For Business

BUSTING SOME LEGAL MYTHS

Common misconceptions in employment law

Written employment contracts are a bonus, an added extra – myth!
Not only must certain employment particulars be confirmed in writing, as a matter of law, but perhaps more importantly, a well thought out written employment contract is the best way for an employer to protect its position.

Policies are a waste of time – myth!
Whilst not strictly a legal requirement, they allow an employer to establish the rules, how employees should act and what they can expect when rules are broken. They also provide important information for employees and help to avoid confusion, misunderstanding or difficulty.

It's not written down so it's not binding – myth!
What you say can amount to a contractual term, it's just more difficult to determine and evidence. Hence the need for written employment contracts and policies, to avoid uncertainty.

I hadn't taken them on so they can't have any claim against me – myth!
A claim of unlawful discrimination in relation to the recruitment process can be started by a job applicant!

They're rubbish at their job but you can never dismiss them – myth!
An employee usually needs two years' continuous service to bring a claim of unfair dismissal, without such their claim cannot proceed, however unfair. But be careful as unlawful discrimination claims do not require any continuous service.

I have a right to a reference – myth!
With very few exceptions, an employer is not obliged to give a reference. However, when a reference is provided, the employer has a legal duty to not misrepresent the position, and to provide a fair and accurate reference overall.

They've signed post termination restrictive covenants, which definitely means that they can't work for anyone once they leave me – myth!
Such covenants must be upheld as reasonable by a court, which will ask if they are reasonable in the specific circumstances between ex-employer and employee, and they do no more than is necessary to protect the ex-employer's legitimate proprietary interests.

That can't be anything to do with me as employer; that incident between two members of staff happened outside of work – myth!
If something has happened outside of work (such as harassment) but is connected with work, the employer can still be vicariously responsible. In such cases it will be for the employer to show that it did all that it reasonably could to prevent the harassment from occurring.

Tim Ogle
01245 453840
tim.ogle@birkettlong.co.uk

Head of the commercial department, Peter Allen, comments on this newsletter's theme of busting legal myths:

"There are many legal myths. Some of them are amusing, such as sticking stamps upside down is treason and that London cab drivers have to carry a bale of hay in their cabs. However, others have more serious implications, such as common law marriage and that oral contracts are not binding. What is true of all of these is that they are myths. People do not acquire rights because they live with someone else in a "common law marriage". Oral contracts are binding; it is just more difficult to prove as you have to rely on witness statements. In this edition we help explode some legal myths which may be useful to you in your business, including the biggest legal myth of all, namely that solicitors are expensive!"

Where's my bank loan?

With the economy strengthening and confidence returning, many businesses are now looking for finance or re-financing deals. It is important to remember that even after the basic facility has been approved by the lender, there will be some way to go before the loan can actually be drawn down and everything completed. Businesses are inclined to think that the bank – or more likely, the bank's solicitors – are being too demanding and/or holding matters up. That is a myth which this article will hopefully help to break.

It can be frustrating for the business, but getting its ducks in a row before the facility is finalised will help to speed things through. As a firm which acts for borrowers, all of the major lenders and sometimes for both borrowers and lenders on the same deal (where the bank's internal procedures allow that), we have considerable experience in dealing with these transactions and helping to ease the matter through to a swift and successful completion.

All too often, though, the business will not have appreciated that the lender may well take a very different view on risk. Sometimes a particular issue that the business has been perfectly happy to accept will be something that the bank is not. Sometimes the issue will have been something that the borrower's own lawyers have either missed or 'taken a view' on and in those circumstances it can be quite hard to make them or the borrower see the validity of the bank's concerns. Usually a commercial, pragmatic approach – which is the Birkett Long way – will resolve any issues, but even then, the procedures mean that the lawyers acting for the bank have to provide a Report on Title to the bank and ask the bank's valuers to confirm that nothing in that Report adversely affects the valuation of the property on which the bank is relying.

A couple of issues that come up with great frequency are the provision of an Asbestos Survey and Maintenance Report and an Energy Performance Certificate for the property. The bank will want to know that there is no asbestos – or that any present is being properly dealt with – and that the EPC rating is such that the property can be sold or let without incurring additional expenditure, so that, if it has to, it can enforce its security easily and without extra cost.

Some examples of matters that we have dealt with recently, where the borrower and lender have had different perceptions of risk, will help to explode this myth.

A borrower was buying a part built property that he intended to finish and was quite happy to rely on the works that the seller had carried out because he knew him and the quality of the work that he'd done. The bank, however,

Bare essentials

Myth busting - the elusive statutory book and stock transfer form

Some clients have received advice that statutory books are not required for private companies and stock transfer forms ("STF") are a thing of the past... however, this simply isn't true!

Statutory books can be hard copy or electronic and are required by the Companies Act 2006 to provide information on company members, directors, secretaries, directors' interests and charges. The company should also record minutes and resolutions of board/shareholder meetings, which should be retained for a minimum of 10 years. Failure to produce the statutory books if requested could incur fines up to £1,000 for the register of members and £5,000 for each of the registers of directors and charges. Failure to notify the Registrar of changes to the secretary and failure of a director declaring an interest in a transaction could also incur liability of up to £5,000 each! The register of members is the primary authority on the shareholders of the company and the register can only be updated once a completed STF has been received, on which stamp duty has been paid (if applicable), making the STF invaluable.

We have acted on the sale of numerous companies without statutory books where there have been issues, uncertainty, increased legal fees and the reconstitution of the statutory books. If you are thinking of selling your company and this sounds familiar, you may wish to act now to avoid delays.

Stephanie Bussell 01206 217612
stephanie.bussell@birkettlong.co.uk

needed evidence of compliance with building regulations and regular building control inspections.

A well known business was quite happy that it would hold its property in a 'property company', but allow its 'operating company' to trade from the premises. The bank required that arrangement to be properly documented by a lease. A possible alternative would have been for the bank to take cross-guarantees from the two companies to ensure that, if necessary, it could enforce its security simply.

On many occasions, restrictive covenants that affect the property or potential chancel repair liability are matters on which the borrower is prepared to accept risk. The lender is unlikely to take the same view and will require indemnity insurance to be put in place.

An understanding of the different approach to risk on the part of the lender and an early review of what is being offered as security, will ensure that transactions run smoothly and to time. The bank and its lawyers want to see the deal completed as quickly as possible, but will expect risks to be minimised or managed.

David Rayner
01245 453826
david.rayner@birkettlong.co.uk

Meet the team

Justin Stock

Justin joined Birkett Long in June 2015 as a partner in the commercial real estate team. His 25 years' experience in this area of law includes transactions, leases (industrial, retail and offices) and secured lending transactions. He acts for a number of property and development companies with commercial property portfolios and in recent years has been heavily engaged in the sale of land for residential development at Channels.

He comes to Birkett Long from Hill & Abbott in Chelmsford, where he was previously a partner and then headed the firm's commercial department.

His local and regional knowledge has allowed him to establish long standing relationships with clients and professionals within the local business community. Justin says:

"I am delighted to have the opportunity to join the commercial real estate team of such a pre-eminent firm in the region, recognised by clients, peers and business introducers for the quality of its commercial property and business services. Birkett Long understands the importance that clients place on receiving personal, no-nonsense advice at a sensible price."

Justin Stock
01245 453860
justin.stock@birkettlong.co.uk

litigation advice

"Lawyers are expensive" and "litigation costs a fortune"

As a dispute resolution lawyer I am all too aware that people are often deterred from instructing lawyers to assist in recovering debts or pursuing claims, or in defending such claims, due to their perception of the high cost involved.

I'm not going to pretend that fighting a legal dispute all the way through to trial isn't expensive sometimes. However, the simple fact is that very few disputes ever get anywhere near a courtroom before they are resolved. Of the 1.5 million claims issued in county courts across England and Wales in 2014, only 8% were defended at all and only 1% actually made it as far as a trial. Of course, there are many more disputes which are resolved each year without any claim being issued at all.

At Birkett Long, we have embraced the growth in 'alternative dispute resolution' and will always assist clients to resolve disputes in the manner best suited to their particular circumstances and budget. That might be by way of negotiation in correspondence, a 'without prejudice' meeting, a mediation or an adjudication. Or it might be that the time for negotiation has passed and that tougher action is required. In such cases we will advise on funding options that might be available and take the appropriate steps to minimise our clients' risk and costs.

Expense should always be considered as part of a cost, benefit and risk analysis which we will carry out at the outset of a matter and discuss with you. For example, you might consider it 'expensive' to pay a lawyer £500 in a claim worth £1,000, whereas you might consider costs of £5,000 in a claim worth £100,000 to be good business.

Furthermore spending a small amount of money to take some early advice will almost always save you money in the long term. You will know what your legal position is and be able to make decisions based on that, rather than what you think your rights are. That may mean a dispute can be avoided altogether or you may be able to negotiate a settlement at a very early stage.

So when considering whether or not to instruct a lawyer to assist you in a dispute, remember:

- Taking early advice will save you money.
- The vast majority of disputes are resolved without claims being issued.
- Even where claims are issued, less than 1 in 10 are defended and only 1 in 100 actually go all the way to trial.
- Alternative funding options may be available to assist with the costs.
- The costs involved may prove to be very good value when weighed against the benefit to be achieved.

For help or advice on any dispute, at whatever stage, please contact Keith Songhurst.

Keith Songhurst
01245 453821
keith.songhurst@birkettlong.co.uk

BIRKETT LONG LLP

PHOENIX HOUSE
CHRISTOPHER MARTIN ROAD
BASILDON SS14 3EZ
T 01268 244144

ESSEX HOUSE, 42 CROUCH STREET
COLCHESTER CO3 3HH
T 01206 217300

NUMBER ONE, LEGG STREET
CHELMSFORD CM1 1JS
T 01245 453800

E BUSINESSNEWS@BIRKETTLONG.CO.UK
WWW.BIRKETTLONG.CO.UK/LEGAL
TWITTER: @BIRKETTLONG

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