



Sloan Plumb Wood

SOLICITORS

Legal Update

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Introduction

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

In this issue we cover:

1. Employment Law
2. Intellectual Property
3. Case Law Updates



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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Employment Law

Welcome to Christina Merrington

We are delighted to let you know that SPW is continuing to grow and expand the range of services that we offer to our clients.

We are pleased to inform you that Christina Merrington, a senior solicitor with substantial employment law experience both contentious and non-contentious has joined us a senior associate solicitor. Christina has worked in private practice law firms in the Midlands and East Midlands for nearly 20 years, providing advice to the local and regional business communities.

We hope SPW will have the opportunity to advise your business on employment law issues in the future should the need arise. Please contact us if you would like any more information about Christina or if you would like the opportunity to meet her or have any other questions about the service SPW is able to offer to you.

As our Senior Associate Solicitor for Employment Law, Christina has over a decade of experience in this field, advising across a full range of employment law matters to include:

- Employment contracts and service agreements
- Absence and performance management
- Disciplinary and grievance procedures
- Company handbooks and policies
- Compromise agreements
- Unfair and wrongful dismissal
- Breach of contract
- Discrimination with a particular strength in disability
- Social media issues within the workplace
- Restrictive covenants and confidentiality
- Working Time Regulations
- Maternity and other family friendly rights
- Redundancy and restructuring
- Transfer of Undertakings to include outsourcing (TUPE)
- Employment Tribunal claims
- Appointment and termination of senior employees' contracts
- Some corporate immigration matters

Christina specialises in all aspects of contentious and non-contentious employment law and has a particular experience in social media issues in the workplace, senior executive terminations and discrimination.

Christina joined Sloan Plumb Wood in January 2012 from Buckles Solicitors in Peterborough, where she was a Senior Associate Solicitor and former head of the Employment Law Department.

She is a regular presenter at seminars – both self-hosted and jointly hosted – with chosen local businesses and has also been a regular guest presenter and trainer for the CIPD group in Peterborough, guest presenter at the Corby Business Group and for the Leicestershire and Northamptonshire Society of Chartered Accountants (LANSCA) in both Peterborough and Leicester. Christina has also presented at a national conference for the Chartered Institute of Housing (CIH) in Manchester.

Christina's commenced her legal career in 1990 as a paralegal, qualified as a Fellow of the Institute of Legal Executives in 1998 and as a solicitor in 2003. Christina has also been the subject of reviews in Chambers and the Legal 500.

Social Media Issues in the workplace – are you prepared?

There has been a huge increase in the use of social media in the workplace. Encouraging employees to access social media can bring with it many benefits and advantages to the employer. For example, employees can help to push out a positive image into the public domain through blogs and similar media.

Virtual communities can be created which contribute to increased cohesion where due to geographical locations a physical proximity is impossible i.e. a global sales force. Openness to modern forms of communication and interaction may enhance the appeal of the employer for recruitment purposes. Networking with other professionals on sites such as LinkedIn may lead to business opportunities.

More controversially, the internet generally and social media in particular, provide a rich vein of evidence in cases against the employee and can prove a useful recruitment tool.

However, where there are advantages there will always be disadvantages. Inappropriate use of social media by employees carries tremendous legal risk for the employer including:-

- Loss of productivity caused by employees spending time on networks during the working day
- Potential unauthorised disclosure of confidential information
- Liability for discrimination or defamatory comments posted by employees
- LinkedIn creates its own problems acting as an online database of clients and their contact information which is fully available to an employee once they have left your employment. Arguably, if the employer encourages participation on such a site they could lose the right to ownership of details within the database. Problems can also arise with the enforcement of post termination restrictions and in particular non-solicitation clauses
- General misuse leading to disciplinary action or dismissal can give rise to difficulties for the employer to justify their action where the conduct occurred outside of work

The above risks are not new but they are exacerbated by widespread unregulated use of social media. The main factor is the blurring of the line between an employee's work life and personal life. What is said and done online in private time and on an employee's own equipment can still have an impact on the workplace and create problems.

Love it, or hate it, you cannot ignore it even the Queen is on Facebook. So whether or not you are drawn into the use of it kicking and screaming or it is top of your agenda there are steps that an employer can take to protect themselves. Setting up a pragmatic social media policy will allow an employer to minimise risk associated with employee use of social media by proactively defining acceptable uses in the context of the employment relationship.

If you would like advice or further information on how to develop and implement a social media policy please contact Christina Merrington by telephone on 01733 302414 or by email: christina.merrington@spw-law.co.uk.

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...coming soon...SPW takes to Twitter! We will have more details about this in our next newsletter, so watch this space..."

Intellectual Property: A Time for Change?

In November 2010, David Cameron commissioned an independent review of the UK's Intellectual Property framework. Specifically, he was concerned that the framework of Intellectual Property laws, some of which were first enacted over 50 years ago, may not adequately provide protection in this modern age of digitalisation. The review panel, led by Professor Ian Hargreaves, published the findings of its review in May 2011.

In August 2011 the Government accepted all 10 recommendations contained within the report and has published a response detailing how it intends to react and implement the review.

Of the 10 recommendations, several are significant for businesses, particularly small and medium sized businesses. For example:

- Proposal that a "small claims" option is introduced in the Patents County Court ("the PCC") to assist rights holders with the enforcement of their rights against infringers. We have previously commented on this aspect in an earlier newsletter. The Government currently intends to introduce a small claims track in the PCC in October 2012 and has recently put out a Call for Evidence to seek evidence and comments from IP rights holders as to how this small claims track should work. It is also seeking comment on whether the Patents County Court should change its name to reflect the fact it deals with all kinds of Intellectual property disputes.
- The Intellectual Property Office ("the IPO") should improve accessibility of the IP system so smaller companies can benefit from it.
- Assessment of the Designs area of Intellectual Property law to help designers protect and market their designs. The Designs law framework is complicated and potentially confusing and the IPO has launched its own review into this area.

Copyright is focussed on heavily in the review by Professor Hargreaves and on 14 December 2011 the Government announced a consultation setting out how it planned to tackle some of the specific issues concerning copyright.

A lot of the Government proposals are in respect of exceptions to copyright, i.e. things that can be done with a copyright work without having to ask the copyright owner for their permission. Some are new exceptions and some are amendments to existing exceptions. As our copyright law is governed by EU law there is only so far that our law can be amended but the Government is seeking to amend it as far as it possibly can.

As with the PCC small claims track, the Government is seeking comment from IP rights holders on the following recommendations for amendments to the copyright exceptions:

- *Orphan Works* – there are proposals allowing works of unknown authorship ("orphan works") to be used. Users at the moment risk copyright infringement claims even if they have tried to find the owner of the copyright but cannot do so, for example because that individual has died. It has been proposed that there is a system of collective licensing to allow a sensible and commercial approach to these rights being licensed.
- *Extended Collective Licensing* – the Government has proposed a simplification of the rights clearance system so that the potentially high costs of obtaining a number of clearances from different bodies are reduced. It will assist copyright holders in being paid and users of copyright to ensure they have the relevant permissions.
- *Other exceptions to copyright infringement:*
 - Allowing private copying
 - Widening non-commercial research exception
 - Widening library archiving exception
 - Introduction of an exception for parody

In summary there could be a number of significant changes in store for IP law in 2012! For those with an interest in this area, the review and Government response can be found at the Intellectual Property's Office website at www.ipo.gov.uk. We will also be continuing to review the changes and proposals on our blog at www.spw-law.co.uk/blog.

Adjudicator exceeded his Jurisdiction

Herbosh-Kiere Marine Contractors Limited -v- Dover Harbour Board [2012] EWCA 84 (TCC)

In a recent case in the Technology & Construction Court Mr Justice Akenhead considered an application by the Claimant, Herbosh-Kiere Marine Contractors Limited, to enforce the award of an Adjudicator against the Defendant, Dover Harbour Board. The Defendant resisted enforcement of the Adjudicator's award on the ground that in reaching his decision the Adjudicator exceeded his jurisdiction by applying a methodology in forming his view that had not been argued or put forward by either of the parties to the dispute. The Defendant also resisted enforcement of the Adjudicator's award on the ground that it breached natural justice, again as the Adjudicator had decided the case on a basis which the parties had not argued before him or on which submissions had been invited.

The Court is generally reluctant to fail to enforce an Adjudicator's award, and will not do so in circumstances where the Adjudicator has made "a mere mistake of fact or law". The Claimant argued that even if the Adjudicator used the wrong methodology in forming his view, that amounted to a mistake and the Court should not go behind that mistake to overturn or refuse the enforcement of the Adjudicator's award. The proper process to challenge an Adjudicator's award in those circumstances is via Court or arbitration proceedings.

Mr Justice Akenhead considered relevant case law on the subject of breaches of natural justice in adjudication cases and concluded that the following factors should be considered by the courts when enforcement of an Adjudicator's award is resisted on grounds of breach of natural justice:

- (a) It must first be established that the Adjudicator failed to apply the rules of natural justice;
- (b) Any breach of the rules must be more than peripheral; they must be material breaches;
- (c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.
- (d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.
- (e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of **Balfour Beatty Construction Company Ltd -v- The Camden Borough of Lambeth** was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto.

In this case the works carried out by the Claimant had been delayed and the Adjudicator was required to consider the cause of those delays and the entitlement of either party to recompense for the delays. The contract provided certain "resource rates" and the parties based their respective position in the adjudication on those resource rates. The Adjudicator formed the view that a composite rate was appropriate and his award was based on that composite rate. This was notwithstanding that neither party had proposed a composite rate or provided any submissions to the Adjudicator as regards an appropriate composite rate.

Mr Justice Akenhead held that the Adjudicator had gone off "on a frolic of his own" in using a method of assessment that neither party had argued and which the Adjudicator had not put to the parties for consideration. Mr Justice Akenhead concluded that it followed that the Adjudicator's decision could not be enforced and accordingly the Claimant's claim for enforcement was dismissed.



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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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