Aspire: helping owner and family managed businesses

Welcome to the Spring 2019 edition of the Aspire newsletter

As we move forward into Spring, there are several important developments coming up across the year that we want to share with our readers.

In this edition, we focus on protecting your business by making sure you are in the right place regarding your businesses 'terms and conditions'; and what to be aware of when dealing with commercial property leases and dilapidations.

I would also like to take this opportunity to announce that our Employment Law team here at Taylor Walton will be launching our revitalised Non-HR Employment Law services, which will cater to businesseses that do not have in-house HR expertise.

For those who are HR professionals, our team of Employment Law experts will carry on providing the excellent, practical advice, guidance and service that has been specifically tailored to cater to your needs.

Please make sure to visit our website and take a look at the various updates we send out as well as details on the various events, workshops and seminars we host, where we share all pertinent information that businesses and individuals need to know about.

Our events are free to attend, highly interactive and very informative so we do hope you take advantage of the opportunities available to join us. Should you need further information on how to register to attend or to share your feedback on this newsletter please contact us via email at marketing@taylorwalton.co.uk.

I very much hope you enjoy this edition of Aspire.

Dermot Carey

Managing Partner of Taylor Walton

Taylor Walton Launches its Non-HR Employment Law services

Message from the head of the department

We have made changes to the free support services we provide to businesses who do not have in-house HR expertise.

We understand that as a business leader you are not a HR manager and that you wish to understand how employment law affects your business and how you can better protect your business. Our free services are now designed to provide that understanding and to assist you in protecting your business.

Moving forward, you will receive:-

1. invitations to practical workshops designed to address significant current risks;
2. a quarterly email bulletin called "TW EmployAssist" which will highlight new risks arising from changes in employment law and identify forthcoming changes to legislation; and
3. briefing notes to provide you with information about difficult areas of employment law and offering practical advice.

We are expecting 2019 to be a challenging year with important changes and developments in employment law.

Our first workshop will focus on the changes affecting all businesses who engage self employed consultants/ contractors (employment status). Details of the changes can be seen in the article on the next page of this newsletter.

Join us at our workshops to find out how the changes will affect your business:

Employment Status ***Tuesday 30th April*** ***Luton office***

Heather Cowley

Partner, Head of Employment Law Department

Are you up to date on employment status?

Employment status and the gig economy were rarely out of the headlines in 2018 and this theme seems set to continue in 2019 and beyond.

One of the recent decision of the employment tribunal confirming that "freelance" lecturers for the National Gallery were workers with limited employment rights rather than self-employed contractors seems to emphasis this. The development of the case law relating to employment status and the Government's proposals for reform targeted at improving conditions for atypical workers, means that it is more important than ever before for HR professionals to get to grips with the potential risks in this area, especially if the business currently engages contractors and casual workers.

Recent cases concerning employment status have clearly demonstrated that the manner in which the business and the individual categorise their relationship is increasingly irrelevant. It is becoming increasingly difficult to demonstrate that an individual is genuinely self-employed.

When determining employment status, tribunals focus on the reality of the situation in practice. Whilst a range of factors are relevant to the employment status of individuals, many recent cases focus on personal service. If an individual is obliged to provide services personally, a finding that the individual is a worker is more likely than not. This principle has been confirmed in several recent cases including the much publicised litigation involving Uber and Pimlico Plumbers.

Where a business is engaging contractors in circumstances where they are required to provide service personally, thought should be given as to whether the arrangements are sustainable.

The Government has also recognised the issues relating to employment status. In November 2016, the Government launched the Independent Review of Employment Practices in the Modern Economy to consider the implications of new models of working for the rights and responsibilities of companies and individuals.

Matthew Taylor's report, Good Work: the Taylor Review of Modern Working Practices was published in July 2017 and made 53 recommendations. Matthew Taylor was particularly concerned that businesses should not be able to avoid responsibilities to individuals by trying to misclassify or mislead their staff. Many of the recommendations in his report are aimed at addressing this issue.

The Good Work Plan was published on 17 December 2018 and includes the Government's intention to implement the majority of Matthew Taylor's proposals. The proposals which are likely to be of interest to most HR professionals include:

- Clarification of employment status - The Government agrees with Matthew Taylor's concerns regarding the misclassification of staff and says it will "bring forward detailed proposals" on how the employment status frameworks for tax and employment rights should be aligned. There will also be legislation to "improve the clarity of the employment status tests".
- Holiday Pay - The Government has launched a campaign to boost awareness of holiday rights and from April 2020 the reference period for calculating holiday pay will increase from 12 weeks to 52 weeks. This ensures that workers who do not have a regular working pattern are not disadvantaged by having to take their holiday at a quiet time of the year when their weekly pay might be lower.
- A new right for workers to request a more predictable and stable contract will be introduced. This is intended to address the issue of "one sided flexibility". It is anticipated that this will work in a similar way to the current rules on flexible working.
- The "Swedish derogation" in the Agency Workers Regulations 2010 currently allows temporary work agencies to avoid the "equal treatment" provisions of the AWR by engaging agency workers in a way that allows for pay between assignments. This will be abolished.
- All employees and workers will be entitled to a statement of terms and conditions from day one.

In addition, the current rules relating to "off payroll working" which apply in the public sector will be extended to large and medium sized businesses in the private sector from April 2020. Essentially this means where the IR35 rules apply, the fee payer rather than the intermediary will be responsible for deducting income tax and employee NICs from, and accounting for employer NICs on, broadly, the fees it pays to the intermediary.

Whilst none of the proposals set out in the Good Work Plan are likely to come into force before April 2020, it is clear that the law relating to atypical working relationships will be subject to significant change in the coming months and years. Employers need to consider how to address these changes in good time taking into account the current approach to employment status being taken at the current time by the employment tribunal.

For any Employment Law related questions regarding your business, please feel free to contact Heather Cowley on heather.cowley@taylorwalton.co.uk or call 01582 731161.

To register to attend any of our upcoming HR or Non HR Workshops, please contact us on:

Telephone: 01582 390568

Email: events@taylorwalton.co.uk

Register online: www.taylorwalton.com/events

The workshops will be held at one of our offices below:

Luton Office:
28-44 Alma Street,
Luton, Beds, LU1 2PL

St Albans Office:
Thornycroft House, 107 Holywell Hill,
St Albans, Herts, AL1 1HQ

Getting the most out of your Terms and Conditions

Essential Terms

It is vital that your terms and conditions protect your business on a wide range of issues, but the following points are particularly worthy of consideration.

Limitation of Liability

Your T&Cs should seek to cap the maximum amount of damages payable to your customer in the event that something goes wrong.

- How can you ensure that your limitation of liability clause is reasonable and will not be set aside by a Court?
- Are there any areas which can't be covered by a limitation of liability provision and, if so, what can you do to protect your business in those areas?

Retention of Title

If you supply goods rather than provide services, your T&Cs may seek to provide protection in the event that your customer enters into insolvency without having paid for the goods.

- Can you gain priority over other creditors in relation to unpaid invoices?
- Can you simply enter the customer's premises and reclaim any goods which have not been paid for?

Warranties and indemnities

You should take particular care in offering a customer any warranties or indemnities and should consider whether the customer should also be required to provide these.

- What are the key differences between a warranty and indemnity?
- What key areas would typically be covered by warranties and/ or indemnities?

Entire Agreement

Often, the parties to a contract will intend that the document alone reflects their agreement in its entirety and that no other evidence should be considered in its interpretation (the so-called "Four Corners rule").

- How can you ensure that pre-contract discussions and negotiations are excluded from the contract?
- When will the Courts impose additional terms into a contract which the parties themselves have not included?

If you have any questions related to this topic, please feel free to contact Peter Kouwenberg in Taylor Walton's Commercial Team on 01582 390411 or by email at peter.kouwenberg@taylorwalton.co.uk.

Limitation and Liability

Every commercial transaction involves a contract of some sorts. Some are documented; some are based on standard terms and conditions while many are created on the back of a handshake or simply by verbal agreement.

However, in each and every case a commercial contract carries a risk of liability to one or both of the parties involved. Without a clause limiting liability there are no financial limits and other than some practical and generic legal limits imposed by law, the Courts will not otherwise imply a limitation of liability clause into a contract.

An express limitation of liability clause is therefore strongly recommended in order to provide you with some measure of control over any liability you may face if a transaction you are involved in goes wrong.

However, I'm afraid that it isn't enough to include an express limitation excluding all liability – if allowed; such a provision would be widely used and abused to the extent that no contracting party would have any liability to another in the event of a breach of contract. Policy and therefore the law place restrictions on what you can or cannot do.

Get it right and you can quantify and place a limit on your exposure if something goes wrong with you contract.

Get it wrong and your limitation clause will be struck down and you will be left relying on the basic legal and practical limitations. By way of example:

1. In *Watford Electronics Ltd v Sanderson CFL Ltd [2001]*, a clause limiting damages to the contract sum payable by Watford to Sanderson was upheld – the effect was to limit Watford's damages to approximately £104,000 in a case where they claimed losses of over £4.5m.
2. In Goodlife Foods Ltd v Hall Fire Protection Ltd [2018], a clause excluding liability for negligence when installing a fire suppression system was upheld an applied to exclude a claim for £6.6m in the context of a system that was supplied and installed for just £7,500.
3. In Saint Gobain Building Distribution Ltd v Hillmead Joinery (Swindon) Ltd [2015] a clause excluding liability for breach of the warranty of fitness for purpose was struck out as unreasonable. If upheld it would have precluded Hillmead's counterclaim for £367,000.

For help navigating these issues contact James Carpenter in Taylor Walton's Commercial Litigation Team on 01582 731161 or by email at james.carpenter@taylorwalton.co.uk.

Dilapidations

When dealing with commercial property leases, repairs and reinstatement at the end of the term of the lease are extremely important areas of law that needs to be planned for - both contractually and financially - well in advance by both landlords and prospective tenants. Planning should take place not only in advance of dilapidations becoming an issue, but before the lease itself is entered into.

What are dilapidations?

When a tenant takes a lease of a property, it is natural that the building will suffer some wear and tear over the years as a result of the business activities being carried out on the premises. A property could also be affected through deliberate or negligent actions that leave the building significantly different to its original state. Dilapidations relates to the breach of the tenant's obligations or covenants and requires the tenant to remedy these breaches.

For landlords who invest in property, it is of course essential to know that when a tenant comes to the end of their lease the building will be in a suitable state to put back on the market, reducing the risk of losing months of rental income while problems are put right - not to mention the cost of the repairs themselves. For both parties, when preparing to enter into a lease it makes good financial and business sense to ensure dilapidations clauses are suitable and fully understood at the outset. The tenant needs to be aware of their obligations and set aside sufficient funds to cover repairs or general maintenance - during and at the end of the lease.

The specifics of lease terms can vary significantly. One of the biggest areas to look out for is whether the tenant is legally obliged to repair structural damage rather than simply the visible decor. This could increase the tenant's financial obligations significantly, and needs to be accounted for in the company's budget. Terms should be carefully negotiated with the help of a lawyer experienced in commercial leases.

The acceptability of more onerous terms will depend on many things, such as: the type of activity carried out by the business; the length of lease being agreed; the state of the property; how much is required in the way of changes to the property to make it suitable for trading; the company's financial status; and the desirability (or rarity) of the address in relation to the business's needs. For landlords, it is essential to check the status of the tenant to understand their financial stability - can the company afford to pay for the repairs and upkeep specified in the contract?

A Schedule of Condition (SoC) is a useful document to draw up (or at least agree the principle of having repair and decoration obligations limited by a SoC) when agreeing the lease heads of terms, often with the help of a surveyor.

The SoC documents the current condition of the property in writing and often with photographs. This provides all parties with a record of how the building should look when the lease ends, and helps the tenant understand and assess their obligations as the years pass by. Going through the process of drawing up the SoC, if done by a surveyor, should also reveal to the prospective tenant if the property is in a lesser condition than the landlord claims.

Tenants should take care not to misinterpret their obligations where changes are made to the property. It is likely they will need to get permission to make any major (or perhaps even minor) alterations, so leases should be checked carefully. Tenants should not assume that, just because their alterations appear to improve the condition of the property, they have free rein to make them: alterations may well have to be returned to their original condition when the lease ends.

A schedule of Dilapidations (SoD) is a list drawn up by the landlord to detail the defects and damages in the building during or at the end of the lease. It will usually detail where the lease terms have been breached, and what the tenant must do to remedy the breaches. The tenant might fix the damage themselves, or reimburse the landlord who arranges for repairs and redecoration to be undertaken.

With the help of a surveyor, the SoD should be carefully compared to the SoC (if the repair and decoration obligations are limited by a SoD). Of course, even if the lease does not state that specific upkeep activities must be performed during the course of the lease (for example, regular repainting) it makes sense for tenants to keep the property in good repair and decoration throughout. This helps to avoid storing up costly repairs when the property is vacated at the end of the term. At that point, the landlord could also claim for lost rent if significant defects need to be put right before the property can be leased again. Advice from a trusted legal advisor is important to ensure any claims are resolved fairly and in a timely manner so both parties can move on with their commercial pursuits.

Tenants who find themselves in contested dilapidations situations should immediately engage a surveyor (if they have not already done so) who will be able to advise them on the Dilapidations Protocol and thereafter to engage commercial property litigation solicitors to advise on any necessary legal aspects of the Protocol.

We are happy to help you with any question relating to this topic or any other issue regarding your business so please feel free to contact Angela Thomas on angela.thomas@taylorwalton.co.uk or call 01582 76511.