW for interns and those carrying out work experience.

Whether or not someone is a worker and is therefore entitled to be paid the NMW depends on the arrangements in place. The guidance includes a new worker checklist and examples of case studies.



## CHILDREN'S INTERESTS NEED TO BE ASSESSED INDIVIDUALLY



The cardinal rule in proceedings involving children is that the welfare of the child comes first. In some cases, the interests of individual children in a family are sufficiently different for them to be considered separately.

In a case involving a Canadian man and his British wife, who had separated leaving their two sons living with their mother, this was exactly what happened. The two boys were 16 and 12 years old at the time of the hearing and had regular contact with their father, who remained resident in the UK although he expressed a desire to return to Canada.

After visiting Canada with him on holiday, the boys were keen to move there to live with him and gave cogent evidence supporting their wishes.

Noting that the current arrangements, whereby the boys lived with their mother, were 'working well', the judge nonetheless granted the father's application. The mother appealed, but only in respect of the younger child, arguing that his circumstances were such that moving abroad would not be in his best interests.

The Court of Appeal considered that the judge had erred in treating the two boys as 'one unit' and upheld the mother's appeal.

In this case, the Court held that what was beneficial for the younger child was not the same as for his elder brother and the needs of the two had to be assessed separately.

**For advice on all matrimonial law matters, please contact us.**

## ACAS ISSUES

### GUIDANCE ON SOCIAL NETWORKING

The Advisory, Conciliation and Arbitration Service (ACAS) has issued several factsheets offering practical tips for employers on how to manage the impact of the use of social networking tools at work. These cover:

- managing performance;
- recruitment;
- discipline and grievances;
- bullying; and
- defamation, data protection and privacy.

There are also useful tips on how to develop a social networking policy.

The guidance can be found on the ACAS website at: [www.acas.org.uk](http://www.acas.org.uk).

## CONSTRUCTION ACT CHANGES

On 1 October 2011, changes to the Housing Grants, Construction and Regeneration Act 1996 (normally called the Construction Act) came into force. These apply to all relevant contracts entered into from that date.

The changes include:

- The removal of the requirement that construction contracts covered by the Act must be in writing;
- The abolition of clauses which require the party putting a matter to adjudication to meet the costs of the adjudication – any such agreement will be ineffective unless it is in writing and has been made after the giving of notice of intention to refer the dispute to adjudication;

- The abolition of 'pay when certified' clauses. These effectively pass the debt risk of the contractor 'down the chain' to subcontractors, who are not entitled to payment until the contractor is entitled to be paid;

- The requirement that a mechanism for raising payment notices be included in the contract. This must state whether the notices are to be issued by the payer or payee. Each notice must set out the sum due (even if nil) and how it has been calculated; and

- The permitting of partial suspension of work under a contract while disputes are negotiated. Previously, suspension was an 'all or nothing' remedy.

The changes are significant and raise the possibility that disputes may



increase because verbal contracts or variations of contracts are alleged to have been made. For contractors, the abolition of 'pay when certified' clauses may lead to significant financial issues. In addition, standard documentation will need to be revised.

**For advice on compliance with the changes, please contact us.**

## SALARY SACRIFICE – VAT CHANGES

HM Revenue and Customs (HMRC) have announced that, from 1 January 2012, supplies made by employers under salary sacrifice schemes (schemes whereby an employee accepts a lower salary in return for receiving certain benefits) will be treated as taxable supplies made by the employer and that output VAT will have to be accounted for as appropriate.

The revision follows a recent decision of the European Court

of Justice that retail vouchers supplied to employees under a salary sacrifice scheme were taxable supplies. HMRC have indicated that they will regard all such supplies (not just retail vouchers) as taxable at the appropriate rate of VAT.

**Businesses using such schemes are advised to consider the impact that the change in practice will have on them, not only in tax terms but in terms of variations to employee contracts.**

## DIRECTOR PAYS PRICE FOR PRIVATE ARRANGEMENT WITH CUSTOMER

The law relating to the fiduciary duties of directors is stricter than many company directors might think, as a recent case illustrates.

The director of a company was given the loan of a second-hand excavator and dumper for his personal use, by a customer of the company, from 2003 until 2008. The equipment was used by him in renovating a house he owned. The director considered it to be a private arrangement of negligible value to him, but the company took the view that he had received the loan as a result of his being a director of the company and that he should therefore account to it for the value received. He left the company's employment before the case came to court. The court ordered him to pay the sum of £5,200 plus interest to his former company. He appealed.

The Court of Appeal ruled that, on the facts of the case, the director's duties of strict loyalty to the company and avoidance of potential conflicts of interest were breached. The fact that the company had neither availed itself of the opportunity nor suffered any loss as a result of the arrangement was not relevant.

The duties of directors are set out in detail in the Companies Act 2006. Directors would be well advised to ensure that they

are aware of the rights and responsibilities attached to the role.

Directors are legally bound not to accept benefits from third parties that arise from their position as a director.



It is also worth pointing out that a person who receives a benefit from a third party by virtue of their employment normally receives a taxable benefit in kind, which must be declared to HM Revenue and Customs on form P11 or P11D so that any tax due can be assessed. A penalty of up to £3,000 may be levied for an incorrectly submitted declaration.

**We can advise directors and companies on the applicable law if there are any circumstances in which a breach of a director's duty has happened or could happen.**

## COMPENSATION FOR HORSE RIDER INJURED IN FALL

A woman who broke her neck during a horse riding lesson has won £60,000 in compensation.

Maxine Wright and her husband had been taking riding lessons in preparation for a horse trekking holiday in Spain. The accident happened during a lesson when Mrs Wright's horse, Marmite, was jumping a fence made from oil drums. The horse's hind legs clipped the fence, which shifted, causing the horse and Mrs Wright to fall.

Mrs Wright suffered two broken vertebrae in the fall. She was in hospital for two weeks and was unable to work

for four months after the accident. She has been told she will be unable to ride again.

She made a claim for compensation from the riding school where the accident occurred. The construction of the jump at which her horse fell did not comply with British Eventing rules as it was unfixed and the oil drums had not been weighted down. Lawyers for Mrs Wright argued that this made the jump 'inherently dangerous'. The riding school's insurers admitted liability for Mrs Wright's injuries and an out-of-court settlement of £60,000 was agreed.



**If you have had an accident while participating in an organised leisure activity, you may be entitled to compensation for any injuries sustained. Please contact us for advice on making a claim.**

## MOSS S O L I C I T O R S

80 -81 Woodgate, Loughborough, LE11 2XE  
Tel: 01509 217770 Fax: 01509 233698  
Email: enquiries@moss-solicitors.co.uk  
web: [www.moss-solicitors.co.uk](http://www.moss-solicitors.co.uk)

This firm is regulated by the Law Society. A list of members is available for inspection at the above address.  
Moss Solicitors LLP is a Limited Liability Partnership.  
Registered in England Number OC307297

## WOODGATE FINANCIAL PLANNING LTD

an associated business of Moss Solicitors LLP

80 -81 Woodgate, Loughborough, LE11 2XE  
Tel: 01509 635467 Fax: 01509 233698  
Email: enquiries@woodgatefs.co.uk  
web: [www.woodgatefs.co.uk](http://www.woodgatefs.co.uk)

Woodgate Financial Planning Ltd is an appointed representative of Chesterton House Financial Planning Ltd, and is authorised and regulated by the Financial Services Authority. Registration No. 4662503 (ENGLAND).