

Spring 2012

Looking to Save on Payroll - Beware the Pitfalls !

When businesses are looking to cut costs it is inevitable that every overhead will come under scrutiny. Beware the pitfalls that can arise from trying to make savings in the payroll budget.

Reducing Staff Numbers - Business conditions might justify dismissing employees by reason of their jobs having become redundant. Note that the Employment Rights Act 1996 contains a statutory definition of redundancy. Most employees will be entitled to a statutory redundancy payment. In any dismissal (including redundancy) an employer must show that it has acted reasonably to avoid unfair dismissal claims.

Wage Cuts - Any unilateral variation of the contract of employment by the employer will amount to breach of contract. The only methods of introducing a wage cut are therefore (1) with the employees' express agreement, or (2) by dismissing employees (relying on 'some other substantial

reason' statutory ground) and then re-engaging them on new terms.

Outsourcing - This will involve either dismissing employees who are engaged in a particular business function before bringing in a contractor, or allowing the contractor itself to take on those employees. Clearly, the first option exposes the employer to the risk of unfair dismissal claims. The second option will likely fall within the scope of TUPE, thereby requiring the (existing) employer to inform and consult those affected and disclose 'employee liability information' to the contractor. The contractor will most likely require indemnities.

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Website Owners Beware

In May 2012 an EC-derived law concerning the use of cookies which came in to force last year will begin to be enforced in earnest. A cookie is a small file that is downloaded automatically to a device when the user accesses certain websites. The new law applies to how cookies are used on computers and other mobile devices.

It requires website owners to gain a site user's consent if they want to store a cookie on a user's device and also to provide clear information about the purposes of the storage of the data. Cookies are very widely used by websites.

The Information Commissioner's Office (ICO) is responsible for advising on, and policing, the new law. With the Government's backing, it allowed website owners a year's grace to comply with the law, ending in May this year.

The ICO has a range of options available to it in the event of non-compliance; these include undertakings, enforcement notices and fines of up to £500,000.

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Paul Swaps Courtroom For Olympics Track

Paul Trincas, commercial litigation Partner and Head of Charles Lucas & Marshall's Corporate Services Team, is to be an Athletics Official at the London 2012 Olympic Games.

He is currently undertaking a variety of training and briefing courses in the run up to the Games, as well as attending test events at the main Olympic Stadium to ensure everything is ready.



Paul has to be available for eleven days of the track and field events and may also officiate at the Paralympic Games.

"I love athletics and to be a part of such a great occasion within the main Olympic Stadium will be the experience of a lifetime" he says.

"I was interviewed last year but thought the chances of being offered a position within the 'Athletics Team' in the main Olympic Stadium were not that great, given that some 250,000 people had applied to be part of the Olympic Games and they needed less than 200 to be part of the 'Athletics Team'.

Paul is a qualified UK Athletics Official and UK Athletics Coach. A schoolboy record holder in sprint hurdles, he now coaches youngsters interested in his favourite athletics event.

Employment Tribunal Reforms - Adverse Consequences for Smaller Employers?

The Government proposes reforms to Employment Tribunals this year with the aim of reducing the number of claims.

It has been argued this may adversely affect small to medium sized businesses because with a form of compulsory early mediation through ACAS, more cases may be settled out of Court on a financial basis - either through Compromise or Settlement Agreements.

The concern is that employers may be more tempted to settle this way because of the potential level of costs the Government has proposed for employers who lose at Tribunal.

Many employers, however, already use Compromise Agreements to settle actual or potential employee claims anyway. Average settlement figures tend to be less than the full cost to employers of defending a case in the Tribunal and

will be cheaper than a potential fine of £5,000, plus the cost of reimbursing the employee's claim fees and having an award of compensation against them.

Obviously, settlement by way of mediation saves time and money and the inconvenience and hassle of having to attend the Tribunal and give evidence rather than being at work and being productive.

Time will tell, but the price for the Government's aims of reducing the number of Tribunal claims lodged may be the potential increased cost to SMEs of effectively being forced into financial settlements they can ill afford by comparison with larger corporations.

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Interpretation of Contracts - Choose Your Words Carefully

A recent Supreme Court judgment has given further guidance on the approach that should be taken when interpreting provisions in commercial contracts which have two meanings.

In what might seem to some observers a statement of the obvious, the Court held in *Rainy Sky v Kookmin Bank* that the interpretation of ambiguous wording should be that which is most inconsistent with commercial commonsense.

This, in fact, reversed the earlier decision of the Court of Appeal.

Over the years the Courts have broadly taken two different approaches to dealing with ambiguous wording in commercial contracts. One is a literal approach which refuses to take into

account what now appears to have been the aim of the provision - even if it is unfavourable to one of the contracting parties or apparently illogical.

The other more liberal, 'purposive' approach seeks to interpret the provision in a way which seems more likely to give effect to the commercial purpose of the contract.

It is this more liberal treatment that was adopted in the *Rainy Sky* case and which seems to have found favour over the stricter, literal approach in a number of decisions in recent years.



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Business Opportunities in Uncertain Times

With the current economic uncertainty, business opportunities are arising from time to time to acquire companies. Due to current funding difficulties, clients need to consider the following issues:

Asset Sale or Share Sale

The general rule is that buyers favour asset sales and sellers prefer share sales. The main advantages for sellers of an asset sale is flexibility since the buyer can specify the assets it wishes to purchase and also lower risk since the buyer does not acquire any liabilities it does not specifically agree to. One downside involved in an asset sale is that key contracts cannot be transferred without an assignment.

Deferred Consideration

With the difficulty of obtaining bank funding, deferred consideration has been an important element of recent deals.

Acting for the seller, one of the key factors is security. Personal guarantees can be difficult to obtain from individual buyers. However, debentures can be considered, both from the company being acquired and also from the buyer company.

Management Buyouts

A management buyout is often a suitable way of a seller disposing of a subsidiary or selling certain key assets to its management. One unusual way of dealing with a management buyout is for the seller to make a payment to its management team to ensure stability for the new company. This can save the holding company closure and other redundancy costs.

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