

Summer2010

PKP French

SOLICITORS

LEGAL REVIEW

Your bulletin on legal news & views from PKP French Solicitors

new ACAS Code of Practice on time off for trade union duties

The Advisory, Conciliation and Arbitration Service (ACAS) revised Code of Practice on time off for trade union duties and activities came into effect on 1 January 2010.

The Code has been updated to reflect the changing nature of the workplace and the effect this has on arrangements for time off for trade union representatives.

To complement the new Code of Practice, ACAS has produced two new guides. The first deals with managing time off for union representatives and the second with time off for non-union representatives.

For further information, see:
www.acas.org.uk/index.aspx?articleid=2391.

PKP French Solicitors

2nd Floor
 Queens House
 Kymberley Road
 Harrow
 Middlesex HA1 1US
 Tel: +44 (0)20 8861 8833
 Fax: +44 (0)20 8861 8823
www.pkpfrench.com



FARMING FAMILY OVERTURN WILL

In a bitter contest involving members of a Norfolk farming family, two brothers have persuaded the court to overturn their late father's will on the ground that he was mentally incapable when he created it.

The man had made an earlier will, executed in 2001, which left his two sons the family farm on which they had worked all their lives, subject to a life interest in favour of his wife. His two married daughters, both of whom had moved away, were bequeathed legacies of £15,000 each.

The man's wife died in 2006. At that time, the daughters returned and discovered the contents of their father's will. Within a week, one of the daughters had driven her father to the office of their solicitor, where a new will was executed. This divided the bulk of the estate between the two daughters.

In a hearing which lasted three days, and contained more than its fair share of



accusations of impropriety, the will was deemed by the court to be invalid. Crucially for the brothers' case, there had been no attempt to check the man's mental state, despite his age (89) and the fact that his wife of 65 years had been dead for less than a week when the new will was made.

If you have an elderly relative who wishes to revise their will, we can advise on how best this can be achieved in order to minimise the risk of a later, successful challenge.

COHABITATION REDUCES MAINTENANCE PAYMENT



A man who was ordered to pay his wife £125,000 in maintenance has been successful in obtaining the agreement of the court to recalculate the payment after a private detective produced evidence that his ex-wife had set up house with another man, with whom she had a child.

The Court of Appeal concluded that the High Court judge, Mr Justice Singer, had erred when reaching his original decision. He had 'erroneously assessed the evidence and misapplied the authorities' in failing to investigate whether or not the ex-wife's new partner was making a financial contribution to the household.

The question of the amount of maintenance has now been remitted back to the court for reconsideration.



We at PKP French would like to say a big well done to one of our clients Nawal Saigal who attempted to climb Mount Everest.

Unfortunately owing to ill health he was unable to finish the climb but did reach camp 2 at 6450 meters through the Khumbu Glacier.

THE NEW 'FIT NOTE' SYSTEM

Employers are reminded that a new 'fit note' regime replaces the current system, whereby doctors issue hand-written sick notes, from 6 April 2010.

Under the new system, a doctor will provide a patient who is off work for more than seven days on account of a medical condition with a computer-generated medical statement providing, where appropriate, information on how their health condition might affect their ability to work and what workplace adaptations or adjustments could help facilitate a return to work.

When issuing a medical statement, the doctor will be able to advise either that the patient is 'not fit for work' or that he or she 'may be fit for work taking account of the following advice'. In the latter case, additional information must be provided by the doctor to support the statement. If the doctor considers that the patient may benefit from common workplace changes,

appropriate adjustments can be suggested by ticking the relevant box. The suggestions are:

- a phased return to work;
- altered hours;
- amended duties; and
- workplace adaptations.

However, the doctor can suggest other suitable changes that would benefit the worker.

The doctor will have to indicate on the medical statement whether or not they need to assess their patient's fitness for work again when the current statement expires. In the first six months of a health condition, the maximum period a medical statement can cover will be reduced from six months to three months.

Employers will not be bound to implement suggestions put forward by a doctor for workplace changes. Changes will be at the discretion of the employer and should be made with the agreement of the employee.

Where the doctor's advice is not followed, the worker should be treated as though they are not fit for work. However, where the employee is disabled for the purposes of the Disability Discrimination Act 1995, the employer has a duty to make reasonable adjustments regardless of what a doctor recommends.

Where changes are made in order to facilitate an employee's return to work, the employer should carry out a revised risk assessment to ensure that any new potential health and safety risks to the returning employee and others in the workplace are minimised.

Employers are advised to review their sickness absence policies to make sure they take account of the new arrangements.

Guidance on the new fit note can be found at: www.dwp.gov.uk/fit-note/.

TAX TAKE LEAPS FOLLOWING INVESTIGATIONS OF WEALTHY

The decision of HM Revenue and Customs (HMRC) to target the wealthy for scrutiny has led to a massive increase in the tax yield from their investigations – said to have increased from £81 million in 2007/8 to £373 million in 2008/9.

Complex avoidance schemes and the use of non-resident income sources have been subject to sustained attack by HMRC and this is expected to continue, with the UK tax authorities increasing information sharing with those of foreign countries and requiring disclosure of foreign accounts.

HMRC will also be looking forward to reaping additional income as the Court of Appeal has rejected the argument put forward by a wealthy Seychelles resident, finding that even though for many years he spent fewer than 91 days in the UK (and thus, in his view, maintained non-resident status), his residence for tax purposes was his home in Oxfordshire.

IN BRIEF

24/7 WebCheck service

Companies House has announced that from now on its 'WebCheck' company search service will be available all day every day...so, if a company owing you money is causing you to lose sleep, you can at least download their accounts in the middle of the night.

The WebCheck service is available at: wck2.companieshouse.gov.uk.

For advice on any insolvency issue, please contact us.

Late night booze bans proposed

The Government has introduced an amendment to the Crime and Security Bill, currently before Parliament, which is intended to permit local authorities to apply a

blanket ban on premises opening for the sale of alcohol between 3am and 6am, by specifying streets or areas, rather than premises, where it is considered necessary to promote the licensing objectives. These include the prevention of crime, the prevention of disorder, the prevention of public nuisance and the promotion of public safety.

The proposals will be particularly welcomed by residents who live in areas where there are several premises offering late-night drinking and in which there is a high level of alcohol-related nuisance.

If your area is blighted by late night disorder or noise associated with licensed premises, we may be able to help.

EX-PARTNER BOUND BY PARTNERSHIP ACCOUNTS

In a partnership, the investment capital on which the business is founded is normally supplied (at least in part) by the partners. Their earnings are credited to their individual accounts in the business and the money withdrawn by each is deducted from their individual account.

When a partner retires, there will almost always be an amount due from the partnership to the partner or vice versa. A partnership agreement therefore normally contains a provision that the final partnership accounts for any period will bind the partners, so that there is agreement over the amount due to or from the retiring partner.

It is not unusual for figures in the firm's accounts to be disputed. What is less common, however, is the situation in which partners claim that the accounts do not bind them. A recent case dealt with precisely such a claim. An ex-partner contended that he was not bound by partnership accounts that covered the year during which he left the partnership because he was not a partner at the end of the year for



which the accounts were prepared. The argument was that the relevant clause of the partnership agreement, which contained a procedure for contesting accounts and which bound 'all partners', did not apply to the retired partner because he was no longer a partner.

The Court of Appeal made short shrift of the claim, deciding that the point of such a clause was to bind anyone who had been a partner in the business for any part of the year in question. It was clearly not intended to create a situation in which some of the partners during the year would be bound by the accounts and others not.

In this case, it needed the Court of Appeal to give the clarity to the legal relations which the partnership agreement did not. A well-drafted partnership agreement is a very sensible precaution, no matter how well you think you know your partners, or your prospective partners, and no matter how well you get along. Please contact for advice on partnership and shareholders' agreements.

DAMAGES FOR WORKER SHOT BY FIREARMS TRAINING OFFICER

A police civilian worker who was shot during a firearms safety demonstration has won a six-figure sum in compensation.

Keith Tilbury, 56, a 999 control room operator at the Thames Valley Police Headquarters in Oxfordshire, was attending a demonstration by a police firearms training officer. The officer loaded a .44 Magnum revolver with what he thought was an inert round from ammunition kept in a 'Quality Street' tin, pointed the gun at Mr Tilbury and fired.

The ammunition was live and Mr Tilbury suffered life-threatening injuries. The bullet passed right through his abdomen and the chair he was sitting on. At the John Radcliffe Hospital, Mr Tilbury received intensive treatment to counter the internal damage and stem the massive blood

loss. He was unconscious for two weeks and underwent a series of operations. After the accident, Mr Tilbury suffered psychological trauma which left him unable to return to work.

When the accident was investigated, the Independent Police Complaints Commission concluded that it was 'astonishing' that procedures were not in place to prevent this type of accident occurring.

Thames Valley Police admitted liability for the accident and agreed to pay Mr Tilbury a six-figure sum in compensation.

Following the incident, Thames Valley Police was also fined £40,000, after admitting breaches of the Health and Safety at Work etc. Act 1974, and ordered to pay costs of £25,000. The firearms officer who shot Mr Tilbury was fined £8,000 plus £8,000 in costs.

VARYING WILLS AFTER DEATH

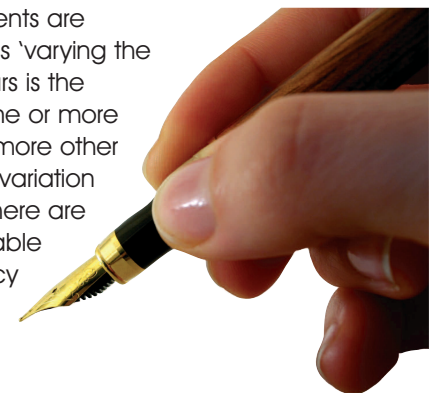
It is not uncommon for a will to provide for a division of assets which is not what the beneficiaries think would be for the best. In such cases, providing there is agreement amongst the beneficiaries, there is a statutory procedure by which the will can be treated as varied for most purposes. This may be beneficial in many circumstances.

For a disposition to be treated 'as if the variation had been effected by the deceased', four conditions must be satisfied:

- The variation must be made in writing;
- It must be made within two years of the date of death;
- It must refer to the statutory provisions to which it is intended to apply; and
- It must not be made for consideration (i.e. not part of a 'bargain').

The variation must be executed in the appropriate form by the person or persons disposing of their interest under the will, the person or persons who will benefit from the disposition and all the deceased's personal representatives.

Although the arrangements are commonly referred to as 'varying the will', in reality what occurs is the making of a gift from one or more beneficiaries to one or more other beneficiaries. Making a variation may be difficult when there are issues such as questionable mental health, insolvency of the donor or where one of the parties is a minor.



In all cases, it is important that such arrangements are made with appropriate professional advice and are based on a thorough understanding of the circumstances of all those involved.

WHISTLEBLOWING – ALLEGATIONS ARISING DURING TRIBUNAL CLAIMS

When someone believes they have been dismissed or suffered a detriment at work because they have made a protected disclosure under the Public Interest Disclosure Act 1998 (PIDA), they can bring a claim to the Employment Tribunal (ET). Last year, there were 1,700 claims involving PIDA allegations. Hitherto, the ET has taken no action regarding information arising from such allegations, which may relate to serious fraud, health and safety issues, financial irregularities etc. However, this is about to change with the introduction of a new system whereby this information can be passed to the appropriate regulator for investigation, without unsubstantiated allegations being released into the public domain.

When a claim is made under the PIDA, the Tribunals Service will, but only with the express permission of the claimant, be allowed to send a copy of the ET1 claim form, or selected extracts from it if this is necessary to comply with the Data Protection Act 1998, directly to the relevant regulator so that it can investigate if appropriate. The consent of the claimant will be obtained by them ticking a 'yes' box on an amended ET1 claim form. The form will be accompanied by guidance outlining what happens when a claimant ticks the consent box and explaining that a claimant can contact the regulator directly if they prefer. Where a claimant consents to the information they have provided being passed to a

regulator, the Tribunals Service will write to both the claimant and the respondent confirming that a copy of the ET1 form, or extracts from it, have been sent to the regulator.

The relevant regulators for the purpose of sharing ET claim information would be those on the list of 'prescribed persons' under the PIDA legislation. However, a sampling exercise revealed that the majority of PIDA claims are likely to be the responsibility of only a handful of these, namely local authorities, the Health and Safety Executive, the Care Quality Commission, Companies Investigation Branch, the Financial Services Authority, HM Revenue and Customs and the Serious Fraud Office. A phased implementation of the new procedure was initially proposed, passing information to only these regulators initially. However, following a consultation exercise, the Government is exploring whether it is possible for the Tribunals Service to deal with all accepted PIDA claims from the outset.

The Government intends that the new system will apply to accepted PIDA claims that are received by the Tribunals Service on or after 6 April 2010.

The implications of the new system for employers are clear. If you are concerned about this, we can advise you on your legal duties and responsibilities.

MAN WINS PLANNING BATTLE OVER HOUSE DISGUISED AS A BARN

A recent planning case in the Court of Appeal produced what the judge described as a 'surprising outcome'.

Alan Beesley had been granted planning permission by Welwyn Hatfield Council to build a barn on green belt land, for agricultural use only. The Council granted his request on the basis that his application stated that the building was to be used only for storing hay and would not require sewage disposal. In fact, Mr Beesley never used the building as a barn but built a three-bedroom single-dwelling house inside the outer structure and connected the dwelling to the mains drainage system.

After four years of living in the 'barn', Mr Beesley applied, under Section 171B of the Town and Country Planning Act 1990, for a certificate of lawfulness for existing use. Under current legislation, there is a four-year time limit for local planning authorities to enforce planning control in domestic dwellings cases.

The Court of Appeal ruled that although Mr Beesley had clearly intended to deceive the Council in order to build a domestic dwelling on green belt land, the case should not be treated any differently from one where planning

permission had been obtained in good faith and there was a genuine alteration to the original plans during the course of building work.



As it stands, the law does not differentiate in any way between circumstances in which planning permission is obtained in good faith and those where the planning application is intended to deceive the planning authorities.

Whilst acknowledging that its decision would appear 'incomprehensible' to decent, law-abiding citizens, the Court had to rule in Mr Beesley's favour. It was for Parliament to amend the legislation should it see fit.

For advice on planning or any other property issues, please contact us.

PKP FRENCH SOLICITORS

2nd Floor, Queens House, Kymberley Road, Harrow, Middlesex HA1 1US

Tel: +44 (0)20 8861 8833 Fax: +44 (0)20 8861 8823

Litigation/Company commercial & Commercial property: Pankaj@pkpfrench.com Direct dial: +44 (0)20 8861 8831

Matrimonial/Conveyancing: Priti@pkpfrench.com Direct dial: +44 (0)20 8861 8827

Commercial Property/Wills & Probate: Jayshree@pkpfrench.com Direct dial: +44 (0)20 8861 8832

www.pkpfrench.com