WORKING TOGETHER

WINTER NEWSLETTER 2011

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WELCOME TO THE WINTER EDITION OF WORKING TOGETHER.

With the New Year upon us, we turn our thoughts to the year ahead. With the Royal Wedding due to take place in April, we look at the importance of pre-nuptial agreements on page 2. We look at the tax changes taking place in 2011 on page 4.

The NHS changes continue to be a subject of much public debate. We consider what these changes will actually mean and the potential impact on the public on page 6.

Page 8 reviews the impact of the removal of the default retirement age and page 11 looks at the relevance of the Equality Act to volunteers - particularly important as the Olympics 2012 approaches.

Finally, as ever we detail the fundraising that has been done over the past couple of months by Simpson Millar LLP staff …see page 12 to find out more!

Editors: Julie Dudson and Caroline Kelly

A RIGHT ROYAL PRE-NUP

As the world waits for the biggest royal wedding in over 20 years, the press is full of speculation about the wedding plans for Kate and William, who are to marry at the end of April. One article noted that the Royal Family have experienced their fair share of family breakdowns, and with all but one of our Queen's children having divorced, a pre-nuptial agreement should be on the Windsor to-do list as the wedding preparations get underway.

For years, family lawyers have been uncertain as to whether pre-nuptial agreements are worth the paper they are written on. We advise our clients that although a pre-nuptial agreement is not legally binding, it may possibly be taken into consideration by the Court when making orders on the breakdown of marriage, dependent of course upon the needs of the family.

The cost of preparing such an agreement can vary depending on whether the parties are in overall agreement as to the terms, and the complexity of the finances concerned. This has meant that until recently a pre-nuptial agreement was considered to be something which only the wealthy would consider.

The pre-nuptial agreement could rocket in popularity after its power was confirmed at the Supreme Court in 2010. German Heiress Katrin Radmacher won her appeal – reducing her French husband's divorce settlement by more than £4 million to a mere £1 million because he had signed a pre-nup. The ruling provided much needed clarity as to the influence of the pre-nup in ancillary relief orders and now, all couples are encouraged to look into its benefits.

"The pre-nup is now a recognised option for British couples"

This groundbreaking decision does not make the pre-nuptial agreement legally binding, but it does enforce the approach that such a contract will be taken into serious consideration and the extensive media coverage of the Radmacher case has publicised this fact to the public at large.

Over the last 12 months Simpson Millar LLP have prepared an increased number of pre-nuptial agreements and many clients have not been wealthy; simply very sensible in their approach to marriage. The personal and financial circumstances of each case are very different and certainly reflect the changing social trends of marriage.

In recent years statistics show there has been an increase in the number of second marriages, and many of our clients who are marrying for the second time have children from their prior marriage that they want to financially provide for. These clients understandably want to ring fence any assets they have when entering their next marriage for those children in the event that the worst may happen and the second marriage is not a success.

There is also a reported increase in the numbers of young people buying their own properties and living on their own before they meet someone and take the plunge into wedded bliss. They too may seek a way to ensure that their own property and finances are secured in the event that the marriage is not a success in its early years. Simpson Millar LLP have prepared a number of pre-nups on this basis.

Finally, as the world becomes a smaller place; a couple might be habitually resident in different countries or continents. A pre-nuptial agreement is becoming an increasingly popular method for these couples as a way to outline which country and jurisdiction will deal with divorce and ancillary matters, in order to avoid the costs and distress of forum shopping in the event the parties later go their separate ways. Yorkshire has a thriving multicultural community and jurisdiction has been an issue for a number of our clients.

Some may consider the pre-nuptial agreement to be unromantic, but as family life becomes ever more complex it is encouraging to see people taking control. Long seen as the preserve of the rich and famous, the pre-nup is now a recognised option for British couples, and as a result, is much more commonplace.

TAX CHANGES IN STORE FOR 2011

THE FOLLOWING CHANGES MAY EFFECT YOUR FINANCIAL PLANNING IN THE NEAR FUTURE.

ISA limits increased

Individual Savings Accounts (ISAs) are savings vehicles permitted by the Government that give individuals the opportunity to save each year in a tax efficient environment. The maximum amount that can currently be invested in an ISA is £10,200 (for tax year 2010/2011). There are many different types of investments that can be held within an ISA to meet different investment objectives and levels of investment risk.

The Government has announced that the annual ISA investment limit will be increased from £10,200 to £10,680 with effect from 6th April 2011. For a couple, this means that £21,360 can be invested with no tax on dividends or interest, no capital gains tax on sale and no need to account to the Revenue.

With the benefit of the tax advantages, it has been calculated that a 35-year old investor would accumulate a fund of £679,077 by age 65, assuming an average annual return of 4.5%.

Junior ISAs

Following the demise of Child Trust Funds ('CTFs'), the Government has announced that an alternative tax-free savings plan for children is to be introduced, which has been dubbed the Junior ISA.

The new product will be available from the Autumn of 2011 but will be available for all children born after the withdrawal of CTFs. The same tax advantages are likely to be maintained as fro CTFs, but participation will be optional and there will be no Government contribution.

An alternative way of saving for children is to place a taxable investment in a bare trust. This permits any gains to be set against the child's annual capital gains tax allowance and any income against their income tax allowance.

Annuity rule axed

In another major pensions concession by the coalition Government, the requirement that pension savings must be "secured" by the purchase of annuities is to be scrapped as from April 2011. Savers will be able to maintain their pension policies in force indefinitely and to draw an income from the investments equal to that which could have been obtained from an annuity.

"The Annual ISA investment limit will be increased from £10,200 to £10,680"

This addresses the issue of unattractive annuity rates and the risk that sums applied to purchase annuities may be lost in the event of premature death. However, the "income drawdown" alternative does expose savers to the vagaries of the stock market, and for this reason most people will continue to prefer the security of an annuity for at least part of their pension pot.

In the event of death while benefits are being drawn from a pension plan, the fund will be subject to a flat tax charge of 55% (compared with 82% after age 75 under the previous regime), and there will be no liability to inheritance tax.

As a result of a further concession, those who secure a pension of at least £20,000 p.a. (for example via annuities or a final salary scheme or State benefits), will be permitted to withdraw the rest of their pension pots in cash, subject to their marginal rate of tax. This will make pensions a very valuable estate planning tool.

Lifetime allowance
The maximum value of the pension pot which can be accumulated during an individual's working life without incurring a tax penalty (the "Lifetime Allowance") will be reduced from the current level £1.8m to £1.5m from April 2012. Transitional arrangements are expected for people whose pension pots already exceed the new limits.

Annual allowance
The maximum pension contribution on which tax relief is allowed is also changing. With effect from 6th April 2011 a new limit of £50,000 p.a. will be apply to personal pensions and other defined contribution schemes, whether the payments are made by the individual or his or her employer, and any excess will be subject to tax. Final salary schemes will be subject to more complicated restrictions aimed at achieving a similar result.

You should seek independent financial advice in relation to your financial planning and not take action based upon reliance on the information in this newsletter.

THE **HEALTH** AND **SOCIAL CARE** BILL

IN JULY 2010, THE GOVERNMENT PUBLISHED A WHITE PAPER SETTING OUT THE COALITION'S PLANS FOR THE NHS. ON 19th JANUARY 2011, THE HEALTH AND SOCIAL CARE BILL WAS UNVEILED. IN THIS ARTICLE, WE EXPLAIN WHAT EFFECT THE NEW LEGISLATION MAY HAVE ON PATIENTS.

What will this mean?

In essence, major change for the NHS. Centralised control of the NHS budgets will transfer to GPs who will be responsible for spending the budget from 2013.

The new approach is bottom up rather than top down, with healthcare practitioners (GPs) and patients within the community making the decisions. The idea behind this approach appears to be based on the premise that local people know what is needed most in their communities, rather than the Department of Health, Strategic Health Authorities (SHA) or Primary Care Trusts (PCTs), all 151 of which will now be phased out.

The government's view is that this new approach will allow GPs to become more responsive to their patients, as they know them best and will encourage GPs to become more business focused.

It is predicted that this new approach will save the Government up to £20 billion by 2014.

What will the impact be and why do we have concerns?

GPs will be accountable for best use of public monies.

Our concern is what will happen when GP's have spent their budget. What will happen to patients who still need treatment? How would they get it? Who would pay for it?

This potential problem is of particular concern in deprived areas where the health of the population is generally poorer than in affluent areas and therefore care/treatment costs are higher. Could this impact on recruitment, i.e. will GPs practices in poorer areas struggle to recruit doctors; will this have a knock on effect on patient care and what are the safeguards against this?

The impact on hospitals will be that they will also have a level of autonomy.

All Trusts will be encouraged to retain self governing foundation status. They will be allowed to compete with other firms, as there will no longer be a cap on private income. The door is therefore open for external companies to get involved, for example private healthcare companies. Our concern is that this will make the whole premise of the NHS a much more commercial proposition rather than a social one. Will patients therefore actually come first?

Putting patients first

Initially, patients are unlikely to notice a significant difference in terms of the treatment they receive. The government's aim however is to offer patients more choice and control over their healthcare and treatment. Patients can already choose where they want to have minor surgery or care, but this will be extended to allow them to choose the GP of their choice.

More trustworthy information is promised to enable patients to make informed decisions about their healthcare, but our concern is in relation to the accessibility of that information. If, for example, this information is only accessible via a computer, then this would exclude those that do not have computers. The elderly are likely to fall in that section of society and could arguably be described as those that perhaps need the care/treatment most of all, but yet will find it the most difficult to obtain the information that they require to enable them to choose the GP of their choice and have the opportunity to review the information.

Improving healthcare outcomes

Another aim of the new Bill is on outcomes. It seems that these will be measured in terms of mortality and morbidity rates, safety and patients' experiences. In theory, this sounds plausible, but our concern is that there are many challenges involved in measuring outcome and there is the danger that there will be a lot of statistical information generated but little will and resource to then improve the outcome.

There are also plans to impose fines when errors such as "wrong sight surgeries" are undertaken. Surely in our view, the approach that must be taken to improving safety standards is prevention rather than cure. Systems need to be rigorously examined to ensure that errors cannot occur.

There will be a "cancer drug fund" which will help patients to get drugs that **their doctor recommends**. This does seem an improvement on the current situation where the PCT decide whether to fund drugs, which has resulted in some inequitable decisions being undertaken, depending on where a person lives, i.e. the postcode lottery. Unfortunately, however, this fund is only applicable to cancer drugs and therefore excludes a vast number of other conditions where large numbers of sufferers require medication which is not currently funded by the NHS.

Cutting bureaucracy and improving efficiency

The aim of the new legislation is to reduce NHS management costs by 45%, by the abolition of PCTs and SHAs. As indicated above, the prediction is that there will be a £20 billion saving by 2014. With the predicted savings, the thought process is that there can be an increase in frontline services. Our concern is in relation to the costs of the proposed changes.

To establish a new management structure and fund the running of new organisations could potentially cost a similar amount to that which has already been spent or possibly more.

Simpson Millar's perspective

The new legislation is intended to improve patient safety, but as indicated above we have concerns that this may not be the case. We also have concerns from a medical negligence point of view.

Looking solely at the medical negligence angle our concern is in relation to who would be liable for potential claims. Will the NHSLA (National Health Service Litigation Authority) provide indemnity cover for the GPs Consortium in the same way that it covers PCTs? The situation at the moment is that if an NHS Trust refers an NHS patient to a private hospital/clinic because the NHS Trust waiting time to have the treatment is too long, and the treatment at the private hospital is sub-standard, the NHS Trust remains liable as there is NHSLA indemnity. What will the situation be if the GP consortium uses a private supplier and the treatment goes wrong? Obviously, individual GP's in their own practices will have insurance, but what about the GP consortium as an organisation in its own right?

This article is intended to highlight our concerns about the impact of the new legislation. Ultimately, the question has to be will the changes really improve patient safety?

If you have been affected by the negligence of a medical professional and wish to find out how we may be able to help, please contact us.

GOVERNMENT ANNOUNCES FIXED RETIREMENT AGE TO BE ABOLISHED

Current Position
Employees have a right not to be treated less favourably because of their age and also have a right not to have a provision, criterion or practice applied to them which puts them at a disadvantage compared to people who are not the same age. Using this law, which is now found in the Equality Act, an employee who is retired because they have reached a certain age may make a claim for age discrimination against their employer. However, at the time of writing, the law states that 65 years old is the national Default Retirement Age ('DRA'). This means that if an employee is retired by an employer when they are 65 years or older, provided the correct statutory procedure is followed by the employer, the employer does not have to justify choosing to retire the employee and the employee is unlikely to succeed in a claim for age discrimination or unfair dismissal.

An employee can choose to retire before they reach 65, but if an employer tries to set a retirement age at below 65 years and an employee disputes this, that employer will have to justify their actions in retiring the employee.

Default retirement age to be abolished on 6th April 2011
On 13th January 2011, the Government announced that the DRA of 65 will be phased out from 6th April 2011 and will be removed completely after 30th September 2011. Regulations will be published that will bring this into effect and ACAS has also published formal guidance for employers on the transitional arrangements and the procedure that should be followed when retiring employees after the abolition of the DRA.

From 6th April 2011 transitional arrangements will apply so that the DRA and the associated statutory retirement procedures will start to be phased out. After the transitional period, on 1st October 2011, the DRA and the statutory retirement procedures will be finally abolished and employers will have to justify the retirement of any employee and follow a fair procedure. Because the old statutory procedures for retirement will be abolished, employers should look to the new ACAS guidance to see what fair retirement procedures should be followed.

From 6th April 2011 to 30th September 2011 the transitional arrangements will be as follows:

- If an employer has given notice of retirement under the DRA using the statutory retirement procedures before 6th April 2011 and the intended date of retirement is on or before 30th September 2011, an employer will be able to rely on the DRA, provided they follow the old statutory retirement procedures.
- After 30th March 2011, the employer will have to give less than six months' notice of retirement and therefore the employee may be able to claim compensation under the old short notice of retirement provisions.
- If an employer has given notice of retirement under the DRA using the statutory retirement procedures before 6th April 2011 but the intended date of retirement occurs on or after 1st October 2011, the DRA will no longer apply. Therefore the employer will need to be able to objectively justify retiring the employee at the chosen age as a proportionate means of achieving a legitimate aim and follow a fair retirement procedure.

- If an employer gives any notice of retirement on or after 6th April 2011, that employer cannot rely on the old rules under the DRA. Instead the new rules will apply; meaning that the employer will have to prove that they had a legitimate aim for their actions and that the retirement of the employee is a proportionate way of achieving that legitimate aim.

Due to concerns about the costs of providing insured benefits for older employees the Government has said that a specific exception will be inserted into the new regulations allowing employers to stop paying for group risk insured benefits like medical insurance once an employee reaches the state pension age without exposing themselves to the risk of claims for age discrimination.

Removal of the DRA will also mean that the maximum recruitment age is abolished, so that employers will no longer be able to refuse to employ applicants to new jobs who are aged 64 years and 6 months or more simply because of their age, unless they can objectively justify any maximum recruitment ages.

Retirement after the DRA is abolished

Once the DRA is abolished, employers will no longer be able to compel employees to retire once they reach 65. Instead, employers must objectively justify retiring employees at any age as a proportionate means of achieving a legitimate aim. Even if employers are able to justify retiring employees at a particular age, they must also prove that the dismissal was fair and that they followed a fair procedure as detailed in the guidance written by ACAS.

The European Court of Justice decided in Rosenblat v Ollerking Gebaudereinigungsges mbH [2010] All ER (D) 101 that a set retirement age (in that case 65 years old) could be justified where employees were entitled to a pension and the retirement age had been collectively negotiated with a union.

Can employers refuse to pay a severance benefit if an employee is also entitled to a pension?

In the case of Anderson v Region Syddanmark [2010] All ER (D) 99 the ECJ said that a Danish law that workers were not entitled to receive a severance allowance on dismissal if they were already entitled to a pension could not be justified. While this decision may help employees in the future to argue that they should not be subjected to a detriment when they are entitled to more than one type of benefit, it is worth noting that the European Court of Justice also decided that restricting the rights of employees to receive severance allowance and pension benefits was a legitimate aim.

Can employers justify forced retirement at a certain age just because of the costs involved?

In the recent case of Woodcock v Cumbria Primary Care NHS Trust (UKEAT/0489/09) the Employment appeal Tribunal said that they saw no reason why cost alone could not justify discrimination.

This case was in fact decided conclusively on another point, so there is still scope for employees to argue that a decision based solely on costs is still age discrimination.

However, comments of the EAT are persuasive and it is likely that other Tribunals will take them into account in the future, with the result that it will be more difficult for employees who have been retired for reasons of disproportionately high costs to succeed in claims for age discrimination.

The judgment will also be relevant in claims relating to other types of discrimination (for example on the grounds of an employee's sex or disability) when the employer's treatment of the employee was discriminatory but was due to the high cost to the employer of taking an alternative course of action.

What happens next?

The abolition of the DRA will have a significant impact on the law regarding age discrimination and unfair dismissal. Employers who wish to retire employees against the employees' wishes on grounds of age alone will need to objectively justify the retirement as a proportionate means of achieving a legitimate aim.

Once the DRA is abolished, retirement will no longer be a potentially 'fair' reason for dismissal. Therefore, even if an employer succeeds in showing that the retirement was justified, the employer will also have to prove that there was a potentially fair reason for retiring the individual employee, that the retirement was fair in all the circumstances and that the employer followed a fair procedure.

The legislation applies equally to all employers and there are no exceptions or limitations to be applied for small businesses.

Because of the far reaching implications of the legislation, some employers may have to change their general employment policies in addition to their retirement procedures, such as policies on career advancement and performance reviews in order to ensure they comply with the requirements of the legislation.

Following the recent economic difficulties and the public sector cuts that are being anticipated and experienced, it is likely that after the DRA is abolished public and private sector employers will seek to reduce their workforce. Older employees are often more experienced and therefore are often more senior and more expensive for employers to employ. Employers who previously have relied on compulsory retirement at age 65 as a useful means of managing their workforce using 'natural wastage' may seek to use other means of dismissing staff, such as redundancy or a stricter application of the attendance and/or capability procedures. Employers, to avoid such age discrimination claims would need to ensure they apply such policies consistently across all age groups or at least justify any inconsistencies.

Because the proposed legislation and case law in this area remains undeveloped, the near future will be an uncertain time for both employers and employees. It is therefore more important than ever for employees, trade unions and employers to negotiate agreements on retirement policy and to ensure any agreed retirement age is based on clear, sound and justifiable reasons.

More information can be found on the websites for the Department for Business, Innovation and Skills (BIS) at www.bis.gov.uk and the Advisory, Conciliation and Arbitration Service (ACAS) at www.acas.org.uk

BIG SOCIETY

Few of us are unaware of the Government plans to build a "Big Society" by getting volunteers to run services. It is also anticipated that volunteers will play an important role come 2012 when London hosts the Olympic Games. So how does the recently-enacted Equality Act 2010, which extends protection from discrimination into areas beyond the field of employment, protect volunteers?

In this article we consider the extent to which Equality Act 2010 protects volunteers against unlawful discrimination.

Did the old anti-discrimination laws protect volunteers?
Before the Equality Act took effect in October 2010, anti-discrimination laws offered volunteers no direct protection from discrimination, however, a few individuals managed to satisfy tribunals that they were either a 'worker' or an 'employee' and as such had a right to the National Minimum Wage as well as protection from discrimination and unfair dismissal. They did this by demonstrating that their relationship with the organisation amounted to a legal contract which, although not necessarily written or involved being paid, was a contract to 'personally do work' for the organisation.

How does the Equality Act 2010 affect volunteers?
Like the old law, the Act does not directly protect volunteers from unlawful discrimination. Volunteers with contracts to 'personally do work', as described above, will continue to be protected by the Act. Volunteers may also be protected by the Act in other ways.

The Act applies to organisations providing 'vocational training and guidance' so people on work experience or those in programmes which aim to provide 'training for employment', such as volunteer training with the possibility of later paid employment, are likely to be covered.

The Act prohibits organisations from discriminating against job applicants in the 'arrangements they make for the purpose of determining whom to offer employment' so volunteers who are applicants in organisations that use volunteering as a way of assessing their suitability for the job may also be protected.

Special Constables are protected because the law treats them as employees of the Police Service, which is covered by the Act. Office holders (who are usually unpaid) such as directors, non-executive board members, secretaries, some members of non-departmental public bodies and certain judicial appointments are also covered by the Act.

Volunteers may also fall within the goods, facilities and services provisions of the Act which apply to organisations that provide services to members of the public (advice centres, libraries, GP surgeries); sell goods or provide facilities to the public (charity shops, cafes, bookshops and community centres) and those who are Associations or Private Members Clubs with 25 or more members (Scouts and Guides). Whenever providers of goods, facilities or services offer volunteering opportunities for people e.g. to work on reception at the community centre or serve in the café at busy times, they will be providing a service to the volunteer. As service users, volunteers will be protected from discrimination in the same way as other clients or customers.

In practice, this means organisations (providing goods, services or facilities) must not treat volunteers involved with their service unfavourably because of disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex or sexual orientation. Volunteers who suffer direct or indirect discrimination, harassment, victimisation and volunteers with disabilities in respect of whom the organisation has failed to make reasonable adjustments or treats them badly for reasons arising from disability may pursue tribunal claims.

Organisations providing volunteering opportunities can reduce the risk of tribunal claims by ensuring that volunteers are treated fairly. It would be unwise to ignore a volunteer who complains of harassment from a client or service user because such treatment could lead to a tribunal claim for unlawful (third party) harassment – for which both the harasser and the organisation may be liable. Volunteers should also receive adequate support and training on how to recognise and deal effectively with discrimination, should it ever arise.

CHARITY NEWS

WEAR IT PINK

Friday 29th October 2010 was Wear it Pink in aid of Breast Cancer Campaign.

Staff were invited to wear "pink" and raised £169.55 in the process.

BBC CHILDREN IN NEED

£237.42 was raised on Friday 19th November 2010 towards Children in Need.

It is Children in Need's mission is to make a positive change to the lives of disadvantaged children and young people right here in the UK. Their vision is a society where each and every child and young person is supported to realise their potential.

Due to the size and scale of the BBC Children in Need Appeal this means they are able to give grants to hundreds of different organisations, some of which are very small and don't have the resources to fundraise for themselves.

ALTERNATIVE TO CHRISTMAS CARDS 2010

Instead of sending Christmas cards the staff of the Leeds and Manchester offices donated money to charity.

Leeds donated £45 to a local charity Alpaca Maraca

This is a small charity set up to provide Animal Assisted Therapy for children with special needs.

Their aim is to work closely with children's charities, schools, community programs and families local to Leeds, to provide fun animal assisted therapy sessions where children can get up close to loving, gentle and friendly alpacas. They want to provide fun, educational and interactive sessions where children can safely stroke, feed and even walk the alpacas under supervision.

In case you were wondering an Alpaca is a domesticated species of South American camelid which resembles a small llama in appearance.

Manchester donated £125 to The Rainbow Trust

Rainbow Trust Children's Charity provides emotional and practical support to families who have a child with a life threatening or terminal illness. Rainbow Trust's Family Support Workers join the family in their own home and are there to provide practical support. They are contactable 24 hours a day for families in crisis from diagnosis, through treatment and even after bereavement.

Founded in 1986, they have now supported thousands of families who have a child with a life threatening or terminal illness. With the help of the families who share their inspirational stories about the difference Rainbow has made to their lives, they have been able to raise their profile and tell more people about the work that they do.

Offices also located at:
London | Bristol | Birmingham | Manchester | Cardiff | Wimbledon | Gateshead| Lancaster.