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EMPLOYMENT Issue 2 2009

Employment law is one of the fastest moving in the UK. From 1st February 2009, there are new compensatory rates for unfair dismissal cases.

The new limits are as follows:-

- compensatory award: increased from £63,000 to £66,200 (the most that can be paid for unfair dismissal unless there has been discrimination)
- a 'week's pay': £330 to £350
- maximum redundancy payment: £9,900 to £10,500

If you need to make staff redundant do take legal advice first to ensure you follow the correct procedures. Consult with staff in advance where necessary and select the correct people. Some companies offer better redundancy pay (enhanced) than is required by law.

Agreements reached

Always check employment contracts to see what is set out there for redundancy payments and also see if there are any agreements reached with trade unions which might offer higher sums than the very modest statutory redundancy payments provide. Do not dress up dismissal as redundancy if a redundancy situation does not exist.

In a recent decision, Stringer v HMRC, the European Court of Justice has confirmed that employees can accrue their statutory holiday entitlement throughout their sick leave and that their entitlement can be rolled over to another holiday year. They are also entitled to be paid for any unused holiday if they are dismissed. Most employers already do this but it is wise to take note of this clarification.

Please contact us for advice if you want an update or to check whether your current employment contracts remain lawful.

BRIBERY AND CORRUPTION

In difficult economic times, people can turn to bribery and cartels to win contracts and meet targets. Corruption proliferates and scams such as Bernard Madoff's come to light.

Obviously bribery is illegal and unwise and the new Bribery Bill will make it even more risky a practice.

Bribery has been contrary to the law at least since Magna Carta declared, "We will sell to no man…either justice or right". Most people have an intuitive sense of what 'bribery' is. However, it has proved hard to define in law. The Law Commission believes the current law is out-dated and in some instances unfit for purpose.

The proposal is for a new bribery offence. This will apply to companies and also limited liability partnerships (LLPs) registered in England and Wales. They will breach the rules where they negligently fail to prevent bribery by an employee or agent. This shows the importance of training for staff as the company could be responsible even though it knew nothing of the practice.

This is already the case with breaches of UK and EU competition law in the Competition Act 1998 and Articles 81 and 82 of the Treaty of Rome. Under the Bribery Bill, it would be a defence to show a company had adequate procedures in place to prevent bribery offences being committed by employees.

Senior managers liable

The Law Commission has recommended that it should be possible to hold directors and senior managers liable if they consent to, or connive in, the commission of bribery offences.

Training and good written guidance and policies in this area can reduce liability. Some companies may also include a clause in their commercial contracts that those with whom they contract have similar policies in place.

A clause about bribery and corruption is very common in UK Government contracts already.

We can draft such policies for you in addition to competition law compliance programmes.

Given that the first people have now been jailed for breach of UK competition law, now would be a good time to provide some guidance to employees and revise contracts.

81 HIGH STREET, CHATHAM, KENT ME4 4EE
Tel: 01634 811118 Fax: 01634 831046 E.mail: mail@kslaw.co.uk
www.kslaw.co.uk

Contract Protection in a Recession

Business clients can protect their position by legal means such as requiring payment in advance. Clients have asked us if they can agree with other suppliers either to request payment in advance or limit credit periods when a mutual customer is in known difficulties.

Such collusion could amount to anticompetitive practice when done by agreement or understanding with other suppliers under the Competition Act 1998. When simply taken as unilateral action, it is lawful. Similarly, collectively agreeing to boycott a customer with competitors is illegal. The EU is currently consulting on its competition law guidelines on horizontal agreements.

Adequately reflect

Also a large number of questions from clients lately have been about currency fluctuations, pricing changes, rights to vary a price given and the unprecedented slump in the pound. Ensure that all contracts with businesses abroad adequately reflect currency risks.

Some companies are factoring their debts and this is obviously one solution although not favoured by many and does not always give the right impression to customers about the viability of the supplier.

Also, sometimes there is a customer relations problem if the factoring company then vigorously enforces debts which result in adverse publicity for the original supplier. There have been plenty of press articles recently about council tax payers losing their homes over £1000 council tax debts many of which had been factored to aggressive debt collectors.

Formalise business

Many companies have no written contracts at all with key suppliers and customers. Of course it is very hard to change the status quo but it may well be possible to tell a supplier or customer that a written agreement is needed to formalise the business arrangement.

A contract may also specify that a notice period of 3 months or even a year or more must be given to terminate an arrangement. Without that in place, contracts can be terminated on 'reasonable notice' under English law. That is too vague a principle under which to operate for many businesses.

So if a written contract with a fixed notice period is in place, then businesses have time to find alternative customers or suppliers to plug the gap if someone terminates an arrangement.

During these difficult times, it is wise to undertake a general review within your business now, before it has financial problems, to find out which contracts are important and what needs to be in writing.

Please contact us for help and advice.

Extension Reveals Unexpected Planning Problems

Household extensions are a frequent source of dispute, although not normally because there is an issue with the building itself, rather than the extension.

In a recent case, however, a house owner's architect noticed that the house itself differed considerably from the plans that had been approved by the local council at the time it was built. Worse still, the pre-commencement conditions for the building could not be shown to have been discharged, which meant that the house itself was in breach of planning regulations.

No plans had been provided when the man had subsequently purchased the house and the planning consent granted was not clear. Unsurprisingly, he claimed damages from the conveyancer who acted for him on the purchase of the property.

You can have confidence in having Kingsley Smith act for you in property transactions, because, as a reputable firm, we are covered by insurance and have proper complaints and disciplinary procedures.

New Freedom of Information Act Guidance

The Freedom of Information Act 2000 gives individuals and companies the right to request data of all kinds from the 100,000 public sector bodies in the UK. This could be a request for details on anythng from the legal advice given to the Government on which it based its decision to go to war with Iraq, to how many people have had parking fines in your road in the last year or what expenses MPs have claimed.

The Information Commissioner has issued additional new guidance under the Act. The three sets of guidance relate to when a public body may keep information confidential. "It will not be enough for the public authority to simply speculate as to why the third party's commercial interests would, or would be likely to be prejudiced; the third party where possible must be asked for their opinions," said the guidance. "If the third party does not put forward any concerns regarding any prejudice to its commercial interests then a public authority should not speculate on their behalf".

Public Bodies

For businesses, the concern is that information in contracts with public bodies may be disclosed to competitors. The Department of Justice also has some guidance in this field which goes into a high level of detail about what information at what stages must be disclosed by public bodies, such as the range of prices tendered.

We can draft clauses for your contracts with public sector bodies requiring the buyer to notify you in advance if they propose to disclose information about you or the contract to a competitor.

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Unfair Advertising and Conduct

The European Parliament has pointed out that some countries such as the UK do not give consumers enough rights under the unfair terms directive. The UK's Consumer Protection from Unfair Trading Regulations 2008 have been in force almost a year.

Although a decision last year suggested competitors might have a right to bring action where a competitor unfairly advertises in breach of the regulations, the regulations themselves indicate that instead complaints are brought to bodies such as the ASA and Trading Standards. The EU is of the view that the regulations in the UK do not give consumers effective redress as they cannot sue for damage.

Alleged Breach

Tiscali v BT the High Court allowed Tiscali to use an alleged breach by BT of the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008 to show the tort of interference with its business by unlawful means arising from a letter BT sent to Tiscali customers exhorting them to change to BT broadband. Such tort would not require dishonesty to be proved unlike the traditional tort of malicious falsehood.

The decision by the judge to allow amendment of the claimant's case in these terms suggests the regulations may indeed give competitors a means to use the regulations against competitors.

In January 2009 an employee of Belkin, the US modem supplier, admitted it had offered to pay consumers who posted positive on-line comments on Amazon.com about its products. Such action in the EU amounts to breach to these 2008 Regulations and the EU directive on which they are based as it must be made clear if someone posting comments on-line is connected to the advertiser or paid by them or not.

Criminal Penalties

A commonly asked question about the above regulations is whether they can be used 'against' competitors rather than simply found a complaint to the ASA and thereafter enforcement by criminal penalties by trading standards officers. It seems they may be useful in litigation and against competitors following the Tiscali case.

If your competitor is not competing fairly contact us for advice on what you can do. You may be able to curb their activities.

Retention of Title Clauses

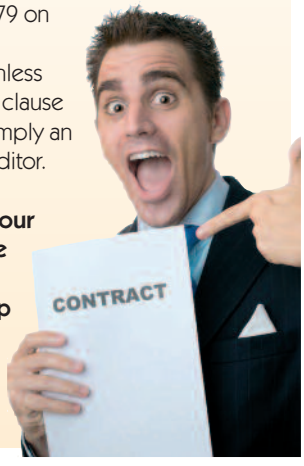
Retention of title clauses enable you to recover goods if a buyer goes out of business. Many people are not aware that unless such a clause is in a contract, the ownership of goods passes to the buyer on delivery, not payment, so they will get nothing back if the buyer goes bust.

Checking that terms and conditions apply is an easy step to take in terms of legal due diligence in the current market. Having the term only on the invoice is too late and accepting the buyer's conditions of purchase usually means there is no RoT clause either. The clauses require careful drafting as they will amount to 'charge' which is unenforceable and void (as not registered at Companies House) if they extend to finished products rather than the goods supplied. It can be wise to have an 'all monies' clause and to take legal advice on what will be needed to prove ownership to a liquidator or administrator.

Follow the rules shown here in drafting such clauses:-

- Ensure the written terms apply and are compliant with case law on retention of title. Then, if a customer goes bust, the seller can walk into their premises and take goods back.
- Give the seller a right of entry to buyer's premises if payment is not made.
- Require the buyer to mark the goods as the property of the supplier.
- Keep full records of which goods have been paid for and which have not. Also have an "all monies clause" or be able to prove the exact goods for which no payment has been made, where some payment has for a proportion of the goods.
- Retain title to intellectual property where this is supplied under the contract until payment is made.
- Avoid clauses which are too complex.
- Do not retain title over goods once they are mixed with other goods of the buyer or else register that provision as a registrable charge at Companies House – a precaution worth considering for larger contracts.
- Do not retain title over goods once they are irrevocably fixed to other goods as, again, a charge is inadvertently created.
- Most importantly, ensure the terms containing the RoT clause apply and that this can be proved by a paper trail to a liquidator.
- Terms on invoices are usually too late to be valid and unless sale order terms are rejected, the supplier often finds their own terms of sale were rejected by the buyer and do not apply
- Remember title passes under the Sale of Goods Act 1979 on delivery, not payment, so unless there is an RoT clause a supplier is simply an unsecured creditor.

We can check your retention of title clauses for you and help enforce them if a customer goes out of business.



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Court Will Not Rewrite Contract to Enforce Covenant

A bungalow owner who wished to replace a flat roof with a pitched roof found himself in court recently when his neighbour sought to rely on a fifty-year-old covenant 'not to make any addition or enlargement or alteration' to the bungalow without the consent of the vendor. The covenant stipulated that such consent would not be unreasonably withheld. The sale documents also contained a covenant prohibiting the building of anything other than a single bungalow on the property.

In this case, however, the vendor concerned was the original owner of the bungalow and the adjacent property. The adjacent property had since been sold to a new owner and the covenant was not stated to extend to successors in title.

Enforecement

The question before the court, therefore, was whether the current owner of the adjacent property could enforce the covenant. He argued that the commercial reality of the covenant was such that the benefit of it must be intended to pass to successors in title. The bungalow owner argued that the covenant had been restricted to the original vendor (who had died in 1977) and thus was not enforceable by the current owner.

The court found that the documents of sale were tightly drafted and there were other references to successors in title where appropriate. The original vendor had created the covenant to protect her own position only. On her death, the covenant ceased to have any effect – otherwise, any future alterations to the bungalow would be rendered impossible because permission could not be granted. The court described such a possibility as 'astounding' and refused to rewrite the contract.

A covenant relating to land often binds successors in title. However, in this case, the covenant was written in terms which clearly distinguished between the vendor and the successors in title to the land. Accordingly, the distinction between the rights of the vendor and the successors in title was clear. **Contact us for advice on all property and planning problems.**

Landlord Not Entitled to Hope Value

The House of Lords has denied an appeal by landlords who were seeking the right to claim an element of 'hope value' when their tenants bought out their leaseholds under the right to buy legislation.

The Lords ruled that hope value is not payable in claims for the freehold under the Leasehold Reform Act 1967 or in lease extension claims or for participating tenants under the Leasehold Reform, Housing and Urban Development Act 1993.

However, the Lords also decided that hope value is to be taken into account in the valuation in so far as it is attributable to the possibility of non-participating tenants seeking new leases on their own flats. A non-participating tenant is a tenant who is not part of a collective scheme for obtaining enfranchisement of leasehold (e.g. where the tenants of a block of flats decide collectively to purchase the freehold).

We can help with negotiations and advise on all property matters.