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General Practitioners Legal Briefing

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Welcome to the first issue of Sydney Mitchell's Newsletter for General Practitioners.

In each issue, we will bring you a legal briefing of matters relevant to you and your practice.

The Healthcare Team at Sydney Mitchell is made up of a number of experts, led by Tony Harris.

Tony has a wide range of experience in corporate and commercial matters, specialising in all types of commercial property transactions. In particular, transactions from greenfield sites through to practical completion of constructing new buildings.

Over the last 10 years, Tony has become increasingly involved in acting on behalf of GPs in the creation of new PCCs. This includes construction by the doctors themselves, by the local primary care trust/LIFT project, and/or by developers.

Tony has also acted for groups of doctors' practices in arranging the taking over of Provider and Commissioning Services from Primary Care Trusts and acting on behalf of Consultants and Surgeons in their various negotiations with hospitals.

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Retirement and Surgery Ownership

It is not uncommon for a GP who owns a share of the surgery property to want to retain that entitlement as an investment after he or she retires. After all, a surgery may seem an attractive asset to hold on to, given that the rent on it is underwritten by the state!

However, a GP considering doing this should seek advice first, and make sure that both he and his partners are aware of the implications and the downsides for the retiring partner and the practice as a whole.

The first practical issue retiring GPs should consider is whether it is really possible to do any better with their money than keeping it invested in a business in which they no longer have an active interest.

This in turn gives rise to broader issues. Before retirement, the premises will probably be held by GPs, all of whom work in the practice and have more or less the same priorities. But if a retiring GP continues to hold a stake, a potential conflict immediately arises. The outgoing GP will want the surgery to be used in a way which maximises his financial return, but that may not fit with the long term development plans for the continuing partners or the business as a whole. On a more practical level, how will the other partners feel about the continued involvement (and possible interference) of the retiring partner? Clearly an agreement will need to be drawn up.

There are other more pressing reasons for a lease to be drawn up. Notional rent from the PCT cannot be paid to the retired partner as it can only be paid to a practising GP. For this reason, a lease is necessary so that a rent can be paid over to the retired partner. This lease will be between the retiring partner and continuing partners together as "landlords", and the continuing partners alone as "tenants".

Failure to enter into a lease may also mean that the partnership (including any non-property owners) get the benefit of what is known as a "protected tenancy" under the Landlord and Tenant Act 1954. If that happens, it can make it very difficult for the continuing partners to exclude a partner who has misbehaved or who has not performed.

As a worst case scenario, allowing an individual outside the partnership to retain a share could jeopardise the continuing partners' own position. If a retired partner continues to hold a stake, then effectively two different interests arise i.e. the landlords interest and the tenants interest. This means that the remaining partners also hold an investment asset and so they could be denied entrepreneurs relief as well, through no fault of their own. This is explained in more detail below.

Retaining a share of the surgery premises after retirement is therefore not the entirely "safe" investment that it might initially appear. There are risks both for the retiring and continuing partners, which need to be fully discussed before concrete arrangements are made. It is also essential to enter into appropriate legal agreements to avoid the various pitfalls that can arise.

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New Regime for Disciplinary and Grievance Procedures

The law on disciplinary, dismissal and grievance procedures changed on 6 April 2009. The statutory procedures have been repealed and from now on employers will need to comply with the new Acas Code of Practice on Disciplinary and Grievance Procedures, known as the Acas Code.

When do the changes apply?
For dismissals and disciplinary procedures - the new regime applies from 6 April unless the dismissal or disciplinary action occurred before 6 April or if a Step 1 letter had been issued or Step 2 meeting had taken place before this date.

For grievances - the rules are more complex and the old regime may continue to apply depending on the date of incident that the grievance is about. You are strongly advised to speak to us, before taking any action.

Which situations do the changes apply to?
The Acas Code applies only to disciplinary situations around misconduct and poor performance. It does not apply to dismissals relating to fixed-term contracts and redundancy, these are specifically excluded from the new Code.

How will this affect employers?

- The amount that an award may be increased in favour of an employee for an employer's failure to follow the Acas Code is now limited to a maximum of 25% (previously 10-50%) and only applies where there has been an unreasonable failure;
- In cases where an employee fails to follow procedure, any award may now be reduced by up to 25%;
- There may be occasions where the Tribunal makes no financial penalties. Under the old regime, an adjustment less than 10% was only permissible in exceptional circumstances. This gives the Tribunal more discretion and the employer more leeway;
- There will no longer be an automatic three month extension of time limits in which to submit a claim to the Tribunal: this closes the window of opportunity earlier in favour of the employer;
- The concept of automatically unfair dismissal on procedural grounds disappears completely. Only if the employee can show that there has been an unreasonable failure to observe the Code will the employer be liable;
- There is no longer an explicit requirement to follow a grievance procedure for former employees.

So what do you need to look out for?

- The transition provisions for grievance procedures are technical and specialist legal advice must be obtained to avoid falling foul of the law;
- An employee no longer has to raise a grievance before submitting a claim to the Tribunal, so employers will not be on notice of a possible claim before it arises.

For employers, best practice should not change significantly and in many aspects the new regime is more employer-friendly.
There have been some important changes relating to Tribunal hearings which employers should seek advice on and there could be some uncertainty for some time to come while the transition is made from the statutory regime to the new Code and specialist legal advice should be sought.

The contents of this article are for the purposes of general awareness only. They do not purport to constitute legal or professional advice. Readers should not act on the basis of the information included and should take appropriate professional advice upon their own particular circumstances.

Capital Gains Tax Implications - take care not to lose £80,000 in Entrepreneurs' Relief

When a partner leaves or retires, he or she will pay capital gains tax on any assets (most importantly the partnership premises) which have increased in value during their time in the partnership.

The usual tax rate for this is 18%. However if the partner is entitled to entrepreneurs' relief, his or her first one million pounds of gain will be charged at 10% rather than 18%. That means that retiring partners could pay £80,000 more tax than they need to if they have not prepared properly.

In order to qualify for the relief, the retiring partner must have used the asset in the practice for a year up to the date of retirement. So if the transaction takes effect only after the retirement date, then the taxman could decide the relief is not available and tax would be payable at the higher rate. Completion of the sale need not take place on the date of retirement, but there must be a clear agreement about the sale in place by then.

A "gap" like this can happen for a number of reasons – but most commonly, in the case of GP partnerships, because an outgoing partner decides to retain an interest in the premises as an investment, as mentioned above.

If a partner does retain an interest in any premises, he or she will then have an investment asset rather than a business asset and will not be entitled to entrepreneurs' relief. It may even mean that the asset itself becomes an investment, and the other partners could lose their entitlement to the relief as well.

Retiring partners need to make sure that they are entitled to the relief by entering into a binding commitment to sell their interest in the partnership before their last working day – the price can remain to be determined by succession accounts, but the principle that the retiring partner is bound to sell immediately on retirement must be made quite clear.

The need for this can be avoided if the partnership agreement is amended – if the agreement provides for such binding obligations to arise automatically on retirement, then further paperwork may be unnecessary.

Property matters are just one of a number of complex issues that need to be dealt with when a partner retires. To ensure a smooth and problem-free succession it is advisable to have an informal chat with us at the earliest opportunity.

It is also important to review your partnership agreement from time to time, and if you would like us to do so, please contact us.