Ortolan Legal Ltd

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E-Newsletter

July 2013

Your latest commercial legal update from Ortolan Legal, the virtual in-house law firm

Hello. Ortolan Legal is having a busy year and I am pleased to be able to tell you that we are in the process of recruiting new solicitors to join our team. We aim to increase our service offering so in addition to the broad range of corporate, commercial and employment law matters we already advise on, we will be adding a real estate and dispute resolution capability in the near future. These are areas in which many of you need legal support so it seemed only sensible to expand the scope of our services to meet this requirement.

Our newsletter this month focuses on some important (and hopefully employer friendly) changes to the employment tribunal procedure. We have also included a couple of pieces which seem to us to be very topical in the field of commercial law and business sales. As always, if there is a subject you would like us to address in a future newsletter, don't hesitate to drop us an email.

Employment Tribunals

The dawn of a new era - or just rewritten rules?

In recent months the Government has made various promises to encourage business growth and in particular to assist small businesses and thus improve the economy. As a direct result, the Government has promised to make it easier to employ people. They are trying to limit meritless claims and make the Employment Tribunal system easier to manage. For employers, it ought to be more straightforward to defend cases. A number of interesting changes have been made to the Tribunal procedure. The most publicised of these is the introduction of Tribunal fees which it is hoped will mean fewer opportunistic cases are pursued and only those where there is a legitimate dispute will be advanced. Another interesting

Signing Documents

Need to make signatory's capacity clear

The recent case of *Hamid v Francis Bradshaw Partnership* has highlighted the need to ensure the signatory of a document states the context in which he is signing, for example, whether as an individual, on behalf of a partnership or for a limited company.

In this case, the signatory had signed his name above and below the trading name, Moon Furniture. The other party to the contract interpreted this as meaning that Dr Hamid was signing as an individual, with the trading name Moon Furniture, however, this was not the case. Moon Furniture was actually the trading name of Chad Furniture Store Limited ("Chad").

No reference had been made to the fact Moon Furniture was in fact a trading name of a limited company. Dr Hamid did not qualify his signature or make it clear that the contract did not bind him personally; therefore Dr Hamid personally

change is the ability for Judges to "sift out" claims at a very early stage based only on the paperwork. This sounds great in principle but we remain sceptical as to whether a hard-line approach will be adopted by the judges.

We provide an overview of some of the key changes here. However, the question remains: Is this really the dawn of a new era? We remain hopeful but fear that in practice little will change.

Employment Tribunal Fees

From 29 July 2013, all new employment claims will require a fee to be paid by the Claimant.

The fees will be paid in two stages:

an 'issue fee' payable on submitting the claim and a 'hearing fee' payable prior to the full hearing if matters progress that far. The level of the fee will depend on whether the claim is Level 1 or Level 2:

Level 1 claims will comprise straightforward, lower-value claims such as sums due on termination of employment (unpaid wages, redundancy payments and payments in lieu of notice). These will be subject to a £160 issue fee and a £230 hearing fee. Level 2 claims will comprise all other claims, including unfair dismissal, discrimination, equal pay etc. These will be subject to a £250 issue fee and a £950 hearing fee.

Revised Claim Forms and Defences

A new ET1 (claim form) and ET3 (defence) will replace the old forms on 29 July 2013. Helpfully this form will require the Claimant to specify the compensation that they seek at the outset. This will not be binding and be open to later revision, but is generally seen as a helpful addition to focus the Claimant's mind and we suspect has been introduce to aid early settlement discussions.

"Sifting" Stage and the Judge's new powers

New rules 26 to 28 of the Tribunal procedure, provide that after the claim has been lodged and the employer has had an opportunity to respond, each case will now be considered by an employment judge. At this time the judge will consider whether the

was held to be a party to the contract.

It is therefore important to ensure you make the capacity in which you are signing clear. If you don't you could find that you inadvertently become a contracting party. In addition, had Dr Hamid have been found to have signed on behalf of Chad, rather than as an individual, the company could have faced fines for failing to comply with the Companies Act 2006. This was because the company name and address were not present on the document, as is required by the Companies Act.

Any contractual agreement should therefore be considered properly and the relevant advice sought to ensure that it is clear who the contracting parties are and to ensure the document complies with the relevant requirements of the Companies Act.

New Wistleblowing Laws

Employees' position strengthened

Three major changes to whistleblowing legislation under the Enterprise and Regulatory Reform Act came into force on 25 June 2013:

- Employees no longer have to show that they blew the whistle **in good faith** to be protected from detriment or dismissal as a result. However, compensation can be reduced by up to 25% if a Tribunal finds the disclosure was made in bad faith.
- Disclosures must also now have a "public interest" element

claim should be able to proceed or should be struck out as:

· it has no reasonable prospects of success; and/or

· the Tribunal do not have jurisdiction to hear it.

The judge will then consider what case management directions should be ordered to get the matter ready for a final hearing.

During this "sift stage", the Judge can also request further particulars, or ask for further written representations before deciding whether to strike out part or whole of a claim. It is hoped that Judges will be proactive in this sift stage and significant numbers of claims will not pass this threshold as they lack merit. We will have to wait and see.

Striking out of claims.

New Rule 37 provides that the Tribunal may strike out at any stage of the proceedings, all or part of a claim. This rule is identical to the old Rule 18; however in the consultation stages of drafting these new rules, the emphasis was clear that employment judges should be more consistent and proactive in exercising this discretion.

Case Management and Preliminary Hearings

Under the old rules, only at a preliminary hearing, which was held by an employment judge to decide any interim or preliminary matter relating to the case, could a judge award costs or strike out all or part of a claim. Issues to be decided at a preliminary hearing could be, for example, whether or not the claim is out of time, whether or not the claimant is an employee, and/or whether or not he or she had the requisite service to bring the claim. This was not possible at a case management discussion which are administrative hearings where the judges set out the timetable and issue directions to prepare the parties for the final hearing. With the introduction of the new rules the technical differences of what a judge can and can't do at these hearings have been removed in order to avoid unnecessary costs being incurred by the parties. It should be noted that 14 days in advance of a hearing the Tribunal will confirm if any substantive issues will be determined at a hearing so

meaning that the employee making the disclosure must have a reasonable belief that the disclosure is in the public interest. That said, as this element will be subjective it will no doubt be contentious.

- Employers are now vicariously liable for any detriment suffered by an employee at the hands of their colleagues suffered as a result of the employee blowing the whistle. Thus finally closing this legislative loophole. There will be a defence for employers who can show they took all reasonable steps to prevent this from happening.

that the parties can consider who the appropriate representative to attend should be. Often solicitors or HR managers feel comfortable dealing with the administrative side of things, but prefer to send counsel to deal with substantive issues.

Restrictive Covenants In Business Sales

Can the buyer prevent the seller from competing?

Any buyer of a business will want to ensure that, once the purchase has been completed, the seller does not set up in competition with the business they have just purchased from the seller. The seller will retain valuable business know how and could use it to attempt to lure clients and employees to his new business.

Where there are no express restrictions in the sale and purchase agreement that prevent the seller from setting up a new business in competition, the courts will imply certain restrictions on the seller, for example, the seller will not solicit the business of his former customers, use the business secrets of the sold business or hold himself out to be part of the sold business.

However, this protection for the buyer is limited. The buyer of a new business should always ensure that the sale and purchase agreement contains reasonable restrictive covenants that prevent the seller from soliciting existing customers or suppliers from the sold business, soliciting and employing existing employees from the sold business, disclosing or using the sold business' trade secrets and competing generally with the sold business for a specified period within a specified area.

Restrictive covenants must be reasonable in the interests of the parties and in the public interest and go no further than is necessary to protect the buyer's legitimate business interests, otherwise they may be unenforceable. In assessing what is reasonable, the parties should consider the duration of the restriction, its geographical reach and the scope of the activities which are covered by it as well as the consideration received by the seller for the sale.

The validity of a restrictive covenant will be determined as at the date at which the agreement containing it was entered into and the onus of showing that the covenant is reasonable lies on the party seeking to rely upon it.

About Ortolan Legal

Ortolan Legal is a radically different law firm providing pragmatic and commercially focussed legal advice. We are all experienced in-house and commercial lawyers, based remotely so our overheads are kept to a minimum. Our pricing structure is entirely flexible; we will adopt your preferred structure and simply ask to earn a fair margin for our work. We don't charge administrative costs. Dealing with ad hoc work or retainer work, we can assist where there is no in-house legal function and also provide holiday cover or supplement existing in-house legal teams. Our work covers non-contentious company commercial and employment law, contracts, tendering, purchase, supply, distribution, franchising agreements and pre-litigation reviews. We also provide general ‘Legal Health Checks’ and a‘Legal Hotline’ offering legal support for a set number of hours each month.

If you require any advice in connection with the content of this bulletin, or on any other issues, please contact Nick Benson or Carrie Beaumont on 0844 5611 638 or e-mail us at nbenson@ortolangroup.com .