SIMON BURN SOLICITORS

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Commercial Law UPDATE

Dispute Resolution – The New Regime

Employers are reminded that the Statutory Dispute Resolution Procedures have now been repealed by the Employment Act 2008. In their place is a revised voluntary Advisory Conciliation and Arbitration Service (ACAS) Code of Practice, which sets out the basic principles for ensuring fairness and transparency when handling disciplinary problems and grievances at work. The new arrangements apply to any case where the trigger event takes place on or after 6 April 2009. It should be noted that the Code of Practice does not apply to dismissals due to redundancy or the non-renewal of fixed-term contracts on their expiry.

Under the new regime, it will not be automatically unfair dismissal if an employer fails to comply with the Code of Practice. However, an employment tribunal will have the discretion to increase or reduce an award by up to 25 per cent where either side unreasonably fails to comply with the Code.

The ACAS Code of Practice can be found at http://www.acas.org.uk/index.aspx?articleid=2174.

The Code of Practice is supported by non-statutory guidance, which provides good practice advice on dealing with discipline issues and grievances in the workplace. The

guidance contains sample disciplinary and grievance procedures, as well as sample letters, and can be found at http://www.acas.org.uk/CHttpHandler.ashx?id=1043.

Employers who have not already done so should review their disciplinary and grievance procedures in the light of the new law. However, it is important to remember that the three-stage statutory procedure must still be followed in disciplinary or grievance cases started before 6 April 2009.

Contact us for individual advice on handling workplace disciplinary matters and grievances.

Good Boardroom Practice

The Institute of Chartered Secretaries and Administrators has published a practical, short guide (3 pages) on boardroom good practice, which will be of great interest to company secretaries and directors, especially non-executive directors.

The guide can be downloaded here http://www.icsa.org.uk/assets/files/pdfs/guidance/080616.pdf.

Late Filing Fees Hike for Companies

Companies filing their accounts after the due date face a bigger late filing penalty from 1 February 2009. The increases in the charges are substantial and are intended to reflect the increase in inflation between 1992 and 2007.

Private companies are normally required to file their accounts within 9 months of the end of the accounting period. Those that file late, but within a month of the due date, will be fined £150. There is an ascending scale of charges if the filing is further delayed. Missing the deadline by more than 6 months will lead to a fine of £1,500.

Public companies must file their accounts within 7 months of the end of the accounting period (6 months for accounting periods starting on or after 6 April 2008). Failure to file by the due date will lead to a fine of £750. Again, an ascending scale applies. Missing the deadline by more than 6 months will lead to a fine of £7,500.

Contact us if you need advice on any company law matter.

Common Sense Restored in Insurance Decision

The recent decision in which the loss of a trawler tied up in port was held to be an uninsured loss, because of the breach of a warranty clause that cover applied only when there was a 'Warranted Owner and/or Owner's experienced skipper on board and in charge at all times and one experienced crew member', has been reversed in the Court of Appeal.

The Court considered that the purpose of the clause was to protect the ship from navigational hazards, which were not an issue in this case as the trawler was tied up in port.

Also, it was clearly not possible for the owner/skipper to be on board at all times. The clause had to be construed practically, meaning that for the insurance to apply the owner/skipper had to be on board at all times when the ship was being navigated. This interpretation was supported by the presence in the policy of another warranty clause which stated that the vessel had to be manned by at least two medically fit people when being navigated.

The decision shows that whilst the Court will not rewrite a contract, it will enforce a common sense interpretation of the terms of the contract when a strict interpretation would be nonsensical.

New Environmental Damage Regulations in Force

The Environmental Damage (Prevention and Remediation) Regulations 2009, which transpose the provisions of the EU Environmental Liability Directive into law in England and Wales, came into force on 1 March 2009.

The Regulations supplement existing environmental protection legislation and impose obligations on operators of commercial activities which cause or threaten to cause environmental damage, which is defined as damage to protected species or natural habitats, or a site of special scientific interest; damage to surface water or ground water; and land damage.

The Regulations seek to ensure that action is taken to put damage right and are based on the 'polluter pays' principle, requiring those responsible to meet the cost of preventive and remedial measures. When there is an imminent threat of environmental damage or actual environmental damage, operators are required to take immediate steps to prevent damage or further damage and to notify the enforcing authority. Where necessary, remedial action can be required by the enforcing authority.

Failing to make the necessary notifications is a criminal offence, the penalties for which are a fine of up to £5,000 and/or up to 3 months' imprisonment, if prosecuted in the Magistrates Court, or an unlimited fine and up to 2 years' imprisonment if prosecuted in the Crown Court.

Failure to Reserve Rights Means Landlord's Plans Stymied

A landlord, who wished to add an extra floor to maisonettes it owned, recently came unstuck because the drafting of the leases for the maisonettes was insufficiently precise.

The landlord's attempt to develop the property was opposed by the top-floor tenant. Firstly, he argued that the roof space above his flat (to which he had no access) was part of the premises demised to him under the lease. Secondly, he argued that the development would result in him suffering a loss of light, because his flat had three skylights.

The court agreed that the tenant's lease did include the roof space and roof, despite the fact that there was a landlord's obligation to repair the roof in the terms of the lease. The lease referred to the roof and walls of the premises and, furthermore, the skylights were clearly integral to the design of the tenant's flat.

The tenant's first ground for objection was successful. Although this meant that his argument regarding loss of light did not need to be heard, it is likely that the tenant would have been successful on that ground also.

In this case, the original lease had clearly not been drafted with any thought of a future addition of an

extra storey in mind. Had it been, the landlord would have reserved sufficient rights to enable it to undertake the works. The tenant was therefore in a position to prevent the development.

When negotiating leases or contracts it is important to think ahead to make sure that any future rights required are preserved as well as those needed presently. Contact us for assistance in the negotiation of legal agreements and the preparation of all necessary documents.

Tenancies and Insolvency – Landlords Take Note

Businesses in financial difficulties are increasingly seeking ways of ridding themselves of extra costs and, in many cases, premises let in more promising economic times are viewed as a substantial and avoidable liability, especially for businesses which have expanded too quickly.

One of the more common ways for a business to be structured on a more profitable basis is to arrange to take the profitable parts into a new business by doing a 'pre-pack' administration – a procedure whereby the business, or part of it, is transferred to a new entity. Prior to this, the business will be placed into administration, which imposes a moratorium on legal processes, such as the landlord's right to make the lease forfeit by peaceable re-entry.

The argument for pre-packs is that they maximise the chance of salvaging the business and preserving employment. On the downside, the creditors of the original business are often left nursing losses.

From the landlord's perspective, a tenant which undertakes a pre-pack may well leave the rented unit behind if it is uneconomic to retain it, thus leaving the landlord facing the prospect of finding a new tenant and a loss of rental income.

If the new business wishes to retain the unit, there may be scope for the landlord to negotiate with the new occupier with regard to arrears of rent as well as adherence to the lease covenants.

The good news for landlords is that in most cases they should be entitled to retain a rent deposit paid by a tenant that goes into administration.

We can help you negotiate with tenants in difficulties and the administrators of insolvent businesses.

Health and Safety – VDU Use

More and more workers are spending a large part of their day looking at a computer screen. The Health and Safety (Display Screen Equipment) Regulations 1992 specifically deal with the health and safety issues associated with working with VDUs.

The Health and Safety Executive has a free leaflet, 'Working With VDUs', which gives advice for employers and employees on minimising risks and ensuring compliance with the law. It covers both conventional (cathode ray tube, TV-style) screens and the newer, flat panel displays such as those used in laptop computers. The guidance is available at http://www.hse.gov.uk/pubns/indg36.pdf.

Regulation 5 covers the employer's responsibility for providing eyesight tests for employees.

Employers have a duty to ensure the provision of appropriate eye and eyesight tests, on request, to VDU users and to any employees who are to become users.

Accor Services, which runs an eye care voucher scheme for employers to provide to employees for use at most opticians, has published a free information booklet, 'Developing a Company Eye Care Policy – Your Options and Legal Obligations'.

As well as guidance on developing and writing an eye care policy, the booklet covers the main points of the law, gives advice on ways to minimise the effects of VDU use and contains general information on eye care.

The information booklet is available at http://www.eyecarevouchers.co.uk.

Contact us if you would like advice on how health and safety law affects your business.

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