

Employment Bulletin



J Innes Clark
Head of Employment Team

Welcome to the October 2009 edition of our Employment E-news Update.

If the Employment Team can assist you with any employment issue then please do not hesitate to contact us.

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Contact

For further information, please visit our web site:
www.morton-fraser.com

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Morton Fraser is a full service law firm. [Find out more about our services.](#)

Or why not download a copy of our latest bulletins:

- [Peopletalk Bulletin](#)
- [Employment Bulletin \[PDF\]](#)
- [Employment Factcard \[PDF\]](#)

Workplace Disputes Free Seminar – 6 October

As part of Morton Fraser's Business Women's Network seminars, Innes Clark and Carrie Mitchell will be delivering guidance on dealing with workplace disputes on 6 October at our Glasgow office.

If you would like to book a place please contact Kari Milligan on 0131 247 1021 or at kari.milligan@morton-fraser.com.

Employment Tribunal Statistics 2008/09

Employment Tribunal statistics for 2008/2009 have just been published. See the following link for details:

www.tribunals.gov.uk/Tribunals/Documents/Publications/ET_EAT_Stats_0809FINAL.pdf

We will report on the key statistics and trends in next month's update.

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Pereda v Madrid Movilidad: Holidays Due When On Sick Leave

A recent decision of the European Court of Justice may have a significant effect for public sector employees who fall sick during a period of annual leave. In **Pereda v Madrid Movilidad** the ECJ held that, where a worker's pre-arranged annual leave coincides with a period of sick leave, the worker must have the option to designate an alternative period for the exercise of the right to annual leave under the EC Working Time Directive.

It seems unlikely that the Working Time Regulations 1998 (WTR) can be interpreted as fully implementing the Directive in this regard, and therefore workers in the private sector may not be able to benefit from this decision unless the WTR are amended. However, the decision will have direct effect so far as public sector workers are concerned and they can therefore rely upon this decision immediately. It is likely that case law will follow in this area in order to establish whether domestic legislation complies with the Directive and this will impact upon the ability of private sector employees to enforce this decision.

Retirement Age – Heyday Decision

The long awaited decision in the case of R (**on the application of Age UK v Secretary of State for Business, Innovation and Skills**) has finally been delivered. The High Court in England has ruled that the Government's Default Retirement Age (DRA) of 65, introduced in 2006, is not unlawful. However, the Court commented that there are convincing reasons for the Government to reconsider this soon. A Government review of the DRA was already scheduled for 2011 but this has now been brought forward to early 2010. It is likely that the several hundred cases in the Employment Tribunal Service system dependent on this decision will now be dismissed.

Six Months Of Maternity Leave To Be Transferred To Father

The Government has confirmed that it intends to bring in legislation to allow the transfer of up to 6 months maternity leave from mothers to fathers. This would occur where the mother has unused maternity leave and the child is between 6 to 12 months old. If the mother has not exhausted her 39 weeks' Statutory Maternity Pay then the father would be entitled to receive the remainder of that Statutory Maternity Pay during the period of maternity leave transferred, provided this leave is taken during the 39 week period of the mother's maternity pay period.

To allow employers time to adjust, it is intended that it will be operative for parents of babies born on or after 3 April 2011. It is intended that parents will self certify by supplying employers with the necessary information.

Prevention of Illegal Working

Attorney General Baroness Scotland's fine of £5,000 for employing a housekeeper who was not legally allowed to work in the UK, is a timely reminder of the need for employers to keep copies of the relevant identification documentation for each employee. Under the **Immigration, Asylum and Nationality Act 2006** an employer who illegally employs someone over the age of 16 who is subject to immigration control will be liable to pay a civil penalty of up to £10,000 per illegal worker. For further advice on this or any other immigration issues contact our immigration specialist: Damir Duheric on 0131 247 1292 or damir.duheric@morton-fraser.com

New DCSF Guidance On Employing Children

A new document relating to employing children has been produced by The Department for Children, Schools and Family. It gives detailed guidance covering types of work children can and cannot do, the number of hours they can work, and specific health & safety requirements.

This guide can be found at [Guide on Employing Children](#).

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Former Partner Not An Employee

In *Train v DTE Business Advisory Services Ltd and Others* a partnership transferred all of its assets and liabilities to a limited company. Although it was intended that the partnership would cease to exist and the former partner would become an employee of the new company, the Court concluded that the 'former partner' of the partnership was still a partner and not an employee.

In this case it was relevant that the former partner's remuneration was variable depending on the actual profits of the business (and there was in effect a profit sharing arrangement amounting to a partnership) and also that he had no separate employment contract. The Court followed the principle of looking at substance over form when it comes to legal relationships.

Although the shareholders agreement specifically stated that there was no partnership, the partner was paid through PAYE, he had a fixed holiday entitlement, and he was held out as being an employee, it was still found that when the reality of the situation was examined that he remained a partner.

The *Train v DTE Business Advisory Services Ltd and Others* commentary was prepared by Morton Fraser's Corporate team. If you would like to receive regular updates on company law developments please click [here](#) to subscribe to our free quarterly Corporate E-News Bulletin.

Changes To The Rules On Foreign Skilled Workers

Following the Government's acceptance of recommendations by the Migration Advisory Committee, it will now be more difficult for foreign skilled workers to fill jobs in Britain under the points based system.

From 2010 employers will have to wait for a 4 week period before offering jobs to workers from outside Europe. In addition, workers from abroad who want to transfer to the British base of their employer will have to have worked for at least 12 months for that employer (as opposed to a 6 month minimum under current legislation). The threshold salary which enables a worker to be classed as a skilled worker also increases, from £17,000 to £20,000.

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