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Legal implications of Covid-19 on the manufacturing sector

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THE NEW NORMAL - EMPLOYMENT LAW CONSIDERATIONS

David Rushmere, Partner, Employment

As we approach the end (hopefully) of Covid restrictions it is important to reflect on business practices to consider whether or not anything should be changed about the way we work to better react to future business disruption that may occur.

We are all hopeful that the Covid pandemic is a once-in-a-lifetime situation; however, failing to be prepared is preparing to fail and so it is important to take some time to see what lessons can be learned.

When the Covid lockdown began the manufacturing industry was somewhat well-prepared in that short-time working and layoff clauses were common in employment contracts. But they were not present in all employment contracts and that left many employers in a difficult situation. As orders dried up, the prospect of large-scale redundancies became a very sobering reality. For the short period in March 2020 until the furlough scheme was introduced, the manufacturing industry was preparing to take a huge hit in terms of redundancy payments and possibly facing substantial volumes of Tribunal claims.

As layoffs and short-time working are only possible where there is a clause present in the employment contract, the absence of a written contract or the absence of such a clause in a written contract left employers with very few options.

Thankfully, with furlough coming to the rescue, many employers were saved at the last moment from having to make large-scale redundancies as they were provided with the alternative of placing staff on furlough. But furlough came at a huge cost to the tax payer and it is not guaranteed that it will be rolled out in the future should there be another mass disruption event to the manufacturing sector. It is therefore advisable for employers to consider their own arrangements to ensure that they are protected in the future should history repeat itself.

The first thing that all employers should do is consider whether they have written contracts of employment in place for their staff. A written statement of employment particulars is mandatory and it must cover certain basic information about the employment relationship. An employment contract usually goes further than this basic statement and contains additional clauses that are usually in the interests of the employer and help with governing the relationship. In addition to having contracts in place at the outset of the employment relationship, it is necessary for employers to think about updating them on a regular basis to ensure that they concur with the current working arrangements for each employee. This can be achieved either through an amendment to the contract or, where the change is relatively minor, by providing written confirmation of the change in a letter or email that is then held on the employee’s personnel file. This is common for things such as pay rises where it would be unnecessary to reissue the whole contract and instead a simple letter will suffice.

Within the employment contract, the employer should consider including specific clauses that relate to the particular requirements of their workplace. Things such as the working hours should be clarified in specific terms. In addition to that, the employer should also think about adding a clause to permit changes to the contractual terms should they need amending in the future. Without a clause in the contract allowing for reasonable changes to be made unilaterally, the employer will be left with very little alternative than to seek the employee's consent to the change. In certain circumstances that can be quite difficult particularly if an employee sees an opportunity for personal gain by withholding their consent.

As well as implementing professionally drafted employment contracts an employer should consider having policies govern the working relationship. For example, a disciplinary policy can set out specific behaviours that are prohibited in that particular workplace so that there can later be no argument by an employee that they were not aware that they should conduct themselves in a certain way. In addition to a disciplinary policy, an employer should consider whether there are any other specific policies that they wish to have in order to govern the working relationship. For example, an employer may wish to have a drugs and alcohol misuse policy if there is a particular problem with that in the workplace or if there are specific health and safety concerns because of heavy machinery.

An employer should consider the particular risks that are relevant to their manufacturing processes or their specific workforce and identify which policies they would need to have in place to properly govern the employment relationships into the future. By imposing well-written policies at the start of the employment, the employer can help protect themselves from any uncertainty that is to come.

Professionally drafted contracts and policies are not necessarily cheap. Legal fees for preparing these documents can run to several thousand pounds; however, by not implementing these documents employers can find themselves facing much more costly Tribunal claims and/or business disruption in their workplace that can cost time and money and hit their bottom line. Employers should therefore see these documents as an investment and not as a cost.

If you require any assistance with preparing employment documentation, please contact David Rushmere on david.rushmere@machins.co.uk

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COVID-19 & BREXIT - WHAT'S AHEAD FOR THE SUPPLY CHAIN?

Sing Li, Solicitor, Company Commercial

Manufacturing in the UK has been put to the test in recent years; investor confidence shaken in the wake of the 2016 referendum with ongoing teething problems even after a trade deal has been negotiated. Manufacturers find themselves having to contend with a real change in the status quo when dealing with the EU which, as a bloc, is the UK's largest trading partner, accounting for circa 46% of UK goods exports and circa 53% of goods imports.

While manufacturing accounts for only around 10% of the UK economy and around 9% of private sector employment, it provides close to half of UK exports and around 60% of private sector investment and employment in research and development. Problems from manufacturers in the supply chain will therefore have implications across the board.

For example, intermediate goods which historically criss-crossed the borders of EU countries multiple times before assembly will find that, even with the trade deal, Brexit will create extra work and costs for the manufacturer, whether in terms of customs delays affecting just-in-time systems, customs declarations, complying with rules of origin requirements, EU customers switching to other suppliers, regulatory differences and more.

How these are dealt with will be critical for many manufacturers, especially smaller firms, many of which are ill-prepared to deal with such additional obligations. While larger manufacturers may have the capacity to do so, they can also choose to relocate, stockpile or change its supply chain, while small to medium sized enterprises will have their work cut out trying to conform to the new requirements in order to survive.

Such concerns are clearly reflected in the decision making of some of the larger manufacturers in the automotive industry, with job cuts at Jaguar Land Rover, Honda selling its Swindon factory and Ford closing its Bridgend plant. Perhaps even more tellingly was Nissan's reversal of its decision to build its cars in Sunderland and Tesla expressly citing Brexit as the reason why it did not invest in the UK.

The ongoing pandemic certainly did not improve matters as the industry ground to a halt as a result of government guidelines and shutdowns and the need for manufacturers to protect its skilled workers, many of whom cannot work remotely even if consumer demand had not collapsed as a result of the restrictions. While the UK manufacturing market did pick up towards the end of last year due to reopening following lockdowns along with a conscious stockpiling effort due to Brexit, this related mainly to manufacturers supplying other firms and investment goods rather than consumer goods which remained weak amid rising unemployment.

My advice to manufacturers in light of these challenges would be to conduct a review of its contractual arrangements against the backdrop of the new trade deal and the ongoing government guidelines and restrictions. Key areas to seek legal advice would be:

- Reviewing the lease arrangements for any factories or plants with the view to negotiating either a concession in rent, a rent holiday or to ultimately end the lease if it cannot be maintained. Many landlords in the current backdrop would rather keep an existing tenant than leave a property vacant given the current market and the backlog of court proceedings.

- Reviewing the terms and conditions and your arrangements with customers and suppliers to see where you stand and whether there could be room to negotiate. Since Brexit, there has been the use of "Brexit" clauses in contracts which inject some flexibility into contractual arrangements but this may not always be a good thing. Similarly, it is not clear whether Force Majeure clauses which do not expressly refer to Brexit or the pandemic would be effective or beneficial.

- Reviewing the staff position to see whether redundancies are required or whether staff can be redeployed or can be kept with the assistance of government aid.

- Reviewing your registered intellectual property rights and your data protection policies given Brexit implications.

For further information on Company Commercial Law, please contact Sing Li, Solicitor on sing.li@machins.co.uk

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> Unfortunately, with Covid-19 restrictions in place, many businesses are reporting a drag on their invoice payments and their debtor days are increasing.

CASH IS KING: COLLECTION OF OUTSTANDING INVOICES DURING COVID-19

Neil O'Callaghan, Partner & Holly Baker, Solicitor, Dispute Resolution

'Cash is king' is a phrase frequently used indicating that cash is often a more valuable asset than book debts or historic invoices. It certainly can be key to many companies' solvency. Unfortunately, with Covid-19 restrictions in place, many businesses are reporting a drag on their invoice payments and their debtor days are increasing. The manufacturing industry has undoubtedly been impacted in this regard, with issues high up in supply chains creating a ripple effect further down in the chain.

Although insolvency proceedings, including use of Statutory Demands, are sometimes frowned upon by the Courts as a debt collection method, Statutory Demands are undeniably a highly effective tool for collecting undisputed liquidated debts (i.e. fixed amounts).

Ordinarily, a Statutory Demand complying with the Insolvency Rules can be served on a debtor of an undisputed liquidated debt (of £750 or more when against a limited company) stating that unless the debt is paid within 21 days, a Winding-up Petition will be presented at Court. The issuing of a Winding-up Petition has an immediate effect on a limited company and their bank accounts are likely to be frozen.

However, in light of Covid-19, in the last year the Government introduced restrictions on Statutory Demands being presented against limited companies. Any Statutory Demand presented against a limited company up to 30th September 2021 will be ineffective, and a Winding-up Petition cannot be based on such a demand. It is unclear currently whether this will be extended beyond the current date of 30th September 2021.

It is still possible to threaten a company with the issuing of a Winding-up Petition on an undisputed liquidated debt of over £750 on the basis that the company is unable to pay its debts as they fall due to the satisfaction of the Court. Usually the creditor would rely on a Statutory Demand which has been unsatisfied for three weeks as evidence of this, but it is possible to rely on other evidence in this regard.

Further, under the current Covid-19 regulations, a creditor has to prove to the Court's satisfaction that the debt hasn't arisen as a result of Covid-19 or the debtor's inability to pay isn't related to Covid-19.

As Statutory Demands are so effective as a debt collection tool, there will be many waiting to see whether on 1st October 2021 they can revert back to issuing Statutory Demands to assist in the collection of outstanding invoices. If the deadline is extended past the end of June, then it may be preferable to issue a letter of claim with a view to issuing court proceedings.

It should be noted that the current restrictions relating to issuing Statutory Demands against limited companies don't apply to individuals (if you are looking to issue a Bankruptcy Petition based on that Statutory Demand).

For information on Debt Collection please contact Neil O'Callaghan on neil.ocallaghan@machins.co.uk or Holly Baker on holly.baker@machins.co.uk

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COMMERCIAL LANDLORD & TENANT - BACK TO BUSINESS?

Samantha Ball, Solicitor, Dispute Resolution

Covid-19 has presented an array of challenges for the commercial landlord and tenant sector. The Coronavirus Act 2020 introduced emergency measures to prevent landlords from re-entering and taking back their premises based on of non-payment of rent. For certain sectors that were particularly impacted by the pandemic, this brought significant relief for business tenants.

The government was keen to protect UK industry. With UK manufacturing estimated to output around £191 billion worth of goods and providing 2.7 million jobs (according to a study undertaken by MAKE UK in September 2020), manufacturing was no exception.

The benefit of this protection has been clearly recognised by government and, as a result, the protection has been extended no less than five times. The latest extension was announced on 16th June 2021, proposing a new end date of 25 March 2022. By this point, commercial tenants will have had the benefit of around two years of protection.

This latest extension, however, does differ from previous protections that were in place for business tenants.

Previous protections, which will remain in force, include:

- Landlords are prohibited from re-entering (forfeiting) a business tenancy on the grounds of non-payment of rent;

- When a protected business tenant comes to renew the tenancy one of the grounds on which the landlord can normally oppose renewal is if the tenant has persistently failed to pay the rent. However, a failure to pay rent which was due during the pandemic protected period will be disregarded by the court and will not count for this purpose.

- The temporary rise in minimum net unpaid rent due before Commercial Rent Arrears Recovery (CRAR) can be actionable will remain at 554 days. CRAR enables a landlord to instruct enforcement agents to take control of tenants' goods and sell them to recover the unpaid rent.

- Restrictions on the circumstances where a Winding-Up Petition can be presented (although this protection will not remain in place until March 2022 – see our insolvency section); and,

- Protection for tenants, preventing the enforcement of possession under court orders handed down before COVID-19, will remain in place as it stands.

In addition to the above the Government has announced that legislation will shortly be introduced to cover the following:

- Rent arrears accrued over the pandemic will be 'ring-fenced' and landlords and tenants will be expected to work together to come to an agreement on proposed repayment plans regarding the ring fenced amounts (this includes long term repayment plans and waiving part of the total sum due).

- Where an agreement cannot be reached between the landlord and tenant, the parties will be required to undertake binding arbitration to establish a fair sum due.

What does this mean for manufacturing tenants?

For manufacturing tenants who may have seen a downturn in the last 18 months or so, resulting in difficulty in paying rent, they may consider utilising the latest addition mentioned above and negotiate to have the arrears reduced as much as possible.

On the basis that arrears accrued during the pandemic will be 'ring-fenced' tenants should be mindful to continue to meet their rent, if they are able to, going forward for the following reasons:

- In the process of negotiating a waiver of a proportion of the arrears or a long-term repayment plan, it will understandably assist tenants where they are able to demonstrate that (where possible) rent has been paid, on time, the moment the tenant could afford to do so;

- The protections are temporary and are not an excuse to simply not pay at all. Tenants will be eventually expected to pay it back (albeit over time or perhaps a smaller sum). Tenants are advised to keep their rent debts to a minimum to avoid future issues when the tenants protections come to an end; and

- Looking ahead, the position after March 2022 (at present) is expected to revert back to pre-protection. Tenants should seek to rely on these protections where absolutely necessary and not treat this as the new normal.

What should manufacturing tenants continue to remember?

Tenants must also bear in mind that the restrictions above only apply to the non-payment of rent and landlord's rights to forfeit the lease for other reasons (such as breach of covenant or use) are still available. There is, therefore, no automatic protection in the event that you breach your lease in any other way.

Whilst the above protections prevent the landlord from taking back the property for non-payment of rent, it does not prevent a landlord from taking enforcement action in other ways. There is, currently, no restriction on a landlord seeking to obtain a County Court Judgement (CCJ) against business tenants for the non-payment of rent or service charge arrears. CCJs will undoubtedly have a significantly negative impact on the business, any directors, and credit rating going forward.

Tenants should also check their leases. Most standard modern leases allow for landlord's to recover legal costs from tenants should steps to recover the amounts due be taken simply increasing the sum that becomes payable by you.

Communication with your landlord early on could avoid this.

Should manufacturing tenants find themselves in situations of rental arrears, or with their landlord taking steps to forfeit, our Property Litigation Team is on hand to assist. For further advice on the issues raised, or general lease dispute advice, please contact Samantha Ball on samantha.ball@machins.co.uk

If you would like to discuss any of the issues raised in these articles please contact our highly experienced team of solicitors on 01582 514 000 or enquiries@machins.co.uk.

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