NEWSLETTER
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LOCKHARTS
Solicitors

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1) Practice Based Commissioning Bulletin

As we approach the end of the second year of Practice Based Commissioning (PBC), many of the groups who were not initially in a position to progress with commissioning or providing are now finding their feet and are anxious to catch up with those who had set an early pace.

Commissioning

The fundamental purpose behind making commissioning recommendations does not require the group to formalise as a legal entity. However, there are advantages in doing so, and some groups may feel that these outweigh the administration and costs associated with running a legal entity. Where a group is considering doing so, it is important that they carefully consider the options available to them, taking advice where needed, prior to choosing and setting up either a Private Limited Company or a Limited Liability Partnership (LLP).

Unlike an LLP which has no default governing document, a company can be set up relatively simply as an 'off-the-shelf' company. This will provide the company with a standard set of company documentation. However, there is a danger that rushing to set up a company without considering the participants' intentions could result in the group running the company contrary to the position set out in their company documentation.

Whilst the impact of this result may be greater for a provider company (see below), there is still a danger for commissioning companies, and such groups should be giving proper thought to tailoring specific provisions for important matters such as the rotation of directors, minority protection, voting, shareholder eligibility and declaration of interests.

Providing

The general trend is for groups to organise their commissioning arm and then develop their provider arm in accordance with their redesign of service pathways. However, where PBC has progressed slower, groups are now keen to progress with both commissioning and provider vehicles. There is a risk that groups who are keen to bid for tendered services may rush the process and select and incorporate provider vehicles without giving proper consideration to the needs and requirements of those involved.

Tailoring company documentation when setting up a provider company raises many similar concerns to those that arise when setting up a commissioning company. However, certain concerns that are particular to setting up a provider company need careful attention – these include the distribution of dividends and measures required to satisfy the NHS Pension Scheme Regulations. It should be a real concern to prospective providers and their employees (and even those groups who have already set up as an off-the-shelf company), that the

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shareholders of the company should be limited to those who are eligible to participate in the NHS Pension Scheme. If the Articles are not tailored correctly, then there is a real risk that, perhaps even unknowingly, the shares could fall into the wrong hands and the company could cease to be an Employing Authority for the purposes of the NHS Pension Scheme. Other issues groups should consider will include the consideration of share classes and voting rights, as well as rights of pre-emption on the buy-back of shares.

Essentially, both commissioning and provider groups should be asking the right questions at the outset and ensuring that adequate company documentation is prepared for when they wish to incorporate. This does not have to be a drawn out process, hampering the group and delaying further progress, but proper consideration at the outset will place the group in good stead for the long term development of their services.

At Lockharts we provide a full service to PBC groups and can help make this process straightforward and (hopefully) relatively painless. If you would like advice on commissioning or provider vehicles please contact Michael Barrett, Mark Jarvis or Alison Oliver who will be happy to assist you. Their contact details can be found at **www.lockharts.co.uk**. Alternatively, email client services at **csd@lockharts.co.uk**.

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2) The Care Quality Commission – a new regulator

The regulation of health and adult social care is currently carried out by three bodies – the Healthcare Commission, the Commission for Social Care Inspection and the Mental Health Act Commission. The Health and Social Care Bill proposes to create a new regulator for health and adult social care, the Care Quality Commission (CQC), which will replace all three of these bodies.

The regulation of health and adult social care by one regime is expected to streamline regulatory activity, ensure the commission manages its budget effectively and assure safety, quality and cleanliness.

Under the new regulator, surgeries will face more frequent inspections and stronger prescription monitoring. Sanctions will be imposed on poorly performing practices which do not improve.

The Bill will also enact four key measures in order to strengthen the regulation of the health professions. The measures include:

- Ensuring all the professional regulatory bodies use the civil standard of proof;
- Creating an independent adjudicator to adjudicate on fitness-to-practise cases for doctors and to enhance public and professional confidence in the impartiality of the GMC's judgments;
- Appointing a responsible officer to identify and handle cases of poor professional performance by doctors and to make recommendations to the GMC for revalidation; and
- Paving the way for the creation of a new general pharmaceutical council.

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3) Change to standard of proof in fitness-to-practise hearings

The General Medical Council (GMC)'s ruling council has formally agreed to adopt a change in the current criminal standard of proof for doctors in fitness-to-practise proceedings. It will change from the current criminal standard of proof to the civil standard of proof. The new rules are expected to be introduced in April. This will ensure that the General Medical Council, the General Optical Council and the Nursing and Midwifery Council operate to a method consistent with the other eight health profession regulators.

The new standard of proof means that fitness-to-practise panels and tribunals in the healthcare professions will take a different approach to deciding disputed facts when hearing allegations over a medical professional's fitness to practise. Instead of needing to be satisfied 'beyond reasonable doubt' that the alleged facts have been proved, they will only need to be satisfied 'on the balance of probabilities' that the alleged facts have been proved. The civil standard is considered to be a less stringent standard; the prosecuting party needs only to show the tribunal

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that it is more likely than not that the alleged facts happened.

The British Medical Association (BMA) has expressed concerns about the introduction of the civil standard of proof. The BMA has stated that the new standard "may make it easier for the GMC to engineer the outcome that it desires". The BMA also warned that the change could lead to miscarriages of justice and to doctors adopting a more defensive approach to practising medicine.

The GMC says that the civil standard can and should be applied flexibly, "tailored to the facts of any given case". It also emphasises that the distinction between the civil and criminal standard of proof in these circumstances is not as great as it is often perceived to be, and that the correct application of the flexible civil standard in extremely serious matters should be more or less equivalent to the application of the criminal standard.

The GMC would launch a detailed training exercise for panelists and legal assessors sitting on fitness-to-practise hearings, and conduct a post-implementation review.

For advice on fitness-to-practise and related matters please contact Michael Rourke at **mr@lockharts.co.uk**.

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4) LMCs forming private limited companies

Some Local Medical Committees (LMCs) are considering forming private limited companies for the purpose of carrying out certain functions. These LMCs are principally motivated by the limited liability that private limited companies afford their members and officers and are hoping to protect themselves from liability in the event of a claim against the LMC. Whilst certain legal services providers are supporting such proposals and encouraging LMCs to form companies, Lockharts can identify numerous difficulties, some of which are briefly set out below.

- First, it is questionable whether an LMC is permitted in law to delegate its functions to a limited company, which is a separate legal entity. The legislation states that functions may be delegated but only to sub-committees composed of members of that Committee.

- Second, in the event that the company became liable to compensate a claimant, it would be reasonable to argue that the delegating body is liable for the acts of the delegate. A claimant, knowing that their claim against the limited company may be fruitless is unlikely to hesitate before bringing claims against members of the Committee, in respect of the Committee's non-delegable statutory obligations.

- Third, there are obvious significant costs and administrative burdens associated with both setting up a limited company and complying with the regular and ongoing obligations required by company law.

Lockharts is clear in its view that there is very little, if anything, to be gained by forming a limited company in these circumstances, and moreover that there are a number of downsides associated with the proposal which can be avoided by maintaining the status quo.

For advice on business structures, LMCs and related matters, please contact Andrew Lockhart-Mirams at **alm@lockharts.co.uk**.

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5) Employment Bill 2007

A new Employment Bill received its first reading in the House of Commons on 6 December 2007. This Bill proposes to revoke the current statutory dispute resolution procedures and related provisions about procedural unfairness in dismissal cases.

Dispute resolution

The proposed law will repeal: the existing statutory dismissal, disciplinary and grievance procedures; the current provisions about procedural unfairness where an employer does not follow the statutory dismissal procedure; and those provisions which prevent an employee from bringing certain tribunal proceedings.

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Emphasis on complying with ACAS code

The Bill will give employment tribunals a general discretion to adjust an employee's compensation by up to 25% if the employer or employee has unreasonably failed to comply with a statutory code of practice, such as the ACAS (Advisory, Conciliation and Arbitration Service) Code of Practice on Disciplinary and Grievance Procedures. ACAS will be substantially revising its statutory code.

ACAS conciliation

The Bill includes an extension of ACAS' powers of conciliation and the removal of the fixed conciliation period. This suggests a major enhancement of the role of ACAS in resolving employment disputes and preventing ending up in tribunal.

Cases to be decided without a hearing

A new procedure based on documentation is proposed for settling monetary disputes without a full hearing, provided both parties agree to it being decided in this way.

National minimum wage

The Bill also makes changes to the enforcement of the national minimum wage by introducing penalties for employers not paying workers the minimum wage and agencies which try to exploit workers. The method for calculating minimum wage arrears will be amended. The current maximum penalty of £5,000 fine will be increased to an unlimited fine.

The new rules are expected to come into force in April 2009.

For advice on employment matters, please contact Lockharts Associate Paul Werrell at **pw@lockharts.co.uk**.

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6) Unfair Dismissal

Time limit extended

Unfair dismissal claims must normally be submitted no later than 3 months after being dismissed. The employee will lose the right to claim if claims are not lodged within this time. Extensions of the time limit are very rare and may only be granted in limited circumstances; these include where the employee can show that it was not reasonably practicable to have lodged their claim within time, and where an employee reasonably believes that a statutory disciplinary and dismissal procedure (DDP) remains in progress at the point at which the time limit passes, (in which case it may be extended for up to six months).

In *Royal Bank of Scotland v Bevan*, Mr Bevan was dismissed by the Royal Bank of Scotland (RBS) for alleged gross misconduct on 12 January 2007. Mr Bevan appealed against his dismissal and the appeal hearing was held on 8 March 2007. He received a letter dismissing his appeal at 7pm on 11 April 2007, hours before the 3 month time limit expired. Until this time, Mr Bevan had assumed that the dismissal procedure was ongoing. On the next day, he notified his solicitors, who entered an unfair dismissal claim seven days later.

The Employment Appeal Tribunal (EAT) upheld a tribunal's decision to extend the time limit in a claim for unfair dismissal, where Mr Bevan was only informed of the outcome of his appeal a few hours before the expiry of the normal time limit. The EAT held that it had not been reasonably practicable for Mr Bevan to have lodged his claim within 3 months. The test of what was reasonably practicable should be given a liberal construction in favour of the employee. Finding against him would have been contrary to the spirit of the statutory dispute resolution procedures.

Employers should ensure that disciplinary hearings and appeals are dealt with expeditiously. Where communication of the outcome of a disciplinary hearing is delayed, this may assist employees who may argue that it was not reasonably practicable for them to have presented their claim in time.

Compliance with DDPs

In *Venniri v Autodex Limited*, the EAT provided guidance on how tribunals should approach their assessment of the procedural fairness of a dismissal. Tribunals are obliged

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to consider whether an employer has followed the DDP.

Section 98(A)(1) of the Employment Rights Act 1996 provides that employers must follow the DDP in order for the dismissal to be fair. It the relevant procedure is not followed, then the dismissal will be automatically unfair.

Mr Venniri's brought his claim for unfair dismissal to the Employment Tribunal without making any reference to any procedural unfairness in relation to his dismissal. The tribunal held that Mr Venniri's dismissal was fair. Mr Venniri appealed arguing that the tribunal had failed to make any finding as to whether the DDP has been followed.

The EAT upheld his appeal, finding, firstly that the tribunal's decision had failed to identify compliance with the DDP as an issue, and secondly that the DDP is part of the essential fabric of unfair dismissal law. The EAT confirmed that in every unfair dismissal case, a tribunal must consider the issues raised by section 98(A)(1) and in particular:

1. Whether there is an applicable procedure (i.e. whether the DDP applies);
2. Whether there has been non-completion of that procedure; and
3. Whether that non-completion is wholly or mainly attributable to failure by the employer.

Tribunals are now required to consider compliance with the DDP, regardless of whether or not the employee has raised it themselves.

Calculating compensation

In *Ros & Angel (t/a Cherry Tree Day Nursery) v Fanstone*, an employee was dismissed ten minutes before her employment would have terminated as a result of her resignation.

Miss Fanstone was employed by Cherry Tree Day Nursery, but had handed in her resignation and her notice was due to expire on 15 May 2006. The nursery summarily dismissed her before the expiry of her resignation. The tribunal found that her dismissal was unfair and awarded her £4000 for loss of earnings. The nursery appealed the amount of the award. The EAT upheld the nursery's appeal and decided that any losses should be limited to the duration of time before the resignation was to take effect, because any losses after that time would have occurred in any case notwithstanding the dismissal. Such losses cannot be said to flow from the dismissal and therefore are not recoverable in an unfair dismissal claim.

This case represents an extension of the circumstances in which the compensatory award for unfair dismissal may be capped.

For advice on employment matters, please contact Lockharts Associate Paul Werrell at **pw@lockharts.co.uk**.

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7) Implementation of the Companies Act 2006

Stephen Timms, the Minister of State for Competitiveness, has made a further Written Statement to Parliament on 13 December 2007 confirming his earlier statement regarding the implementation of a number of the new Companies Act provisions due to be introduced this year.

In our last issue, we highlighted that the Government has decided to delay the implementation of the following provisions:

- objection to company names;
- trading disclosures;
- provisions in relation to corporate directors and under-age directors;
- directors' conflict of interest duties;
- declaration by a director of an interest in existing transaction or arrangement;
- inspection of register of interests in a company's shares; and
- repeal of current restrictions in the Companies Act 1985 on financial assistance for acquisition of shares in private companies.

The Government has now decided to commence with effect from 1 October 2008:

- the new procedure for private companies to make capital reductions supported by

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a solvency statement instead of by a court order.

The Registrar of Companies believes that the necessary changes can be made by October 2008.

In the light of comments from key stake-holders, the Government has decided to commence with effect from 6 April 2008:

- removal of entries relating to former members in the register of members;
- inspection of register of interests in a company's shares.

A separate commencement order was made on 17 December 2007 to bring into force the repeal of provisions in the Companies Act 1985 in relation to the audit of small charitable company accounts.

There will also be a separate commencement order regarding provisions to be commenced in 2009. This will be published by the Department for Business Enterprise & Regulatory Reform in spring 2008.

For advice on company law please contact Michael Barrett at **mb@lockharts.co.uk**.

The Firm

Nicholas Fry will be joining the Client Services Development Team alongside Richard Gilligan.

Previous Issues

If you would like to receive previous Issues of the Lockharts Newsletter please contact Nicholas Fry at **csd@lockharts.co.uk**.

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