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Agricultural Write News

Offering clear, pragmatic legal advice to the rural business community

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01

Immigration Issues When Employing Seasonal Workers

The employment of foreign workers is an ever changing and complex area, with the biggest shake up in UK Immigration law having been introduced in the last 12 months.

In this article we focus specifically on the issues surrounding the employment of Eastern European workers, who may be one of the most readily available resources of temporary labour during busy times of the agricultural year. There are numerous other categories of foreign workers who require permission to work in the UK and employers should always be mindful to check whether a worker has a right to work in the UK whenever employing any new worker.

Potential Consequences

Employing any worker without the right to work can result in criminal charges or sizable fines. There is a criminal offence of "knowingly" employing someone who does not have the right to work in the UK (which can be punishable by a prison sentence of up to two years) and a civil penalty of a fine of up to £10,000 per illegal worker, where an employer "negligently" employs someone without the right to work. The UK Border Agency has recently stepped up its enforcement regime and incidents of fines and prosecutions have significantly increased over the last year.

There is a defence to the imposition of a fine, if an employer can show they have obtained copies of certain documents required under the immigration rules. Employers should check that all new workers can provide the relevant documents when starting a new job and details of the documents that should be obtained can be found at **www.bia.homeoffice.gov.uk**.

European Accession States

Nationals of the so-called 'European Accession States' (Czech Republic, Estonia, Latvia, Lithuania, Slovenia, Poland and Hungary - collectively referred to as the A8 Countries) have the right to work in the UK but must be registered with the UK Border Agency until they have completed 12 months' registered employment, when they receive a residence permit. It had been widely anticipated that these requirements would be phased out in coming months, however, the Government has just announced that this scheme will continue to operate for a further two years. The press has also been full of reports of foreign workers returning home due to the economic downturn but recent reports suggest this has been exaggerated and foreign workers are remaining in the UK seeking work.

It is the worker's responsibility to register with the UK Border Agency within the first month of their employment. However, employers should provide confirmation of the date that the worker started work in order to assist with their application. An employer should retain a copy of the worker's completed application form and a copy of their certificate, when granted, to show that they are entitled to work. Failure to do so can result, in these circumstances, with the imposition of a fine of up to £5,000.

Bulgaria & Romania

There are different issues when employing workers from Bulgaria or Romania (who joined the EU in 2007). Generally, these nationalities do not have the benefit of the right to work without restriction and must apply for an accession worker card, and in most circumstances, their employer must make a further application for permission for the worker to work in a specific role. Generally, these roles must have been first advertised to give a UK worker, or other worker with the right to work in the UK, the opportunity to apply.

However, the Seasonal Agricultural Workers Scheme ("SAWS") specifically provides for the employment of workers from Bulgaria and Romania to work in the agricultural sector for a maximum period of 6 months. Employers must show that there is sufficient work for the workers and that they can provide them with suitable accommodation and comply with prescribed health and safety requirements.

There is a quota system in operation and when all the places under the scheme have been allocated in a given year, the scheme is closed. The quota had been reducing year on year, however, for 2009 the quota has increased (from 16,250 places in 2008) to 21,250 places, perhaps suggesting willingness by the Government to make greater use of such resources.

The scheme is administered by a number of agents appointed by the UK Border Agency who recruit the workers for the scheme and ensure compliance with the scheme's requirements. Employers should contact one of these agents if they are interested in utilising the services of these workers as it can prove to be a good source of labour in appropriate circumstances. Again, further information can be obtained from the UK Border Agency website.

Conclusion

It is paramount to ensure that, whenever employing new workers, even for short periods, employers undertake the necessary document checks and satisfy themselves that those individuals have the right to work in the UK. The UK immigration system is complex and the potential consequences for a failure to comply with the immigration rules can be expensive. Checks should be made in relation to all new workers, not just those an employer may think require special permission to work in the UK. Retaining records of those checks provides the best defence to any allegation of a breach of the immigration rules.

Inheritance Tax - Budget 2009 update and recent changes

Inheritance Tax (IHT) on agricultural property can be mitigated through the application of both Agricultural Property Relief (APR) and, in some cases, Business Property Relief (BPR).

100% APR is available, subject to certain conditions, if an individual has owned and occupied the land for two years, or seven years if it has been occupied by someone other than the owner. APR only applies to the 'agricultural value' of the land which can often be less than the open market value. In some circumstances land may benefit from 50% BPR which would reduce the tax liability on the value of the land over its 'agricultural value'. Woodlands Relief allows IHT on the value of timber or underwood to be deferred until it is sold.

European Land

Following a case in the European Court, Inheritance Tax legislation has been amended extending APR to cover property within the European Economic Area (EEA). This change was announced in the recent budget and will be included in the Finance Bill 2009. The extension will apply from 22 April 2009 but also applies retrospectively for agricultural property in an EEA state, where IHT is due or has been paid after 23 April 2003 and Woodlands in an EEA state where the relief is claimed in relation to a death before 22 April 2009. The earliest date that these reliefs can be claimed will be 21 April 2010.

The Finance Bill 2009 will also extend Capital Gains Tax holdover relief, to agricultural property in the EEA which has been farmed by a person other than the owner. Hold over relief defers payment of the tax charge until the asset is sold or disposed of. This extension also applies retrospectively but can only be claimed in the five years from 31 January following the tax year of the disposal, with the effect that the deadline for claiming relief for the 2003-04 tax year is 31 January 2010. The Finance Act 2008 reduced time limits for hold over relief claims to four years with effect from 1 April 2010, claims for the 2004-05 and 2005-06 tax years will need to be made by this date.

Business Property

The recent case of HMRC v Nelson Dance family has clarified the ability to apply BPR to specific business assets. BPR has previously been applied to transfers of 'a business or an interest in a business'

The facts of the case were that Mr Dance placed some of the land from his farm business into a Discretionary Trust and died shortly afterwards. APR was available on the agricultural value of the land, but the substantial development value was not covered by APR. If BPR could not be applied, the development value would have been subject to IHT.

HMRC argued that as Mr Dance had only transferred individual assets (rather than the whole business), BPR did not apply. The court held that all that is required for the relief to apply is that the value transferred can be attributed to the value of the deceased's business. If the land was part of a business then the value of the land would also be part of the value of the business, bringing it within the scope of BPR.

Key Points

- **APR has been extended to cover land in EEC states**
- **BPR may be applied to individual assets**
- **The IHT threshold is £325,000 from 6 April 2009**

03

Employee Fixed Term Contracts

Fixed term contracts ("FTCs") have become a necessity in today's market and are particularly relevant where the work undertaken is seasonal, as is typical in farming.

FTCs are used when employees are required for a specific project or length of time and it is easy to determine the duration of the contract.

As soon as an FTC is entered into, an employment relationship may exist which brings rights and obligations for both parties. It is therefore important for employers to understand what they are taking on. FTCs provide employees with specific protections under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the "Regulations"). The Regulations do not apply to apprentices, students on work experience placements or agency workers but they provide an employee under an FTC with the right not to be treated less favourably than a comparable permanent employee.

Less favourable treatment can occur where a fixed term employee is given different contractual terms to a permanent employee or where a particular benefit is provided to a permanent employee but not to a fixed term employee. For example, if a permanent employee is given more holidays or is provided with a benefit such as a clothing allowance which is not offered to a fixed term employee, this would be considered to be less favourable treatment. Employers should also be aware that fixed term employees have the right to be informed of any permanent vacancies within the business.

If the employer can show that it has balanced the needs of the business against the fixed term employee's right not to be discriminated against, the less favourable treatment might be objectively justified. However, employers should be careful and should seek legal advice before relying on this justification.
FTCs should be in writing and should set out the date on which the employment will end. This will be when either a specified date is reached, a specific event occurs or does not occur or when a particular act is completed. Despite the specified end date, employers should still give notice. The length of notice will depend on the wording of the contract and the reason for termination. It is therefore advisable to include a clause in the FTC stating that the contract will terminate on the specified date "without the need for further notice" in order to cover the employer in the event that they forget to give notice.

However, employers should note that they may be in breach of contract if they terminate the employment before the date specified in the contract. It would therefore be sensible to ensure the FTC includes a 'break clause' allowing the employer to serve notice to end the contract before the specified expiry date. Employers should further note that the expiry of an FTC will still be a dismissal and will be subject to the law of unfair dismissal. In order for the dismissal to be fair, it must be for one of the potentially fair reasons set out in section 98 of the Employment Rights Act 1996. In most cases employees will require one year's continuous service in order to present a complaint of unfair dismissal.

Employers need to bear in mind that the Regulations provide that employees who have been on a FTC for four years or longer will usually be classed as permanent employees if their contract is renewed or if they are re-engaged on a new FTC.

In summary, whilst FTCs are a useful tool where the duration of the contract can be determined, employers need to be aware of the rights employees acquire and the potential risk of claims if the Regulations and the general obligations under employment law are not complied with.

Rent review update - implications of Mason v Boscawen

We reported in our previous edition the importance of a timely consideration of rent reviews in your agricultural lease. However the recent case of Mason v Boscawen (which exposed the effect of a VAT change on the timing of rent review in an Agricultural Holdings Act 1986 ("AHA") tenancy) has caused a great deal of concern and has been the subject of frantic negotiations between DEFRA and the Treasury over recent weeks, culminating in an amendment to the forthcoming Finance Bill announced in this years' Budget. This article considers the case, its potential effects and the steps being taken to correct these problems.

• Background

In 2001, the Landlord of Mr Mason's holding in Cornwall elected to charge VAT on the rent of his commercial and agricultural holdings and, in September of 2006 invoiced Mr Mason for rent (including a sum in respect of VAT). Mr Mason did not pay and, in November 2006, his landlord served a Notice to Pay Rent on Mr Mason (a tenant farmer) requiring payment within two months. Mr Mason did not comply with the Notice and the landlord subsequently served a Notice to Quit under case D.

Mr Mason contended that the Notice to Quit was invalid because the Notice to Pay had included an element of VAT (which was not part of the rent due) and was therefore invalid. The landlord maintained that VAT was in fact part of the rent (and therefore the Notice was perfectly valid).

• AHA and rent review

The AHA 1986 contains strict guidelines on when and how rent reviews can take place and no rent review may take place earlier than three years from the date on which a previous change of rent takes effect.

The question therefore was whether the VAT element could be lawfully included in the rent demanded of the tenant (as the lawfulness of the Notice to Pay would hinge on whether the Landlord had made reference to the correct rent figure in his demand).

The tenant argued that VAT could not be considered an integral part of the rent, because if it were, this would have a very disruptive effect on rent review under the AHA (as any variation in the rate of VAT would 'reset the clock' for rent review purposes, thus preventing any rent review for a further three years). Any election or change in the VAT rate would therefore reset the rent review clock in AHA tenancies.

• Rent and VAT

The High Court ruled that "rent" included any VAT payable. Thus, a Notice to Pay Rent stating a sum of "£x including VAT" was held to be valid (as was the subsequent Notice to Quit on which it was based).

• Implications for AHA tenancies

This decision caused a great deal of concern (even to the trial judge himself!) because of its potential effect on the process of rent review in AHA tenancies in the light of the reduction in VAT announced by the Chancellor of the Exchequer in November 2008. As VAT was an integral part of the rent, then any change in rent would reset the rent review clock in AHA tenancies (an unintended, but nevertheless highly significant consequence of the judgement).

Without urgent legislation, the reduction in VAT would cause all forthcoming AHA 1986 rent reviews to be postponed until 1 December 2011 at the earliest and, even worse, should VAT be returned to its previous level in December this year, this would reset the clock again and further delay any rent review until 2013.

• Farm Business Tenancies ('FBT')

As Farm Business Tenancies are governed by different legislation to AHA 1986 tenancies the impact of the decision is less immediate, however where parties to an FBT have agreed a specific formula for rent review, this will need to be examined closely to ensure that any changes to VAT rates do not have an impact on rent review provisions in the FBT.

Stop Press - Update April 2009

Following frantic negotiations between DEFRA and the Treasury, it has been agreed that a provision will appear in the forthcoming Finance Bill negating the possible impact of the decision on the three year cycle of rent reviews under the AHA 1986. The precise details are as yet unclear, however it is expected that the provisions (in whatever form they subsequently appear) will be applied retrospectively. Watch this space for forthcoming updates…

Key Contacts

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