RadcliffesLeBrasseur

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Employment Update

CORPORATE

BULLETIN

Back home again

In our November 2003 Employment Update, we discussed jurisdictional issues relating to claims brought by employees who work outside the UK. The article was aptly called "Employment Tribunals go Overseas". Well, they are now coming back.

In the November Update, we mentioned the case of *Lawson -v- Serco*, which was in the process of being appealed to the Court of Appeal.

The Court of Appeal recently gave judgement and held that an employee employed by a UK company to work overseas had no grounds to claim unfair dismissal if he did not work in the UK.

The case involved Stephen Lawson, a British man employed by Serco, a Middlesex based company, who was interviewed in the UK, paid in sterling but worked in the Ascension Islands. Mr Lawson never worked in the UK. He resigned in dispute over working hours and claimed constructive dismissal. The Employment Tribunal dismissed his claim for unfair dismissal for lack of jurisdiction. However, the Employment Appeal Tribunal argued that he could bring a claim because Serco carried on a business in the UK. Serco appealed to the Court of Appeal.

The Court of Appeal in Serco took a more back to basics approach saying that in most cases, it would not be difficult to decide whether the employment was in Great Britain. Borderline cases, however, would depend on an assessment of all the circumstances of the employment in the particular case. The employee's residence could be relevant but the emphasis must be upon the employment itself. The Appeal Court, however, made it clear that someone dismissed during a single short absence from Great Britain would not normally lose their protection under the Employment Rights Act. Therefore someone who works partly in the UK and partly overseas could argue that they actually work here. Someone who is working mostly in the UK who is sent abroad for a short period of time should still be covered by the legislation. What, however, is not clear is how long they would have to work overseas before they lose their rights. Mr Lawson is appealing to the House of Lords. Watch this space to see what the House of Lords says.

If you have any questions about these resolutions please contact sejal.raja@rlb-law.com

Stop Press

The Court of Appeal decision in the case of *Durant -v- The FSA* provided a useful decision for employers in relation to subject access requests made by individuals pursuant to the Data Protection Act.

Following that decision, helpful guidance has been released by the Information Commissioner. The guidance suggests that not all data that names or mentions an individual will be personal data. It is a question of focus and whether or not the data affects the privacy of the individual concerned. In addition, far fewer paper records will be relevant to a subject access request, as strict criteria need to met before it is necessary to disclose them.

Sejal Raja will explore the Durant decision and the Information Commissioner's guidance in detail in the June Update.

Share incentives back in favour

With share prices on the increase, there appears to be renewed interest in shares as a means of remuneration and incentive. Our experience at RadcliffesLeBrasseur is that there was massive interest during the dotcom boom of 1999 and 2000 but, with falling share prices in the following three years, shares as an incentive have definitely been out of favour.

The markets turned in March 2003 and, since November, we have seen a marked increase in interest. So would share incentives be a sensible innovation for your company?

The answer depends on a number of factors. If you are in the charity sector, for example, share schemes are almost certainly out of the question and you are best advised to move on to the next article!

Could share schemes benefit you?

For many trading companies, however, share schemes are likely to be a possibility. You need to bear in mind, however, that shares on their own mean little, the employee needs to convert his or her shares into cash and that means selling them. Therefore a company with a trade sale or a flotation in sight, or possibly a part sale to an investor, is a prime candidate. If there is no such “exit” in view, then you will need to think about how the employee is going to sell his shares. Would existing shareholders want to buy? Probably not as they already own the company. One is therefore probably looking at a share buy-back or the use of a trust to create a market. Creating a trust adds to the task, but may prove a boon to current shareholders who wish to sell part of their holding.

As a general rule, share schemes in subsidiaries are frowned on by both institutional investors and the Inland Revenue and one should be looking at the parent company in a group.

If you can make arrangements for the shares to be bought, are there other issues? The ideal company from the point of view of share incentives is one with the hope of a significant increase in share values. The reason for this is that capital gains are currently subject to extremely low rates of tax.

Even if growth is not a major prospect, shares may entitle the employee to dividends or simply be a means of his owning a share in the company.

The next step is to work out what the company is out to achieve. Some motives are easy. Shares may be essential for recruitment, for example, when the best candidate for a senior role insists on sharing in what he hopes will be his achievements.

Share schemes can undoubtedly assist in staff retention by putting a cost on an individual leaving. Typically, this is done by granting options which are only exercisable if the employee stays with the company for a number of years. Providing there is a continual feed of options dependent on, say, three years’ service, the employee knows that he will lose two years’ worth of options if he leaves at any time. In such a case, options become effective (or “vest”) if the employee stays in service for given periods of time. Curiously, if one were to suggest to staff that part of their pay in a given year would be withheld and only paid if they were still with the company two years later, there would probably be a protest. Yet achieving the same affect through options seems to be wholly acceptable.

As to whether share incentives increase productivity, the position is less clear. There is some evidence that companies with share schemes are more productive, but is this more a result of their having good management which in turn has caused the share scheme?

Pure tax saving is not the best of motives. While some schemes are tax-advantaged they should not simply be regarded as a way of putting cash into employees’ hands without tax.

So what is on offer?

Options are usually a good starting point. Typically, the employee is given the right to buy shares in the future at today’s price. So if the value of the shares goes up, he makes a profit. This arrangement probably suits the employee better than buying shares because if the price falls, he will not lose money. From the employer’s point of view, these are also benefits, the employee does not rank as a shareholder and, if he leaves, one does not have to buy the shares back.

Enterprise Management Incentive Scheme probably the best .....

First prize must go to the Enterprise Management Incentive Scheme ("EMI"). In its simplest form, if the company grants options so that employees can buy shares at market value at the time of grant, and sell immediately after exercise, then the only tax payable is Capital Gains Tax when the shares are sold. After two years with taper relief, this is as low as 5% for a lower rate taxpayer or 10% for a higher rate taxpayer and, with the annual exemption, very often there will be no tax at all. Some industries will be excluded and some companies may be too large, but a vast range of companies will qualify. If there is a reasonable prospect of a growth in share values, this scheme is highly attractive.

Next comes the Company Share Option Plan. Again, options are granted and the gain is subject only to Capital Gains Tax. But if shares are sold immediately after exercise, then taper relief will not be available, although the annual exemption still will be. This may not be material as the initial value of shares which may be put under option is limited to £30,000. This arrangement is really only suitable if you do not qualify for EMI.

Unapproved options, i.e. not falling into any Inland Revenue-approved arrangement, are very much a last resort. No tax benefit is available so profits are generally taxed as income and there may be National Insurance if there is a market for the shares.

As to share purchase arrangements, the Share Incentive Plan is an Inland Revenue-approved scheme which enables shares to be allocated to employees free of tax, and also allows employees to purchase shares with special reliefs. The disadvantage is that only £3,000 of free shares may be allocated to each employee in any year and the shares have to be held by trustees. Given the need for approval and a trust, this is the most expensive scheme to set up and run, but could yield good benefits if one puts in the effort. A disadvantage is that it cannot be focused on particular individuals, broadly everyone should be allowed to participate. Overall, it has not proved hugely popular.

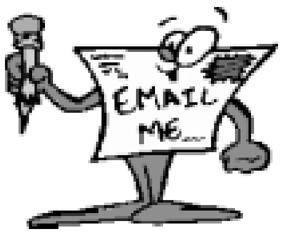
Unapproved share purchase arrangements, however, have a lot to recommend them, if one accepts that share acquisition is the answer. The employee suffers the risk of buying shares only to see their price go down, but should, with a little care, only pay Capital Gains Tax on any profit. The main problem is that share purchase schemes seem to be regarded with suspicion by the Inland Revenue with the result that gains, in given circumstances, could be taxed as income. To make matters worse, if the shares are marketable, there may be National Insurance where there is an Income Tax charge, which is a cost on the employer although there are proposals to modify this. The days when one could just issue shares are gone but, with planning in advance, one should be able to manage the tax risk.

Overall, share schemes seem to be coming back to life and, if your company is suitable, could be a major incentive.

If you have any questions about this article, then please contact Robert O'Donovan on robert.o'donovan@rlb-law.com.

What is the best benefit?

At our workshop on the Senior Executive, we asked participants to identify the best non-cash benefit for retaining a senior executive. The answer, by an overwhelming majority, was a final salary pension. One interesting comment was that, in one company, extra holiday would be a very popular benefit.



Ask REG

We would like to introduce you to REG.

Who is REG? REG (otherwise known as RadcliffesLeBrasseur Employment Group) is a friendly, approachable and yet knowledgeable character (who is also pretty good at pub quizzes!) and is going to appear here as a regular feature in our Update to answer employment law questions.

Dear REG,

Why are service agreements sometimes executed as deeds, and what is the effect?

To find the answer, you need to delve back into English legal history. Most legal systems have the concept of two tiers of formality in contracts. The English approach was to require that particularly significant documents, such as a transfer of land, had to be signed and sealed, and such a document was called a "Deed". On the continent, the approach was to require that some classes of documents had to be signed in the presence of a notary public, who was a lawyer approved for this purpose by the State.

The second relevant concept is the idea of someone being authorised to do something on behalf of someone else. Usually, very little formality is required: for example, most HR managers would take it as read that they are authorised to hire someone as an employee on behalf of their employer. On the other hand, if someone is to sign a deed for someone else, then the English approach is to require that the signer had himself to be authorised by a deed.

Some contracts of employment authorise the employer to sign documents on behalf of the employee. There are usually two cases: first, to transfer copyright or patent rights relating to ideas or inventions made by the employee. The second is to sign anything to record the departure of the employee. If any documents need to be signed as a deed, then the authority to sign needs to be a deed as well. For this reason, where the contract contains an authority which could extend to deeds, the employee should execute the document as his deed.

You may ask what happened to the seal? The answer is that in 1990, the requirement for physical sealing was lifted and as long as the document says it is intended to be a deed and the person signs in the presence of a witness, then it is a deed. The rule was also changed for companies who may still sign a deed using their common seal or may simply have two directors or a director and the secretary sign.

Do I have to offer employees on maternity leave the opportunity to apply for any internal vacancies that arise?

The simple answer to that is yes. In a recent case, which was reported in January 2004, the Employment Appeal Tribunal held that failure to notify an employee on maternity leave of a vacancy for which she would have applied, had she been aware of it, is a breach of trust and confidence, entitling an employee to resign and claim constructive dismissal. This is irrespective of the fact that the company was of the view that she would not have had the qualifications for it. The Employment Appeal Tribunal held that that is not the point. The point is, if she had been made aware of it, she could have applied.

REG invites you to email your questions to reg@rlb-law.com. You can also telephone or email any of us and we will pass your questions on. Look out for REG's answers to your questions in forthcoming issues of the Employment Update.

Workshop/seminar news

Disability Discrimination – 10 June 2004

Disciplinary Processes – 16 September 2004

Annual Seminar – 11 November 2004

If you require any further information regarding the issues mentioned in this bulletin please contact Robert O'Donovan or Sejal Raja.

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