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Construction Law

NEWS AND ADVICE FROM BIRKETT LONG

Employment law changes...good news?

Parliament has recently introduced a number of changes to employment law which will have a significant effect on employers and employees alike. The question is whether this will be good news for employers, employees or everyone!

All of these changes affect dismissals which occur after 29 July 2013.

Employees pursuing claims in the employment tribunal are now required to pay a fee when issuing their claim and a further fee when their case is listed for a hearing. Simple claims, such as claims for statutory redundancy pay, require payment of a £160 issue fee and £230 hearing fee. All other claims (for example, unfair dismissal) require payment of £250 and £950 respectively. Certain employees who are not working can apply for remission of the fee provided they meet the qualification requirements.

The maximum unfair dismissal compensatory award that can be awarded to an employee is now the lower of the statutory cap (£74,200) or one year's gross pay. Compensation for discrimination claims remains unlimited.

Under a new "sift" procedure an employment tribunal judge must assess the merits of the claim(s) and response(s) and can ask a party to show cause why its case should not be struck out.

If the party does not respond within the time frame given by the judge, the claim or response will be struck out. If the party does respond, the matter must be set down for a hearing to determine whether the claim or response should proceed.

I believe, on balance, that these changes favour employers. The introduction of fees and the sift procedure should remove some of the frivolous claims issued by employees. The introduction of a cap in the unfair dismissal compensatory award will reduce the level of compensation available which will have the knock on effect of reducing the value of negotiated settlements.

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The cost efficiencies of 'going green'

Renewable energy is becoming increasingly important for those involved in the construction sector, for those who have residential properties and all businesses who own or occupy commercial premises. It is becoming important, not just because climate change, sustainability and "green issues" are moving up the political agenda and the public consciousness, but also for the far more basic reason that "going green" can actually save costs - and often significant costs.

There has been a perception that the benefits of any green initiative can take a long time to come through, but the evidence from those who have actually taken steps to "go greener" is that investment in green technology can start to pay off far more quickly than many had previously thought. Certainly there are some green projects that can begin to pay back within two or three years.

Many of those in the construction sector are now becoming involved in renewable energy projects; whether that is solar PV, wind, biomass, anaerobic digestion or heat pumps. Far more will get involved in this green technology as it becomes more popular and prices drop. Even changes to the Government subsidy system have not put property owners and occupiers off from considering renewable energy as a good way of reducing costs.

Whether you are a property owner or occupier on the one hand, or a contractor, designer, equipment or product producer or provider on the other, it is important to remember that the installation of a renewable energy system is a construction project and should be properly documented as such. Even small projects should be documented properly.

This means that correct installation contracts and deeds of appointment should be entered into with all of the usual arguments and considerations that are given to those documents in a standard construction context. Warranties and collateral warranties will be important for future owners, occupiers and possible funders and product warranties will also be vital.

From the contractor, installer, designer and sub-contractor perspective, all of the usual points to consider when negotiating any contract or appointment need to be borne in mind, such as:

- the ease of making and the number of assignments
- the appropriateness of including "no loss" provisions
- the desirability of including a "net

Legal update

Who is the contracting party?

Often, it can be difficult to identify contracting parties. For example, when negotiating with a developer that is a holding company but uses special purpose vehicles for each individual development.

Alternatively, there may be different trading companies in a group and it may not be clear which trading company you are working with. Things may become even more difficult if there are dormant companies in the group.

The importance of knowing who you are contracting with was shown in the recent case of Liberty Mercian Limited v Cuddy Civil Engineering Limited. In this case, the contract had the wrong name in it.

This meant when a problem arose there was an extra step for the claimant to overcome to take action. The High Court declined to correct the error in the name of the contracting party. This meant that the claimant had to sue a dormant company with no assets.

When entering into a contract you should make sure that the correct name of the other party is used. It should be clarified whether the contracting party is a limited company or some other entity. If it is not clear this may cause problems in the future.

contribution" clause, and
- the need to have approval from one's insurers to any documentation being entered into

A properly documented renewable energy project protects both the property owner/occupier and all of those involved in the design, construction and manufacture of the system.

Unfortunately, there are a considerable number of renewable energy systems that are being installed without adequate documentation and these will lead to difficulties if issues arise after they have been operating for a while. It is far better to have the certainty of properly drafted documents than the future uncertainty and potential costs of litigation.

For many owners and occupiers they will also discover that poorly documented renewable energy projects will have an adverse effect on their ability to either sell or let their premises or, in some cases, to obtain funding.

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Meet the team

Peter Allen

Peter is experienced in advising on and drafting construction contracts and sub-contracts. In January 2012 he was made a member of the Technology and Construction Solicitors Association (TeCSA). Peter works with all types of clients regarding contractual terms and collateral warranties and advises on other associated documents required in the building industry such as guarantees and bonds. His experience covers all the major standard forms including JCT, NEC, FIDIC and ICE.

Peter also deals with mediations, adjudications, arbitrations and court proceedings, advising clients on breaches of contract, non payment, extensions of time, loss and expense and valuation claims. He deals with allegations of professional negligence, taking actions against professionals and defending proceedings for professionals. Clients include businesses, manufacturers, contractors, developers, sub- contractors, local authorities, health authorities, educational establishments, construction professionals/consultants.

Peter joined the firm in 1997, became a Partner in 2000 and is now head of the commercial department and leads the construction team.

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under the spotlight

Collateral warranties might be construction contracts

In the recent case of Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd, the High Court decided that a collateral warranty could be a construction contract.

Collateral warranties are used so that third parties (such as funders, tenants or purchasers) can take direct action against building contractors or design professionals if there are problems with what was built. Third parties would not normally have such rights as the building contract and professional services contract would normally be with a separate developer. Collateral warranties are therefore very important and used widely throughout the construction industry. Many collateral warranties may be provided for a single development.

In this case, the tenant received a collateral warranty from the contractor, Laing O'Rourke. Part of that warranty stated that Laing O'Rourke "...warrants, acknowledges and undertakes...it has carried out and shall carry out and complete the works in accordance with the contract". It was held by the judge that on the interpretation of these words, this was a construction contract as it related to the carrying out of the works. There was future work to be carried out as the works were not complete at the time.

This case related to a building contractor. In respect of professional service contracts the definition of "construction contracts" is slightly different. It might not be so easy for a collateral warranty by a professional consultant to be held as a construction contract; however, potentially it could be.

The question, though, is why does this matter? It matters because if a collateral warranty is a construction contract then any dispute could be referred to adjudication. Adjudication is a quick process for resolving disputes and often regarded as leaving the responding party on the back foot. This may mean that contractors and consultants could face adjudications when they have only just found out about the dispute.

There are other problems with regards to matters referred to adjudication. A dispute may arise many years after the works were completed, leaving the responding party with no time to look into the dispute and respond properly. Furthermore, adjudication cannot be used with multiple parties and so many different adjudications may be launched to deal with the same point.

This is a problem that the industry will have to address. It may be possible that a correctly worded collateral warranty can avoid the conclusion that it is a construction contract. Alternatively, it may be that the timing of the collateral warranty provision will be important. If it is worded correctly and provided after all works have been completed it may not be a construction contract, as there will be no further works to be carried out. It will be interesting to see how these issues are resolved.

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Forthcoming events

- **Employment law breakfast club**
  Zero hours contracts and other ways of working
  12, 13 and 14 November 2013
- **Energy and environment breakfast**
  Business resilience - are you ready for the effects of climate change?
  23 October 2013

For more details or to register your free place, email seminars@birkettlong.co.uk or visit www.birkettlong.co.uk/events

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