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Legally Speaking - Judge & Priestley's Quarterly Legal Update for Commercial Clients

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Employment law changes come into effect

A new set of employment regulations came into effect on 29 July.

The most controversial, the introduction of fees for bringing claims to employment tribunals, went ahead as planned despite opposition from union leaders.

The changes mean that employees wishing to bring a claim to a tribunal now have to pay fees on a sliding scale depending on the nature of the claim and the number of claimants.

Level 1 claims include breach of contract, equal pay, holiday pay, redundancy issues and wages.

Level 2 claims include unfair dismissal, detriment and discrimination.

For a Level 1 claim, the employee will have to pay an Issue Fee of £160 to begin the claim and then a further £230 if the case proceeds to a tribunal hearing. Level 2 claims will require an Issue Fee of £250 and a Hearing Fee of £950.

Fees for groups of claimants will vary depending on how many people are involved. For example, if there are between 2 and 10 claimants, the Issue Fee will be £500 followed by a Hearing Fee of £1,900. Cases involving more than 200 people will involve an Issue Fee of £1,500 and a Hearing Fee of £5,700.

Unison has campaigned against the changes and has been granted permission to apply for a judicial review of the lawfulness of the scheme. This is due to be heard in October. However, the High Court rejected the union's application for an injunction to delay the introduction of fees until its application for review had been heard.

Further changes that came into effect on 29 July include a cap on unfair dismissal

compensation of one year's gross pay or £74,200, whichever is the lower.

The new regulations also mean that "settlement agreements" replace "compromise agreements". The new agreements will still be legally binding. In essence, they allow an employee to waive certain rights such as taking a claim to a tribunal in return for terms set out in the agreement.

The new settlement agreements allow for pre-termination negotiations to take place "without prejudice" even if there is no existing dispute at the time. This is in contrast to the previous system whereby there had to be an existing dispute for the "without prejudice" protection to take effect.

The purpose of the change is to make it easier for settlements relating to termination of employment to be reached without either side fearing their words may be used against them if the matter goes to a court or tribunal hearing.

Employers should still take great care, however, as the protection only extends to ordinary unfair dismissal claims. It doesn't cover dismissals that are automatically unfair, or relate to matters such as discrimination or breach of contract. The protection may also be removed if anything is said or done in pre-termination negotiations which a tribunal later considers to be improper.

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Contract failings mean no fee payable

When drawing up a contract for consultancy work it is important that both sides agree what the objectives are and what will constitute success.

If there is no clear understanding, disputes can arise over fees, as shown in a recent case before the High Court.

It involved a company that engaged a consultant to advise it on how to cut costs in several areas of expense including air travel.

Under the agreement, the target reduction in each category was 5%. The fees were to be paid on a contingency basis with the consultant receiving 50% of the savings obtained.

The consultant produced a report as agreed but the company rejected the findings and refused to pay any fees.

The court found in favour of the company. It held that if the consultant's findings were to qualify

as a recommendation report there had to be a benchmark report setting out the current levels and prices paid.

The consultant had produced a benchmark report but the judge considered that it contained no clearly identifiable yardstick against which success in reducing costs could be measured. Such imprecision could be acceptable in a preliminary discussion document, but not if the intention was to provide a benchmark for calculating subsequent savings.

As the benchmark report contained no intelligible success criteria, the consultant could not show that such criteria had been met and so could not claim any fees.

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Restaurant ‘not at fault in discrimination case’

The Court of Appeal has ruled that a restaurant did not discriminate against a disabled girl when it refused to allow her to eat its food outside its recognised seating area.

The issue arose when the girl, who has Down’s syndrome and suffers from autism, visited a restaurant at a theme park with her family. The restaurant only allowed its food to be consumed on its own premises.

The girl’s parents didn’t want to eat at the restaurant. Instead, they wanted to take the restaurant meals to a nearby public picnic area but were told they could not do so. They explained that the girl would become upset if she was asked to move from the picnic area and offered to carry the food outside themselves. The restaurant still refused.

The family’s discrimination claim went all the way to the Court of Appeal, which found in favour of the restaurant.

It held that it was unlawful for providers of services to discriminate against disabled people by failing to make reasonable adjustments to accommodate them.

However, in considering cases like this, it was necessary to determine what kind of service was being provided. An owner of a restaurant was not a mere meal provider; he provided a service which could best be described as “serving meals and drinks at tables prepared with chairs and eating equipment such as glasses and cutlery”. It was different from a takeaway service.

The Code of Practice published by the Disability Rights Commission made it clear that the duty to make reasonable adjustments did not require a service provider to take any steps that would fundamentally alter the nature of its service, trade or business.

The company in this case was providing a restaurant service, not a takeaway service and so did not have to make any adjustments.

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Less restrictive planning rules to ‘revitalise town centres’

The Government has outlined its plans to revitalise town centres by making it easier to bring empty buildings back into use.

The new rules, which are based on recommendations made in the Portas Review, will allow conversions from retail to residential. This is intended to provide new homes and ensure that better use is made of commercial properties that are no longer economically viable.

It will also be possible to convert retail premises to banks and building societies, providing more branches in the high street and more choice for consumers. Ministers also want to allow offices, hotels and other commercial premises to be turned into nurseries to help meet the strong demand for more childcare provision to support working parents.

Rural communities could benefit by converting barns and other agricultural buildings into affordable homes, and into new schools and nurseries. This would support working parents and protect the countryside by ensuring previously developed land is used first.

Planning Minister Nick Boles, pictured left, said: “Thousands of empty and underused buildings, often on the edge of town centres, are going to waste because people do not want the hassle and uncertainty of submitting a planning application.

“Removing this barrier will bring more people closer to their town centres,

providing a much needed boost to local shops and ensuring we make the most of buildings that are already there for new homes, nurseries and schools this country needs.”

The proposals are subject to public consultation and are expected to come into effect in April 2014.

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Landlord’s mistake over rollover tenancy proves costly

A recent case before the Court of Appeal highlights the need for landlords to ensure that they have protected deposits from former fixed term tenants who went on to acquire statutory periodic tenancies.

Failure to do so could result in penalties and prevent the landlord from serving notice for possession.

The case involved a tenant who had taken an assured tenancy for a fixed term of one year less one day from January 8, 2007 and paid one month’s rent as a deposit. The arrangement preceded the Tenancy Deposit Scheme (TDS) which came into effect in April 2007. There was therefore no reason at that stage to protect the deposit in an approved scheme.

When the assured tenancy came to an end, the tenant remained in the property and became entitled to a statutory periodic tenancy. Six months later, the landlord served notice for possession. Legal proceedings began and went all the way to the Court of Appeal, which ruled in favour of the tenant.

It held that after the original fixed-period tenancy ended, a new tenancy began. This meant that although no new deposit was paid, the landlord retained the original deposit and was legally bound to protect it in an approved scheme as required by the new regulations which had since come into effect.

The landlord had failed to do so and was in breach of the regulations. The failure meant the landlord could be subject to penalties and it also prevented him from obtaining a possession order.

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Accountant to pay nearly £1m in negligence case

An accountant must pay £943,000 damages to a client after giving him negligent advice about saving tax during the sale of a business.

The case involved a successful entrepreneur who was in the process of selling his company for £8.5m. He was liable to Capital Gains Tax (CGT) on 10% of that figure.

He engaged an accountant to help him reduce his tax liability using the most efficient method available.

The businessman was Iranian and did not live permanently in the UK. His non-domicile status could have enabled him to reduce his CGT liability. The accountant knew about the non-domicile status but didn't make use of it.

Instead, he advised that the client should enter a capital redemption plan. This approach failed and the client had to pay CGT plus penalties and interest for late payment. He took legal action to recover his losses from the accountant.

The court found in favour of the client. It held that the accountant was obliged to consider the client's best tax position and give appropriate advice. There was an obligation to use all due skill and care in giving that advice.

The accountant should have advised the client that non-domicile status carried potentially significant tax advantages and that he should take tax advice from an adviser who specialised in helping non-domiciled individuals.

He failed to do so and as a consequence the client entered into tax arrangements that did not meet his requirements and resulted in him paying more tax than was necessary. The client was therefore entitled to recover his losses of £943,000.

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EU tries to make it easier to recover European debts

The European Parliament is considering plans to make it easier for firms and individuals to recover debts across national borders.

The proposed European Account Preservation Order (EAPO) would make it possible to freeze a debtor's bank account in another member state.

Supporters of the move say the procedure would be quicker and cheaper than having to take action in the country involved. According to the European Commission, it would help EU companies to recover £500m a year.

A creditor would be able to issue an EAPO before the debtor is informed. This would achieve a "surprise effect" that would prevent the debtor moving funds to another country. An order could be issued even before a court has ruled on whether the debt can be recovered.

There are safeguards to prevent the orders being misused. For example, a creditor would have to compensate an alleged debtor if the use of an EAPO is found to be unjustified. The debtor will also be able to contest any order and oblige the creditor to set aside enough funds to cover compensation should that prove necessary.

Italian MEP Raffaele Baldassarre, who is steering the legislation through the European Parliament, said: "This regulation strikes a balance between the rights of the creditor and those of the debtor through specific amendments which concern the procedure, the claimant's liability and the disclosure of information."

EU member states are now discussing how the new regulations should be implemented.

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Company must pay 13 months' rent after tenancy dispute

The High Court has ruled that a commercial tenant that continued to occupy its premises after the lease expired had effectively created a new periodic tenancy and so was liable to pay 13 months' rent.

The issue arose after the tenant's lease expired in 2009. No new lease was signed but the tenant remained on the premises for another three years. During this time it conducted occasional negotiations with the landlord but nothing was agreed.

In June 2012, the tenant found new premises and gave three months' notice that it intended to vacate. The landlord responded by saying that a new periodic tenancy had been created and so the lease could not be terminated for a further 13 months.

The High Court found in favour of the landlord.

It held that in all cases where there was a holding over after the expiry of a fixed term, the question arose as to whether the conduct of the two parties allowed for the implication of a periodic tenancy.

The suggestion in this case was that both sides had been content for the tenant to continue in occupation and there had been no push from either for negotiations. A relationship had developed where it was accepted that the landlord would not take steps to get rid of the tenant without notice.

It was also accepted on both sides that notice was relevant and that occupation had been allowed on that basis.

These factors meant that their relationship had developed to create a continuing protected tenancy and so the tenant was liable to pay the 13 months' rent remaining on that tenancy.

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Directors to be more accountable for failings

The Government has outlined proposals to make directors more accountable for misconduct and company failures.

It also wants to improve company transparency to make it easier to work out who really owns and controls companies in the UK.

The proposals were put forward by Business Secretary Vince Cable in a discussion paper entitled, Transparency and Trust.

The first section of the paper sets out how the Government will implement its G8 commitment to create a central registry of the beneficial owners of UK companies. It proposes the abolition of bearer shares, and outlines measures to tackle the misuse of corporate directors and nominee directors.

The reforms are designed to prevent tax evasion and money laundering, and to improve the investment climate in the UK.

The second section of the paper outlines ways of making directors more accountable for their company's misconduct or failure – including the directors of banks. Key proposals include giving regulators greater powers to disqualify directors in specific sectors and allowing courts to take more account of the "social impacts" of directors' actions.

The paper also asks whether disqualified directors should directly compensate creditors after a company collapses, be offered education before returning to a similar position, and whether foreign directors should be barred from holding a similar position in the UK.

The proposals are now subject to public consultation. We shall keep clients informed of developments.

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Non-competition covenant 'too broad to be enforceable'

Non-competition covenants can be a helpful way to protect your business by restricting an employee's ability to set up a rival company and poach some of your customers.

However, they have to be drawn up with great care. If the restrictions are not tight enough they may not be effective, but if they are too restrictive they may be judged unenforceable, as happened in a recent case before the High Court.

It involved a firm of financial advisers and one of its employees who was subject to a covenant which prohibited him from "directly or indirectly being engaged or concerned in any business or activity of a direct competitor".

The employee's work involved him having access to information about the firm's clients.

He resigned and started working for another company whose business included the provision of financial services. Shortly afterwards, two of the old firm's clients moved to the employee's new company. Four of the staff who had worked with him also joined him.

The firm sought to enforce the covenant to prevent the former employee from working for his new firm for another six months.

The court found in favour of the employee. It held that a covenant must be shown to be no wider than reasonably necessary to protect a firm's legitimate business interests.

In this case, the covenant was unreasonably broad. It not only prevented the employee dealing with clients when working for a competitor, it also prevented him being involved in management, regulatory compliance, training, research into new products and other fiscal planning services.

There was no justification for such general restrictions. The covenant was unenforceable.

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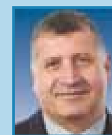
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