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earwiggin : employment law update

EMPLOYMENT STATUS - SHAM CONTRACTS

Protectacoat Firthglove Ltd v Szilagyi

It has long been known that, to determine an individual's employment status, you have to look at the substance of the relationship rather than the label applied by the parties. A written contract suggesting a self-employed relationship can be ignored if it is a "sham".

But when will a contract be deemed to be a sham? Previous case law suggested that this requires a common intention to mislead third parties as to the true nature of the relationship. However, in this recent case, the Court of Appeal has ruled that there is no need to find that the parties intended to deceive a third party. Instead, all that needs to be shown is that the contract does not reflect the parties' true intentions or expectations.

PF Ltd's business involves applying protective coatings to the external walls of houses. Mr Szilagyi began working for the company in 2006. After being provided with some initial training, the company told him to find an assistant to work with. It then issued him with two documents - a partnership agreement between him and his assistant; and a separate contract whereby the "partnership" agreed to provide services to PF Ltd. This contract provided that PF Ltd was not obliged to provide any work, Mr S was not required to observe any particular hours and that he had to provide his own equipment. Following a dispute over scaffolding, PF Ltd terminated the contract and Mr S brought a claim for unfair dismissal. PF Ltd argued that his claim should be struck out because he was not an employee.

The Court of Appeal upheld the tribunal's finding that the written contract was a sham and that Mr S was an employee. Although there was no common intention to deceive a third party, the Court of Appeal was satisfied that the evidence demonstrated that the relationship was, and was intended to be, different from that described in the contract.

This case will make it easier for freelancers and other "self-employed" workers to claim that they are employees for employment protection purposes. The message is clear - if the intention is that the individual will operate in the same way as other employees, the fact that the contract may suggest something different is unlikely to prevent a finding of employment status.

DEFAULT RETIREMENT AGE

Heyday appeal - ECJ decision

The European Court of Justice has recently given its judgment in the case brought by Age Concern (operating as Heyday) in which it is challenging the legality of the provisions in the UK legislation allowing employers to retire employees when they reach the age of 65.

In summary, the ECJ ruled that the default retirement age of 65 is, in principle, capable of justification. The case will now return to the High Court which will be required to decide whether it is in fact justified by a legitimate aim. In the meantime, it is likely that the tribunals will continue staying claims brought by employees who have been compulsorily retired.

The Government has previously indicated that it will review the default retirement age provisions in 2011. However, it has recently been reported that, following fears that older workers are at higher risk of redundancy during the current downturn, MPs may attempt to force the Government to confront the issue now by requesting that the soon to be published Equalities Bill includes a provision scrapping default retirement ages.

TAXATION OF TERMINATION PAYMENTS A v HMRC

It is well known that the first £30,000 of any redundancy payment or money paid as compensation for loss of office is free from income tax. It is not so well known that compensation for discrimination that occurs during employment is not taxable even if it exceeds £30,000. This means that, where there have been allegations of pre-dismissal discrimination, it is possible to structure severance packages so that the departing employee is able to take more than £30,000 tax-free.

In this case, Mr A was employed by a bank. After disciplinary proceedings were commenced against him in respect of alleged breaches of compliance rules, he resigned and brought a claim alleging that he had been unfairly dismissed and that he had subjected to a detriment for making a protected disclosure. The bank settled the case for £250,000.

Mr A argued that £200,000 of the settlement payment was compensation for injury to feelings and loss of reputation arising out of the discriminatory treatment he had suffered prior to his resignation and was therefore free from tax. He claimed that the balance of £50,000 was compensation for loss of office and therefore was only taxable to the extent that it was over £30,000. In other words, he argued that he was only required to pay tax on £20,000 of his £250,000 settlement payment.

The Special Commissioner dismissed Mr A's arguments and held that only £10,000 of the settlement payment was attributable to injury to feelings. The remainder was treated as a termination payment. Mr A was therefore obliged to pay tax on £210,000 of his settlement payment.

This case is a useful reminder of the possibility of structuring termination payments in way which enables more than £30,000 to be paid tax free. However, there are limits. Allocating more than about £10,000 to pre-dismissal discrimination is likely to be viewed with some scepticism by HMRC. Also, it will be important for the settlement agreement to record how the payments are structured.

IMMIGRATION CONTROLS Tightening of qualification requirements

The Government has announced that, in light of the economic downturn, it will be introducing changes to the new points based system to make it more difficult for migrant workers to enter the UK. The changes will affect Tier 1 (which has replaced the highly skilled migrant worker programme) and Tier 2 (which replaced the old work permit regime and is for skilled workers intending to work in the UK for longer than 12 months). In summary, the changes are:

- Tier 1 - all migrants entering under this tier will be required to have at least a Masters qualification (only a Bachelors degree is currently required) and minimum previous earnings of £20,000 (the threshold is currently £16,000).
- Tier 2 - there will be a general requirement for all vacancies to be advertised by employer sponsors through JobCentre Plus. At present this is just one way of satisfying the resident labour market test.

These changes are due to be introduced from 1 April 2009.

In addition, the Government also announced a review to consider whether further changes to the points based system are required. These include limiting entry under Tier 2 to shortage occupations only and a further tightening of the criteria under Tier 1.

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