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

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Updates to TUPE regulations come into force

Changes to the TUPE regulations, which protect the interests of employees when a business is transferred to a new owner, have now come into effect.

The changes mean that employers can now renegotiate terms and conditions with their staff one year after they have taken control of a company, provided that the overall offer is no less favourable than the existing one.

Buyers can also begin redundancy negotiations with staff before they have taken over if permission is granted by the selling company, and smaller firms can communicate directly with their employees, whereas before they usually had to go through an official representative such as a trade union. One other innovation is that changes to employee contracts will be permitted for economic, technical or organisational reasons with the agreement of the employee and/or where a contractual right of variation exists.

The amendment to the Transfer of Undertakings (Protection and Employment) regulations (TUPE) came into force on 31 January.

The regulations also clarify the existing law in cases where employees' terms and conditions are provided for in collective agreements. In these circumstances, only the terms and conditions in the collective agreements

that are in place before the date of transfer will apply.

Any future changes will not bind the new employer, unless it has taken part in the bargaining process that brought about the changes.

Employment Relations Minister Jenny Willott said: "When a business is transferred from one company to another we want to make sure that TUPE continues to provide appropriate levels of employee protection, whilst making the process as smooth as possible for the businesses involved.

"Making these changes will give businesses more clarity about conducting transfers and provide them with the tools to create new opportunities in the UK labour market, whilst protecting fairness for all."

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Tougher action against late payers?

The government is looking at ways to ensure that large businesses pay their suppliers on time.

The Prompt Payment Code (PPC) was set up in 2008 to encourage companies to pay invoices within the agreed timescale.

However, research by YouGov revealed that 85% of small businesses still experience late payment. The government is carrying out a public consultation seeking views on how the problem can be tackled.

Prime Minister David Cameron said: "It's not right that suppliers are not getting paid on time. I know that late payment can have devastating effects on businesses."

The consultation highlights the importance of firms paying their bills in a reasonable time period. The government will be seeking industry views on issues such as: how to strengthen the PPC, could it do more to enforce legislation, and is there a case for issuing penalties to late payers.

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Landlord gets £4.75m compensation for damage to flats

A landlord has received £4.75m compensation after faulty workmanship and equipment led to "catastrophic" flooding at a block of flats.

The damage occurred after a pressurised water system was installed throughout the building. The system enabled water to be pumped to the higher floors in the block, but could also produce an effect known as "water hammer" in which high pressure surges caused burst pipes. There were two such incidents in different sections of the building on one day. The companies involved in installing the system agreed that the subsequent flooding caused £4.75m worth of damage.

The issue was how much blame should be apportioned to the contractors and how much to the manufacturers of the equipment. The court held that the first incident was caused by a combination of metal debris in the threads of a nut and the over-tightening of that nut.

There were various reasons for the second incident including failures of both workmanship and the design of the system.

The court held that 60% of the overall liability fell to the contractors and sub-contractors, and 40% to the designers of the mechanicals systems used.

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Handing over your business in the right way

After many years building up a business, directors often worry about how to bow out successfully while ensuring that the firm continues to thrive.

The key to ensuring a smooth succession is to start planning as early as possible ahead of your target retirement date. The first step is to hold meetings with those who will run the business when you leave so you can agree an exit strategy.

If you own a large share of the business, the remaining partners or directors may need to raise money to buy you out. Or if the firm is very successful, some of its profits could be used to raise part of the necessary finance. This approach would need Inland Revenue clearance but is worth exploring.

It may be that you agree to sell your shares back over several years so the firm's finances aren't put under too much pressure all at once. In that case,

you may need to change your will so the arrangement can continue should you die before the sales are completed. There could be tax implications whichever system you choose for withdrawing capital from the firm so professional advice should be sought.

If you own the business premises, you will need to decide whether to sell or lease them back to the firm. It's also important that those who remain in the business consider how they'll get by without you. It may be that your expertise can be passed on to the remaining directors, or they may have to replace you. In that case, a successor should be chosen before you leave. If you have built up a close relationship with key customers then you should arrange for them to meet the other directors so trust can be developed and continuity assured.

Some entrepreneurs find it difficult emotionally to leave a business they have built up from scratch. If you feel that way then you might consider staying on as a part-time consultant.

Throughout the succession planning, it's important to get advice from your accountant, lawyer and possibly your bank manager. They will have helpful suggestions and can ensure that the agreement is fair to everyone.

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Firms to have more say over how they are regulated

Businesses that are unhappy with the way their sector is regulated can now contact regulators and government ministers to push for changes.

Business Minister Michael Fallon says he wants to give companies a greater say in how their sector is run.

The original 'Focus on Enforcement' initiative had some success in improving the system but was run entirely by civil servants.

The new initiative is called 'Business Focus on Enforcement' and will allow input from businesses and trade associations which have become frustrated by unnecessary burdens, inconsistent advice and unhelpful guidance from regulators. They will now be able to raise their concerns and present their case for change directly to the regulators. Mr Fallon said: "We are re-shaping the way regulators work with business, so that upholding standards does not act as an unnecessary barrier to growth.

"Rather than relying solely on government to achieve this, we are putting the private sector in the driving seat. Harnessing trade bodies' knowledge, networks and first-hand experience will allow us to get straight to the issues and deliver the right results for business."

Terry Scuoler, Chief Executive of EEF, the manufacturers' organisation, will help run a pilot scheme to encourage trade associations and business groups to propose reforms and changes specific to their sector.

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Storage firm fails to prove there was breach of contract

A firm providing storage and distribution services has failed to prove that a commercial client was in breach of contract by not granting it exclusive rights as discussed during negotiations.

The firm had nothing in writing to prove its claim and had to rely on oral agreements which were far from conclusive.

The court heard that the two firms had enjoyed a successful business arrangement for a number of years. Following a meeting in 2010, the storage firm thought they had reached an agreement whereby it would be granted exclusive rights to supply the client's warehousing and distribution requirements.

However, the client continued its business exactly the same as before, using other providers when it thought necessary.

The storage firm said this amounted to a repudiatory breach of the agreement entitling it to terminate the contract. The court, however, found in favour of the client. It held that there had been no discussion of exclusivity until one of the client's directors had already signed the written agreement.

The issue of exclusivity may then have been mentioned but there was no detailed discussion as to what it would mean. Before any such term could have been agreed, the client's directors and managers would have had to discuss the implications and decide what to do. They did not do so.

There was no agreement about exclusivity and so therefore the contract could not be said to have been breached.

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Director duties in focus as divorce hits business

Directors have a legal duty to act in their company's best interests.

When their work as a director alerts them to a business opportunity that would benefit the company, they should not exploit that opportunity for personal gain and to the company's detriment.

However, that duty may not apply if the company's shareholders consent to a director pursuing personal interests, as happened in a recent case before the courts.

It involved a family business set up to acquire dental practices.

The shareholders were a mother and her two sons, and a dentist who was married to one of the sons. They each had a 25% shareholding. At a shareholders' meeting, the dentist raised the issue of being able to acquire five dental practices in her own name, outside the corporate structure.

The mother, who was the dominant voice in the family, told her that she could go ahead if she wished.

The two sons said nothing and did not raise any objections. The company went on to acquire several practices, and the dentist acquired five other practices in her own name as discussed at the meeting.

The marriage between the son and the dentist then broke down and divorce proceedings began.

The family then questioned the legality of the dentist acquiring the practices

in her own name and claimed she had breached her legal duties as a director.

The judge, however, ruled in her favour. He said that the family shareholders had understood what she was doing and had consented to it. She was therefore the legal owner of the five practices.

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Landlord can't increase rent despite improvements

A landlord has lost his appeal to increase the rent on a property which had benefited from substantial improvements over two years.

The issue arose after the landlord made a set of improvements in 2008. He applied to the Rent Control Committee to be allowed to increase the rent but was turned down.

He made further improvements in 2009 and made a second application to the committee which was also rejected.

The landlord considered this to be unfair and so in 2012 he made a further application which was again rejected. The committee said it could not consider

the improvements made in 2008 and 2009 because they had already been assessed at the time.

Only improvements made since the last application could be considered and as there had been no improvements since 2009, there was no justification for increasing the rent.

The landlord appealed to the High Court on the basis that although each set of repairs may not in themselves have justified an increase, taken together they were substantial and entitled him to charge a higher rent.

The court ruled against him. It held that if the landlord felt the decisions in 2008 and 2009 had been wrong, he could have appealed against them.

When assessing the application in 2012, the committee had been right to assert that it could only consider repairs and improvements that had been made since his last application. There was therefore no reason to say the committee's decision had been wrong.

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Installation firm wins case against negligent surveyors

An installation company has won compensation from a firm of surveyors who were negligent when assessing the suitability of properties for cavity wall insulation.

The installers won their case even though they had been negligent themselves.

Employees of the surveying firm had inspected two timber-framed houses to determine whether they were suitable to have cavity wall insulation. They confirmed that they were suitable.

The installers were also obliged to check the suitability of the property under the terms of the trade bodies of which they were members. However, instead of doing their own checks, they relied on

the verdict of the surveyors and installed the insulation.

The householders were not satisfied with the resulting work and sued the installers for breach of contract.

The firm settled and then took legal action against the surveyors on the basis that they had been negligent in saying the houses were suitable for cavity insulation.

The surveyors defended themselves by saying it wasn't the first time their employees had wrongly given positive surveys, but previously the installation company had noticed the mistake before work had begun.

They argued that by failing to carry out its own pre-installation check, the installation firm was partly to blame and so had broken the chain of causation which had begun with the faulty survey.

The court ruled in favour of the installers. It said that while they had been negligent in their failure to carry out their own checks, their actions weren't reckless. Their failure did not break the chain of causation from the surveyors' original negligent survey.

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Company 'pre-nups' can reduce disagreements

Running a business is never easy and the economic downturn of the last few years has only added to the difficulties.

The pressures of making vital decisions in such trying times can often put a strain on the relationship of company directors. The danger is that businesses can begin to struggle when directors disagree over policy.

This is particularly true for new or small businesses. For example, if two directors have equal shares in a joint venture, settling disputes over which direction to take can become very difficult. At that point, both sides may wish they had a business 'pre-nup' in place.

Such agreements set out how disputes should be settled in a way that is fair to both sides.

It is obviously better to decide on such issues at the start of the relationship when there is still trust and goodwill, rather than wait until things turns sour.

One simple matter would be to decide a policy on the transfer of shares. If one

director wants to sell some of his shares in the future, should the other be allowed first refusal to buy? Should partial disposal of shares be allowed, or should it be forbidden to avoid fragmentation?

Problems can arise when two directors have equal shares in a business and therefore equal control. It could lead to deadlock in the event of a disagreement. One way round this is to agree an arbitration system.

This could be done by nominating an independent third party as an arbitrator. This should be someone who understands the business and is trusted by both sides. The first task of the independent arbitrator would be to try to help the two sides reach agreement.

If that proves impossible, the arbitrator could then make a decision on principles set down by the directors in the pre-nup. However, if disputes are impossible to resolve, it may be necessary for the directors to end their business relationship.

This could be done in several ways. For example, the business could be sold to a third party, in which case the directors would need to decide in advance how the proceeds should be divided.

Alternatively, one director might buy the other's shares. In that case, it would sensible to set out in advance how the shares should be valued.

There could also be disputes as to which director buys out the other, assuming they both want to continue with the business.

Laying down some simple ground rules in advance can prevent complicated disputes further down the line.

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Liquidators reclaim money director paid to himself

The director of an insolvent company has been ordered to return money he paid to himself at a time when he knew the business was likely to fail.

The case involved the director of a company specialising in waste management projects. The business started to build up debts that it couldn't afford to pay. In spite of this, the director continued to make payments to himself and to a new company that he had set up. He also made payments to the bank that was helping to finance his new venture. Shortly afterwards, the waste management company went into liquidation,

The liquidators took legal action to make the director repay the money on the basis that he had breached his duty to act in the best interests of the company and its creditors.

In giving its ruling, the High Court pointed out that directors were not free to take action which put their interests ahead of creditors' prospects of being paid.

The director had breached his duties by making payments for his personal benefit and for the benefit of his new company. He was ordered to repay the money in full.

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