Hamel-Smith FORUM
ATTORNEYS-AT-LAW, TRADEMARK & PATENT AGENTS

VOLUME 8 ISSUE 6 | The Lawyers Newsletter for Business Professionals | APRIL 2014

STAY AHEAD OF THE GAME! HOW TO MANAGE THE IMPACT OF THE WORLD CUP ON YOUR WORKPLACE

Catherine Ramnarine

With the 2014 FIFA World Cup almost upon us, many Trinis are about to catch a serious case of "Football Fever". Unfortunately for employers, symptoms may include absenteeism, distraction and reduced productivity. Here are some tips for managing the impact of the World Cup in your workplace.

Requests for Time Off

Employers may be faced with an increase in requests for time off during the World Cup. As a general principle, vacation leave or time off is seen as an earned benefit that an employee is entitled to once he has put in an agreed amount of service. The scheduling of time off is, however, generally subject to approval by the employer. In deciding when an employee may schedule time off, an employer can properly have regard to its general operational requirements. However, it should, as far as is practicable, also consider the personal wishes of the employee.

An employer that wishes to proactively manage any anticipated increase in requests for time off should first consider whether there is any existing policy or clause in the employment contract which may govern such requests. An early reminder to employees about the terms of any relevant policy or clause, that requests for time off are subject to the operational requirements of the business and encouragement to apply for time off as early as possible can help to create realistic expectations, prevent disappointment and mitigate against a flood of 'last minute' requests. As an alternative, employers can also consider whether it is feasible to offer flexitime to employees, provided that they make up the time later.

Lateness and Absenteeism

Employees may be tempted to 'call in sick' so that they can watch a game, or may be late or absent from work because they are nursing a hangover after a night spent celebrating victory or drowning sorrows. This can have a negative impact on productivity. An employer will be in a better position to pro-actively manage unscheduled absences or late-coming where this is governed by a policy or dealt with in the employment contract. Additionally, an employer can try to reduce the risk of employees disingenuously calling in sick by requiring employees to phone in to their supervisor within a certain period of their scheduled start time if they anticipate being late or absent from work and by requiring employees to produce a medical certificate if the absence exceeds a specified period.

Can an employer discipline employees for unscheduled absences or tardiness? The short answer is 'yes'. However, good industrial relations practice requires employers to adopt a proportional and progressive approach to discipline. Termination for absenteeism or tardiness is generally only justifiable where the employee has shown a persistent pattern of such behaviour and has been warned by the employer and given an opportunity to improve, but has failed to do so. A single unscheduled absence or late arrival is, in and of itself, unlikely to be sufficient grounds to justify termination.

In determining the appropriate disciplinary action to be taken, an employer may consider whether the reason given for the absence or lateness was genuine. However, employers should be wary of jumping to conclusions based solely on the timing of an absence or late arrival, without fully investigating the facts. Employers should also, as far as possible, ensure that their approach to dealing with absenteeism and late-coming is consistent for all employees.

(cont'd on page 5)

CONTENTS

PASSING THE BATON!

At a recently hosted cocktail event, clients and friends of the firm celebrated the announcement of the elevation of Philip Hamel-Smith and Timothy Hamel-Smith to Partner Emeritus, and the appointment of Nicole Ferreira-Aaron as Managing Partner.

Philip, Timothy and Nicole have each enjoyed their entire careers at Hamel-Smith. So far, Philip and Timothy have dedicated over 40 years each to the firm, while Nicole joined in 1991, immediately after becoming qualified as a lawyer.

Philip symbolically hands the baton to Nicole, while Timothy looks on appreciatively.

THE LONG(ER) ARM OF THE LAW – STRETCHING THE FOUR CORNERS OF A WRITTEN ACT

Giselle Romain

As framers of our laws, Parliament often intends for the express words contained in legislation to outline the four corners within which the particular subject matter of the Act would be governed. This intention, however, may appear to be contradicted by certain discretionary powers which Parliament incorporates into many laws, thereby giving non-lawmakers the seemingly broad authority to push the limits of the written law. In this Article, we consider whether there is a need for these powers and if so, how they should be exercised.

The laws of the Republic of Trinidad and Tobago comprise rules and regulations which are intended to govern personal, social and economic behaviours. Framers of the legislation intend that written laws should leave little uncertainty as to these specific rules. Unfortunately, such is not always the case, and the usual culprits for uncertainty include broad and ambiguous drafting, together with failure of the written law to change as rapidly as social law changes.

Another factor which may give rise to uncertainty in legislation, or at the very least, raise the issue of the extent of the legislation, is the provision in many statutes which expressly gives or indirectly alludes to an individual or body having the authority to create policies, guidelines and other binding rules in pursuance of the implementation of the legislation. These individuals and/or bodies are often the regulators of the industries to which the legislation relates. The exercise of this authority results in a plethora of policies, rules and guidelines which effectively extend the parameters of the existing legislation and lengthen the already long arm of the law.

Many of our economic industries such as securities, banking and finance, insurance, food and drugs, telecommunications and civil aviation are governed by legislation under which regulators of the specific industry are appointed to provide guidelines. Indeed, the appointment of regulators and regulatory bodies is necessary and can be justified. However, the discretion to interpret, apply and enforce provisions of legislation seemingly puts these authorities on equal footing with both the legislative and judicial arms of the Government. While there is much justification for appreciating the sometimes "big stick" role of these guards, we cannot ignore the age old question *"who will guard the guards?"* or more aptly *"who will regulate the regulators?"*

The answer may lie in both regulators and industry players appreciating the need for a symbiotic relationship between the written Act and the discretion to extend the parameters of the Act. It is also important that regulators and industry actors work in tandem to give effect to the spirit and intention of the written law. In so doing, the regulators regulate the industry and its players, while the players keep a check on the regulators.

The provisions granting discretionary powers often allow regulators to create policies and guidelines that, in their opinion, are in the interest of public policy. In some cases the discretion can be exercised if the regulators believe such guidelines would serve to bolster the provisions of the Act or even remove any ambiguities contained therein. In an attempt to fetter this discretion and hold our regulators accountable, industry players must be aware of the rules governing the exercise of an unfettered discretion.

Under common law principles, the exercise of discretion is subject to many rules of interpretation and application which seek to protect the rights of affected individuals. Regulators are therefore challenged to ensure that the exercise of their discretion is neither unlawful, unfair, unreasonable nor unjustified. Indeed case law dictates that "*in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms…*". As such, regulators are required to exercise such discretion rationally and in good faith while balancing the need to protect the public

NOT YOUR EMPLOYEE? YOU MAY STILL BE LIABLE FOR HIS INJURY

Catherine Ramnarine

It is not uncommon, especially in the energy industry, for companies to engage general contractors to provide labour, or subcontractors to perform specific tasks. Where workplace injuries occur, it can be difficult to untangle the relationships between the different players on the work site in order to determine which of them is liable.

As the recent local case of Jairam v Trincan Oil Limited and Others demonstrates, the fact that the worker may have an employment contract with one company does not necessarily preclude another from being liable for his injury.

In the *Jairam* case, Trincan Oil Limited ("Trincan") engaged another company, Drilling International Services and Supplies Limited ("Drilling") to provide labour and materials for its operations. The worker, Jairam, was under a contract of employment with Drilling, who paid his wages, but was assigned to Trincan and worked under its control and supervision. Trincan retained the services of Vincent Rampersad & Sons Limited ("Rampersad") to clean its oil tanks, but agreed to provide lighting for the job. Jairam was one of the workers on the Trincan lighting crew. Unfortunately, while he was engaged in that task one of the oil tanks exploded, seriously injuring him. He brought proceedings against Trincan, Drilling and Rampersad for negligence and breach of statutory duty under the *Occupational Safety and Health Act*. Trincan argued that it was not Jairam's employer and was therefore not liable for his injury.

On the negligence claim, the Court decided that:

- Although Jairam was under a contract of employment with Drilling, it did not exercise any control over the work he performed and as such, was not liable;
- Trincan, on the other hand, did exercise control over Jairam's work and therefore owed him a duty to provide a safe place and system of work and to take reasonable care for his safety. It was, moreover, also the occupier of the tank. In these circumstances, it was liable for his injuries.
- Although Rampersad was not Jairam's employer, it was involved in a joint enterprise with Trincan for the cleaning of the tanks and had input into how this process was carried out. As such, it was also liable.
- Liability was apportioned 80/20 between Trincan and Rampersad.

On the OSHA claim, the Court decided that:

- Although Drilling was Jairam's employer for the purposes of OSHA, it was not liable since, having no control over his work, there was nothing that it could reasonably have done to prevent injury to him;
- Trincan was not Jairam's employer for the purposes of OSHA (which defined "employer" in a very strict and narrow way) and was accordingly not liable. It may have been liable as occupier of the premises, but this was not pleaded and accordingly did not arise for the Court's consideration;
- Rampersad was neither employer nor occupier and was accordingly not liable.

As this case confirms, when deciphering liability for workplace injuries, the existence of an employment contract is often secondary to the question of who exercised actual control over the worker. Companies should therefore be mindful of their duty to take reasonable care to ensure the safety of all workers within their supervision and control, and their potential liability for workplace injuries.

Catherine Ramnarine is a Senior Associate in Hamel-Smith's Dispute & Risk Management Department.

THE LONG(ER) ARM OF THE LAW—STRETCHING THE FOUR CORNERS … *(cont'd)*

(cont'd from page 2)

interest. Another presumption is that Parliament would not intend an absurd result. Under this presumption, regulators must avoid an exercise of discretion that would make the provisions of the underlying Act, impractical or inconvenient.

Finally, the exercise of discretion must always lead to a fair result among all persons. This is based on the presumption that in granting an unfettered discretion, the legislature does not intend to achieve a result that is manifestly unfair, unreasonable or arbitrary. In the case of *R. (Tagoe-Thompson) v Mental Health NHS Trust* the court encouraged construction of statutory provisions in a manner "*which will be consistent with the smooth working of the system which the statute purports to be regulating……*" as opposed to one which will *"introduce uncertainty, friction or confusion into the working of the system".*

The regulators are not the only ones with a responsibility to ensure synergy between the written law, the discretion and the management of industries. Industry players have a duty to ensure that their businesses and, by extension, their actions conform to the rule of law to which they are subject. These individuals and corporations must familiarize themselves with the legislation which governs their industry of choice. They must also seek the expert advice of professionals who can assist them with interpreting the provisions of the legislation to ensure that their business operations do not run afoul of the law.

Industry players are also urged to work with the regulators and to perform the fragile balancing act of heeding the regulators advice and/or instructions while holding them accountable for their decisions. Ideally, industry players and regulators must collaborate to guard against unlawful and/or improper entry into and operation within these industries.

Giselle Romain is an Associate in Hamel-Smith's Transactional Department.

PENALTY CLAUSES: WHEN ARE THEY JUSTIFIABLE?

Pierre Rudder

In drafting contractual agreements, it is common for parties to make provision for damages payable in the event of a breach. One example is the inclusion of delay or liquidated damages clauses requiring the defaulting party to pay a sum of money or a rate of interest on late payments. However, these clauses may be deemed unenforceable if they seek solely to penalise the defaulting party rather than to compensate for legitimate losses. This article attempts to explain the law regarding enforceable and unenforceable penalty clauses.

Contracts providing for the payment of money upon a breach may serve the dual purpose of enabling a party to know their liabilities for breach under the contract in advance and avoiding the difficult question of quantification and remoteness. Notwithstanding the foregoing, courts are mindful of the possibility that a party with superior bargaining power might stipulate for a sum out of proportion to any loss that might occur. To this end, the courts have sought to place an interpretation on these clauses that would allow non- defaulting parties to mitigate against losses suffered rather than to penalise defaulting parties. The interpretation of the specific clause turns on a question of law. Lord Dunedin in a landmark English case added that the question was one of construction of each contract to be *"decided at the time of its making and not the time of breach"*. He summed up the distinction as one between the instances where the purpose of the clause is to punish and thereby deter the party from breaking the contract (penalty clause) or where the clause is a genuine pre-estimate of compensation payable for the loss suffered (liquidated damages clause).

Estimating the Compensation

To assist in discerning this distinction, the Lordship offered these four tests:

- *"It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach."* An example would be where a clause to do building work worth $50.00 would be penal if it provided that the builder should pay $1 million if he failed to do the work.

- *"It will be held to be a penalty if the breach consists only in not paying a sum of money and the sum stipulated is a sum greater than the sum which ought to have been paid."* A common example would be where a clause making a debtor liable to $1,000.00 if he failed to pay $50.00 on the due day would thus be penal. The principle derived from this test is that the sum payable must be proportionate. Thus, a contract for the sale of the furniture and stock in trade provided that if either party defaulted he should pay the other $50.00 was held to be a perfectly fair bargain yet the court determined the clause to be penal because the buyer would have to pay $50.00 even if he defaulted in payment of only $1.00.

- *"There is a presumption, but no more than a presumption that a clause is penal when a single lump sum is made payable… on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage".* Under this rule a sum is not presumed to be penal if it is expressly proportioned to the seriousness of the breach e.g. if a lease provides for payment of $100.00 per acre for land not restored to its former condition, or if a contractor agrees to pay $500.00 per week for delay. Such stipulations are only penal if extravagant.

- "*It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of breach are such as to make precise pre-estimation an impossibility."* Essentially, the lordship is advising that even if it is impossible to make a genuine pre-estimate of compensation for the breach, it can still be regarded as a liquidated damages clause providing that the sum is not extravagant.

Analysis of these four steps and examples indicate that the primary concern of the court in differentiating a penalty clause from a liquidated damages clause is that of proportionality. Accordingly, there is nothing wrong with incorporating a late-payment damages clause provided the sum/interest payable is proportionate and fair considering the loss suffered and the circumstances of the case.

Loopholes

Case law concerning the Penalty Doctrine have been confined to situations where the relevant liability for the damages/penalty was triggered by a breach of the contract. Consequently, informed drafters have sought to avoid the doctrine by including penalty clauses that would be triggered by an event which was *not* technically a breach. This apparent loop-hole was challenged in a recent case by the Australian High Court who considered the enforceability of various charges imposed by the Bank, including 'over limit fees' which applied when a customer had overdrawn their account. At first instance, it was determined that these fees could not be treated as penalties as the Bank's customers were **not** under a contractual obligation to avoid overdrawing accounts. Therefore, the charges were not triggered by a breach of contract and therefore not considered penalties. However, the High Court unanimously overruled such reasoning and said that relief against penalties is potentially available even if a fee is **not payable on a breach of contract**. Rather, the proper approach to determine whether a charge was a penalty is to consider whether the *"substantive purpose of the fee is to secure performance of a contractual obligation,"*

This High Court decision has effectively widened the scope of the Penalties Doctrine to capture charges which are not technically triggered by a breach and invalidate them as a penalty clause if they are considered punitive and not

(cont'd on page 5)

STAY AHEAD OF THE GAME! HOW TO MANAGE THE IMPACT OF THE WORLD CUP ON YOUR WORKPLACE

(cont'd from page 1)

Monitoring Internet Usage

Even if employees are physically present at work, they may be strongly tempted to watch matches or keep up with the latest scores and news online. Not only can this be a powerful distraction for the employees in question (and their neighbours) but it can also put a drain on the employer's resources.

Whether or not an employer can monitor an employee's internet usage depends, in part, on whether the device in question belongs to the employer or the employee. In any case, however, there is a risk that an employer could be accused of invasion of privacy. In order to mitigate against this risk, employers should ideally have a policy or make provision in the employment contract which clearly sets out what is or is not permitted. In order to limit distractions, employers may also consider blocking certain websites.

Disciplinary action can be taken against an employee who breaches any applicable policy or clause of the employment contract, bearing in mind that any disciplinary process must comply with the requirements of good industrial relations practice.

Betting Pools

Employees may want to organise an office betting pool. While this may seem harmless, there is a general prohibition under the *Gambling and Betting Act* against conducting pool betting operations without a betting officer's licence. Pool betting, as defined under the Act, essentially refers to situations in which bettors each contribute a sum which is pooled into a pot that the winner receives. Other activities which do not fall within this definition may be allowed. However, on balance, it is probably better to steer away from any betting activities in the workplace. Again, disciplinary action can be taken against employees who commit any prohibited acts, provided that it is in keeping with good industrial relations practice.

Don't Forget The Positives

It is easy to see the World Cup as nothing more than a drain on productivity. However, it also provides a wonderful opportunity to connect with staff, build team spirit and improve morale. Small gestures like allowing flexitime, arranging for staff to watch select matches on a communal television, letting employees wear their team jerseys or colours on "Casual Friday" or simply spending a few minutes chatting about the latest match can have a positive effect on workplace morale. Consider how best you can harness employee enthusiasm for the World Cup to create a winning team in the workplace.

Catherine Ramnarine is a Senior Associate in Hamel-Smith's Dispute & Risk Management Department.

PENALTY CLAUSES: WHEN ARE THEY JUSTIFIABLE?

(cont'd from page 4)

compensatory. The result is that informed drafters must now revisit their standard form contracts to ensure that they do not run the risk of having their once accepted charges being invalidated.

Interest Charges

Regarding interest charges on late payments, parties should be aware that clauses which attempt to allow for increasing interest payable in the event of default can make an enforceable provision penal. The differentiating factor is whether the increased interest operates prospectively or retrospectively, the former being allowable and the latter being penal.

Illustrations of this principle are derived from the English common law cases. While it was initially held that, in the case of mortgages, a provision where the rate of interest payable increases in the event of default by the borrower was unenforceable as a penalty, a later distinction arose between two types of interest payable provisions:

(i) Cases in which the rate of interest payable was liable to a reduction in the event of a punctual payment; or
(ii) Cases where the rate of interest payable was liable to an increase in the event of default.

It was determined that (i) involved no penalty; but (ii) did. However, the learning also suggests that in a case such as (ii) above, where the rate of interest was only liable to increase with *prospective effect*, the increased rate would then be enforceable.

By way of example, where interest was payable on a mortgage debt at the rate of 5%, but if any instalment was not repaid, the rate was to increase to 8% with effect *from three months after the date of payment*, was held by the House of Lords to be recoverable.

This principle was later revisited in an English case by Colman J where he stated that prospectively increasing rates of interest were justifiable… "*on the grounds of the increased credit risk of the defaulting borrower, and will be upheld, provided that the increase is itself modest.*"

In summary, the best policy for parties intending to incorporate penalty clauses is to ensure proportionality when applying interest rates or sums payable in event of default. With respect to charging interest rates, note that if you intend to charge an increasing interest rate on some event occurring, ensure that the increase occurs prospectively and that any such increases are modest and fair.

Pierre Rudder is an Associate in Hamel-Smith's Transactional Department.

The Lawyers Newsletter for Business Professionals

Published by M. Hamel-Smith & Co.
Eleven Albion, Cor. Dere & Albion Streets
Port of Spain, Trinidad & Tobago
Tel: 1(868) 821-5500 / Fax: 1(868) 821-5501
E-mail: mhs@trinidadlaw.com / Web: www.trinidadlaw.com
and intended for limited circulation to clients and associates of our firm.
2014, M. Hamel-Smith & Co., all rights reserved.

Member
LexMundi
World Ready