



Sloan Plumb Wood

SOLICITORS

Legal Update

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Introduction

Welcome to the Summer edition of the Sloan Plumb Wood LLP legal update.



If you would like any advice or further information on any of the topics in this issue, or would like to suggest any subjects that you would like to see covered in future issues please get in touch with one of the following:

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Welcome to our newest Lawyers!

We are happy to announce that SPW is continuing to grow and we have welcomed three new Solicitors and a paralegal into the firm.

James Bizley is a Senior Associate Solicitor and since his qualification in 2004 has specialised in company commercial matters, both in private practice and in-house. At his previous firm, James undertook a range of corporate/commercial work for local, national and international clients, including Company sale and purchases, Business and asset sale and purchases, Management buy-outs, Group restructuring, Shareholder matters, Joint-ventures, Franchising, Agency and distribution, Partnership matters, Commercial contract negotiation and Employee share incentives.

James also spent time in legal practice in industry, having spent three and a half years in the legal team of BGL Group Limited, a large insurance intermediary based in Peterborough where his workload broadened further, for example advising on a range of commercial contracts, mergers and acquisitions support, project advice, corporate governance, compliance and data protection and IP registration and protection. For more advice in this area, please contact James on 01733 302413 or james.bizley@spw-law.co.uk.

Our new commercial litigation specialist is Peter Corrigan. Peter is a Senior Associate Solicitor with over 30 years of experience and has handled during that time, a variety of commercial disputes, varying in both value and complexity. He is able to advise on a broad range of matters including Contractual claims, Professional Negligence claims, Property disputes, Restrictive Covenant claims arising out of a Contract of Employment, Shareholder disputes and Debt recovery.

Peter is a regular presenter at seminars both solely and with others and is also an ADR qualified mediator. If you would like to contact Peter, please call 01733 302426 or e-mail him on peter.corrigan@spw-law.co.uk.

Nick Monsell is a private client lawyer with many years experience of dealing with the preparation of Wills, and Lasting Powers of Attorney; advising clients in relation to inheritance tax; the creation and administration of lifetime trusts and the administration of all sizes of deceased person's estates large and complex estates.

Nick is also a Notary Public, a separate profession of lawyers from solicitors, whose main role is to witness signatures to or certify documents for use in foreign countries for people and businesses. Nick's phone number is 01733 302427 and e-mail address is nick.monsell@spw-law.co.uk if you would like further assistance in this area.

We have also recruited a paralegal, Jake Parker Bishop, who is working within the Construction and Intellectual Property Departments. Jake will soon be leaving us temporarily to complete his Graduate Diploma in Law (GDL) and Legal Practice Course (LPC) and will return to us in 2015 to complete a training contract upon completion of his academic training.

Alongside our regular newsletter, we also post regular updates on our blog which can be found at www.spw-law.co.uk/blog. We write about lots of different issues which may affect your business and we welcome comments on them.

Also...SPW has taken to Twitter! Follow us @SloanPlumbWood

Christina Merrington presents employment law update to local CIPD group

On 25 February 2013 our employment specialist Christina Merrington presented an employment law update to almost 100 members of the CIPD. The presentation focused on Christina's top ten important legislative changes and case decisions that occurred in 2012 to include a look at how specific organisation of a workforce for the benefit of a customer or client can be key to establishing an 'organised grouping of people' for a transfer to occur under the service provision rules in TUPE, controversial political dismissals, a lesson in not suspending employees as a knee jerk reaction to alleged misconduct and key cases to update the law on age discrimination and annual leave.

The top ten of 2012 was followed by a glance at 10 key changes that will occur this year. Some of the changes featured were pre-termination negotiations and settlement agreements, equality act reform, changes in the tribunal rules and system and employee shareholders.

If you would like any information on the above, have any questions on any of the changes or forthcoming changes or are from an organisation that you consider would benefit from this or any other presentation to be delivered in-house, please do not hesitate to contact Christina (christina.merrington@spw-law.co.uk).

Ending the Employment Relationship 2013 Style

Every year we see a number of changes to employment law and this year is no exception with a whole raft of changes planned in 2013. Amongst the changes there was a particular focus on boosting business confidence by reforming the employment tribunal system to improve its efficiency and encourage early resolution of disputes. Of the changes to come one of the most important bills we will see become law is the Enterprise and Regulatory Reform Bill ('ERRB') which introduces many of the changes that were proposed in the Government's response to the Resolving Workplace Disputes consultation.

One of the new concepts that will be introduced by the ERRB is pre-termination negotiations. This means an employer would in theory be able to approach an employee, raise any concerns they might have and propose a termination package for ending the employment relationship. The idea is that the employer would be safe in the knowledge that the employee could not put details of these negotiations into evidence before a tribunal to the effect that the employer was planning to dismiss the employee. The ERRB will also rename compromise agreements to settlement agreements.

The Government detailed a list of principals when carrying out pre-termination negotiations that will be embedded in a new ACAS Code of Practice. The principals include:

- (i) The protection will be limited to unfair dismissal claims only. This is ordinary unfair dismissal only not automatic unfair dismissals.
- (ii) The pre-termination offer of settlement can be made by either the employer or the employee.
- (iii) There is no formal procedure that needs to be followed before a pre-termination offer can be made. However, parties are encouraged to follow 'without prejudice' negotiation practice as closely as possible.
- (iv) Any offer made must be confirmed in writing and must be clear as to what is actually being offered (money/reference etc), set out the next step for each party and the time frame for the process to be concluded.
- (v) The ACAS code may give examples of improper conduct. If the employer does not handle the process in accordance with the code it may lead to a constructive dismissal claim from the employee based upon a breach of the implied term of trust and confidence.
- (vi) If an employee refuses the offer of settlement the employer must then proceed with a fair process if any formal action is to be taken such as dismissal.
- (vii) There will be a number of precedents available to employers to assist with the process such as a template settlement agreement and model letters.

In conclusion, it would seem that whilst the concept of pre-termination negotiations is well intentioned it could have the potential to create further litigation. It could also lead to satellite litigation on the question of whether the ACAS code was followed in the first place. It will be interesting to see how confident employers are to make use of this process given that the protection is limited to ordinary unfair dismissal claims only. This means in any other type of claim the negotiations can be revealed to the tribunal.

It is also questionable whether a one size fits all agreement will be suitable for more complex cases or whether the employer will still be left needing to seek advice from a lawyer or ask them to produce an agreement which would then defeat one of the Government's aims i.e. to reduce costs involved in negotiated exits.

Lastly, there does not seem to be any waiver to the requirement for the employee to seek independent legal advice on the terms and effect of the agreement before entering into it. This is another cost factor for the employer to consider. The change is planned to come into force on 29 July 2013 so watch this space for an update. If you require any further information on this or any other employment law subject, please do not hesitate to contact Christina Merrington on 01733 302414.

Handling a dispute: a brief guide

This guide sets out the principal actions a business should consider taking when a dispute or potential dispute arises.

Does the business really want to be involved in legal proceedings?

It is very important to understand what the business is getting involved in. It is almost always better to find a commercial solution to a dispute. Consider for example, the value of the claim, the costs involved and the commercial implications of success or failure. Even if the business wins, it will not recover all of the legal costs it has incurred. Also consider what the business is trying to achieve from the litigation process and the time, cost and management commitment involved, most of which is incurred early on in the process. These are a few of the commercial considerations.

Is it possible to negotiate a settlement?

A business should not consider it a sign of weakness to approach the other side to explore the chances of a settlement. This can be done at any time during the litigation process, even during a trial. Settlement negotiations facilitated by a neutral third party (known as mediation) are increasingly popular.

Always take legal advice first to ensure the settlement discussions are conducted on a “without prejudice basis”. This means that anything said about the dispute during the settlement negotiations or in any written settlement offer cannot be used later at the trial. This protection only applies to statements made purely in an attempt to settle the case.

Practical steps to take when a dispute or potential claim arises

Take legal advice as soon as possible after an incident occurs, particularly if the business receives any formal documents requiring a response within a specified time. It is important not to leave everything to the last minute. There are time limits which a business will need to comply with.

We would advise that any business does not admit anything or agree to settle or communicate with any external party (for example, a trade association) without taking legal advice.

Do not destroy, delete or amend any relevant documentation

A business should not destroy, delete or amend any documents or media containing information relevant to the case (for example, notes of conversations, diaries, e-mails, photographs or tapes). If you have them suspend any routine destruction process that the business may have in place and ensure everyone with access to information relevant to the case is immediately notified not to destroy it and to be careful when creating new documents.

Be careful when discussing a potential dispute or preparing a report on an incident

Businesses may have to show embarrassing or damaging documents to the other party or the investigating body as part of legal proceedings. Therefore:

- Always consider whether a written document needs to be created.
- Think about what is being recorded and how it would appear if it was read out in court. Take legal advice first if it is likely to contain confidential or sensitive material.
- Never speculate, offer opinions or make critical remarks: simply stick to the facts.
- Remember that e-mails are documents, just like letters.
- Only send the document or e-mail to those who really need to see it.

A business may have to implement improvements or changes in practices following an incident, implicitly showing that previous practice was flawed. Take legal advice to find the best way to do this without prejudicing any possible litigation.

Handling a dispute: a guide – Continued...

Is the business insured?

Check the business' insurance policy to see if it is an insured claim. If it may be, notify the insurers immediately and follow their claims procedure, otherwise the insurance claim could be invalidated. The business may need to get the insurance company's consent before taking any action.

Establishing the case

- **Evidence.** Locate and preserve any relevant materials as soon as possible.
- **Witnesses.** Identify anyone who may be relevant to the case and, therefore, may have to give evidence.
- **Other parties.** Is there any other party who may be liable or should be involved in the case (for example, was the disputed work sub-contracted?).
- **Assets.** Consider where the other party's assets are and if there is a risk the other side may try to dispose of them?
- **Management time.** Keep a record of management time taken by the case.
- **Case review.** Review how the case is going on a regular basis. Consult all areas of the business that the dispute is likely to have an impact on.

If you have any queries about this topic please contact Peter Corrigan (peter.corrigan@spw-law.co.uk).



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Update on Legal Advice Privilege Contract

R (Prudential plc & another) v Special Commissioner of Income Tax and another [2013] UKSC 1

The Supreme Court has confirmed in its judgment handed down on 23 January 2013, in the case of Prudential PLC v Special Commissioner of Income Tax, that legal advice privilege should not be extended to communications in connection with advice given by professionals other than lawyers, even where that advice is legal advice which that professional person is qualified to give.

Legal advice privilege applies to all communications passing between a client and their lawyers, acting in their professional capacity, in connection with legal advice. In this case legal advice was given by accountants in connection with a tax avoidance scheme and, following the service of a notice by the revenue requiring the Prudential to produce documents relating to the scheme, the Prudential refused, on the basis that the documents were privileged. Proceedings were issued by the Prudential in respect of the notices asking for them to be set aside. The Court and following an appeal, the Court of Appeal refused to do so, on the basis that legal advice privilege could only be claimed by lawyers. The Prudential appealed to the Supreme Court.

The Court's reason for refusing to extend privilege was the concern that it could create uncertainty in that it may not be clear which occupations, other than lawyers would qualify and it may be difficult to decide how to deal with documents which contain legal and non-legal advice.

In the circumstances the only way to ensure that the contents of any advice given remains privileged, is to ensure that it is given by a lawyer.

The articles within this newsletter are for general information purposes only and intended to raise your awareness of the issues covered. They are not a comprehensive report on all aspects of the law applicable to the topics referred to nor are they a substitute for specific legal advice.

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