Turbervilles Solicitors

Inside Track

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Employers fear increase in age related tribunal claims

Just under half of UK employers fear an increase in the number of age related tribunal claims due to the removal of the national default retirement age (DRA), according to research by the CBI.

From 6th April 2011, employers will no longer be able to issue any notifications for compulsory retirement using the DRA procedure.

The research showed that 79% of employers use the DRA of 65 and only 16% have no set retirement age.

The CBI says that with so little time to prepare before April, 69% of employers are concerned that the removal of the DRA will create greater uncertainty around workforce planning.

John Cridland, CBI Deputy Director-General, said: "Given that some employers are unaware of these changes, the Government needs to give businesses more time to prepare, and provide clear guidance on how to operate without a DRA.

"The DRA is a dignified way to manage cases where performance isn't up to scratch or people are no longer physically up to the job. Abolishing it leaves a huge void, and has the potential to open the floodgates on age-based litigation."

The research shows that 63% of employers are concerned about the readiness of their managers to deal with declining performance in the absence of the DRA, and 48% are worried that there will be an increase in the number of age-related claims.

This is at a time when the number of claims to the Tribunals Service is already at record levels. In the 12 months to March 2010, the number of claims rose by 56%. This was largely caused by the increasing number of multiple claims. These are where several employees bring the same claim, usually relating to issues such as equal pay or TUPE matters.

However, there was also a 14% increase in single claims and a 17% increase in claims relating to unfair dismissal, breach of contract, and redundancy issues.

Employers may wish to revise their employment policies if they have not already done so in readiness for the removal of the DRA.

Please contact us if you would like more information about the issues raised in this article or any other aspect of employment law.

Good contracts can help prevent late payment

Small and medium sized enterprises (SMEs) are being urged to reduce the risk of crippling cash-flow problems by adding carefully written clauses into business contracts.

The Law Society says many businesses are so overburdened with red tape that seeking protection against late payment often gets pushed to the bottom of the list of things to be done.

Yet cash flow remains a serious threat to the survival of many companies. SMEs are currently having to wait an average of 41 days beyond due date for payments and, collectively throughout the UK, they are owed £24bn at any one time.

The new 20% rate for VAT, effective from 1st January, means that the situation is likely to get worse and so the Law Society is urging businesses to ensure they are protected as much as possible against late payment.

Law Society spokesman Robert Heslett said: "It could be the difference between the business surviving or not, especially in the uncertain economic climate."

The EU is currently looking at ways to tackle late payments which are causing problems across Europe. Meanwhile, the Law Society is urging more businesses

to include late payment clauses in contracts.

Mr Heslett said: "Many smaller businesses perhaps felt the recent budget did not do enough to tackle cash flow problems head on, and although the EU is looking at it, the safest bet is to protect against cash flow blockage between the customer and the business with a solid, solicitor-drafted contract.

"A carefully worded contract drawn up by a solicitor between a business and their commercial customers can include clear terms on late payments, including penalty clauses and strict time frames for payment.

"Such terms can act as an effective deterrent for late payment and encourage timely payment for services, thus avoiding these terms coming into play."

Please contact us if you would like more information or advice.

Director to pay damages after hijacking contract

A director must pay compensation after hijacking one of his company's potentially lucrative contracts and using it to set up a new business.

The director had been approached as a representative of his company to provide a service checking and maintaining aircraft. During the negotiations, he decided that he would bypass his company and set up a new business so he could receive the full benefit of the contract. He then resigned after telling his company that it had lost the contract.

He did not inform his former colleagues that the business had been awarded to his new firm.

The company later discovered what had happened and took legal action alleging that the director had breached his fiduciary duty – that is, his obligation to act in the company's best interest.

The High Court held that the director had failed to act in good faith. He had sought to make a profit out of his role as a director and put himself in a position where there was a conflict between his self-interest and his duty to his company.

He had also failed in his duties as an employee of the company. He had not acted in good faith and the information he had gained as an employee had been used for his own purposes. The director and his new firm were therefore liable for damages.

Please contact us if you would like more information about the issues raised in this article.

Landlords are getting tougher over break clauses

The standard break clauses to be found in most commercial tenancy agreements have often led to disputes, but the numbers have risen dramatically over the last few years. The recession is the main reason, of course.

Declining orders mean more and more firms are using the break clause option to downsize or just find a better deal elsewhere. In their haste to depart and save money, tenants may not be too careful about meeting all the conditions of the lease, particularly relating to maintenance and repairs.

The landlord is just as likely to be money conscious. In better times, a tenant departure might only be a temporary inconvenience. Now it can be the difference between staying afloat or going out of business. Faced with the prospect of empty premises they have very little chance of re-letting, landlords increasingly respond by poring over the small print of the tenancy agreement to make sure everything is in order.

There have been several cases recently where landlords have challenged break notices for technical reasons. One example involved a tenant who tried to exercise the break clause by giving the landlord six months notice as required by the tenancy agreement.

The landlord refused to accept it because the tenant had failed to also give notice to the property's management company – another requirement of the lease. The tenant argued this was a mere technicality. The case went all the way to the Court of Appeal where the landlord eventually won and prevented the break clause being exercised. In another case, a commercial tenant was prevented from terminating a lease because it gave notice under the name of its new parent company rather than its original name which was still on the tenancy agreement. This was in spite of the fact that the landlord had been informed of the change of name, and rent invoices were sent to the parent company.

Conditions relating to vacant possession, repairs and maintenance can also lead to disputes as landlords take a tougher stance. They need their properties to be in a fit state so they can re-let them as soon as possible.

It means that if work is not carried out to an acceptable standard or is not completed exactly on time then the landlord may refuse to accept the break. Some tenants try to prevent any problems by asking the landlord for guidance on work required but the landlord is under no obligation to help.

Landlords who do choose to help should make it clear that any information they give does not over-ride the need to comply with the terms of the lease. Both sides are entitled to protect their interests and so now, more than ever, both sides must try to make sure they comply exactly with every detail of the terms and conditions in the lease. Failure to do so could prove very costly.

Please contact us if you would like more information about landlord and tenant issues.

Builder awarded £72,000 damages for inaccurate valuation

A builder has been awarded more than £72,000 compensation after a surveyor overestimated how much rental income could be earned on a flat.

The builder had bought the property to rent out to augment his pension. When he applied for a mortgage, the lender engaged the surveyor to value the flat and assess how much rental income it would generate. The surveyor produced a report saying rent of £2,000 per month could be achieved.

Based on that report, the landlord went ahead with the purchase. He was relying on the rental income to pay the mortgage. In the event, however, he could only let the flat for £1,050 per month, which meant he could not meet the payments and eventually had to sell the flat at a loss.

He sold in 2006, a year before the downturn in the housing market.

The High Court held that the surveyor's responsibilities were not limited to the mortgage lender which had engaged him to value the property. The surveyor had known that the landlord was a buy to let purchaser and would rely on the rental income to pay the mortgage. The court held that a competent valuer would have estimated the flat's rental value at about £1,100 per month – just over half the figure suggested by the surveyor.

It followed that the landlord was entitled to be compensated for the losses incurred when the rental income failed to reach the expected figure. The landlord was awarded £72,234 plus interest.

Legal commentators have described this as a landmark case which could lead to more compensation claims from landlords in similar situations.

Please contact us if you would like more information.

Ruling could help business tenants with offices in 'houses'

The Court of Appeal has ruled that a property designed as a house but used as an office can still be classed as a house for enfranchisement purposes.

It's thought the ruling could lead to several enfranchisement claims from commercial tenants who will see it as an opportunity to buy the freehold of their offices on favourable terms.

The case involved three commercial tenants who leased offices in properties which had originally been built as town houses.

The tenants argued that the buildings were still essentially houses and sought to exercise their right to enfranchisement under the Leasehold Reform Act 1967.

The landlords objected saying the Act did not apply in this case because the buildings were used exclusively for business rather than residential purposes.

Giving the lead judgment in the Court of Appeal, Lord Neuberger said the definition of house could "extend to buildings exclusively used for business purposes".

He said the question of whether a building was a house for purposes of the Act should be determined "at least in the main" by the nature of its character and physical appearance.

He said: "One could, it seems to me, quite naturally describe a building built as a town house, which had subsequently been internally converted into offices, as a 'house used as offices': hence it would 'reasonably be called' a house, even though it was not used for residential purposes, and even if it was not permitted to be so used."

Please contact us if you would like more information about commercial property issues.

Businesses want a halt to EU red tape

The Federation of Small Businesses (FSB) has called for a halt to excessive EU regulations affecting small firms.

It says the overall cost to businesses across Europe of EU regulations is more than £100bn a year.

A declaration drawn up by the FSB and the European Small Business Alliance has been presented to the European Parliament by a cross-party group of MEPs.

It calls for a halt to the "introduction of excessive and unnecessary rules and regulations which, far from increasing the EU's economic competitiveness, serve as a barrier to growth and employment".

John Walker, the National Chairman of the Federation of Small Businesses, said: "In the EU, every year 1.7 million businesses fail and over 50% of these businesses cite the regulatory burden as a significant factor.

"In the current economic climate we should be making it easier for people to start or grow a business not placing obstacles in their way."

Meanwhile, the Government has welcomed proposals by the European Commission to reduce the regulatory burden on business but has stressed that it wants "smarter European regulation" in future.

The Commission has promised that it will review its consultation process to make sure all those who will be affected by EU action are able to influence its development.

It also proposes to adjust laws after evaluating how they are working in practice to test whether regulations remain necessary and are workable.

Another proposal is to strengthen further the impact assessment process that allows new proposals to be checked for effectiveness.

The Business Minister, Mark Prisk, said that promises must be followed up by action: "The Government is working to break the habit of regulation in the UK, freeing businesses to realise their potential for growth. In the coming years I'd like to see the Commission try to do the same, bringing in smarter regulation, and wherever possible alternatives to regulation."

Please contact us if you would like more information about regulatory issues.

Builder's warning about faults not enough to avoid damages liability

A builder who installed an inadequate drainage system has been found liable in damages even though he warned the client that it may not work properly.

The builder had been hired to carry out some improvement works at a farm. The project involved installing a lavatory and drainage system.

Before beginning work, the builder informed the farm owner that the proposed new drain was inadequate but that it would probably work. The owner decided to proceed on that basis.

When the system then started to overflow and leak, the owner refused to pay for the work. The builder took legal action which led to a court hearing.

The judge held that although the builder had told the owner the drainage system might be inadequate, the warning was not sufficiently clear.

It was not strong enough to remove the implied warranty that the system would be fit for purpose.

The builder was therefore liable in damages for having installed a defective system.

Please contact us for more information about the issues raised in this article.

Plan ahead for a smooth business succession

Fewer than half of first-generation family businesses in the UK have succession plans in place, according to figures released by the Government agency Business Link.

This could cause serious problems because many business owners intend to stand down within the next five years and will need to ensure a smooth transition to the new owners in order to fund their retirement.

There are several options available to entrepreneurs who wish to retire or move on to other challenges. The business could be handed on to a family member or colleague. It could be sold to an outside party, merge or be taken over by another company, or be bought by the existing management.

Whatever the course chosen, it is important to start planning several years ahead of your target leaving date, especially if you are handing over to family members or colleagues.

The first step is to hold meetings with those who will run the business when you leave so you can agree an exit strategy. If you own a large share of the business, the remaining partners or

directors may need to raise money to buy you out.

It may be that you agree to sell your shares back over several years so the firm's finances aren't put under too much pressure all at once. In that case, you may need to change your will so the arrangement can continue should you die before the sales are completed.

There could be tax implications whichever system you choose for withdrawing capital from the firm so professional advice should be sought.

If you own the business premises, you will need to decide whether to sell or lease them back to the firm. It is also important that those who remain in the business consider how they'll get by without you. It may be that your expertise can be passed on to the remaining directors, or they may have to replace you. In that case, a successor should be chosen before you leave.

Some entrepreneurs who are handing over to family members can feel guilty that they may be taking too much out of the business making it hard for the next generation to succeed.

By the same token, the sons and daughters can worry that they aren't providing their parents with a fair deal. Sometimes, business priorities and family ties can become a little blurred.

This is another reason why it's important to get advice from professionals such as your solicitor and your accountant. They can remain objective and ensure that the agreement is fair to everyone.

Please contact us if you would like more information about the preparation needed for handing on a business successfully.

Minor failure was not enough to invalidate agreement

The High Court has ruled that a minor failure was not enough to invalidate a contract between a property owner and a developer.

The developer had entered into an option agreement to buy the freehold of a development of approximately 80,000 square feet. The agreement stipulated that once the option was exercised, the developer would lease back a part of the property to the owner. However, it then emerged that a small part of the proposed leaseback area could not be made available with vacant possession. The developer offered a nearby section of similar size.

This was not acceptable to the property owner who refused to complete the sale. The developer took legal action to exercise the option and complete the contract. The High Court found in his favour. The judge held that the small area that could not be made available with vacant possession was too insignificant to prevent the contract being completed. The owner could be compensated financially for the minor non-compliance.

Please contact us if you would like more information about contract issues.

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