

Making a sacrifice for the greater good

Public and private sectors are facing similar challenges as to how to manage and reduce costs.

One of the key cost areas for the public sector is that of employment and the related costs of pay and employee benefits.

Public sector organisations are increasingly looking to the private sector to see if savings opportunities being implemented there will provide possible solutions for them. One of the most effective cost savings opportunities related to employment is through the use of "salary sacrifice" arrangements.

In essence, salary sacrifice involves employees giving up a portion of their wages for benefits taxed and/or subject to National Insurance Contributions (NIC) at lower rates. The end result of this is that employees in many cases will benefit through increased take-home pay. Employers also save employer's NIC thus reducing the overall costs of employment.

Salary sacrifice is viewed by HM Revenue and Customs as safe and acceptable planning and they have even outlined how to make such arrangements effective on their website. It can be used in a variety of ways (pensions, travel, parking and childcare are just some of the potential benefits that can be linked to salary sacrifice) and, depending upon employee take-up, can produce potentially significant savings.

Many employers are looking at ways of introducing sacrifice arrangements which provide income tax and NIC free benefits. The tax and NIC savings are then shared (often equally) between the employee and the employer.

For example, an employer who implements a tax and NIC free salary sacrifice arrangement for 3,000 employees who each sacrifice £1,000 of



Pay negotiations: 'salary sacrifice' arrangements can benefit both employee and employer.

their average salary of £25,000 per annum into tax and NIC free benefits could yield a saving of £657,000 for the organisation per annum. Employees' savings of £657,000 a year could also arise (an extra £219 take home pay per employee per annum and equivalent to a 1.3% gross pay rise).

Implementing any salary sacrifice involves managing a variety of different issues including employee relations/HR, legal, tax and administration/payroll. In the public sector, additional issues may arise in terms of the ability to apply salary sacrifice to public sector pensions. Professional advice, through a feasibility review, should, however, highlight any issues.

Bearing in mind the potential savings and the current economic situation, more and more public sector organisations are likely to be considering whether salary sacrifice is now right for them.

For further information please contact John Dormer on 01926 884626 or via email.

john.dormer@wrighthassall.co.uk

The future is green for leases

Local authorities, in their role as both landlords and tenants, have had to cope with various changes in recent times emanating from an increased focus and awareness of carbon emissions from green travel plans to display energy certificates.

A further development is likely to come in the form of the "green lease" for commercial premises. Although there is no industry recognised standard for such a lease, it is generally accepted that a green lease will be one containing additional responsibilities for reducing carbon emissions. For example, this may require local authorities to factor in carbon efficiencies when replacing communal plant and machinery - which might require the introduction of more expensive, state of the art energy efficient building heating and cooling systems.

New lease obligations might in future require tenants to reduce energy consumption year on year including discussions with the landlord on opportunities for further reducing energy consumption and emissions. Authorities might have to employ only energy efficient contractors in delivering the communal site services.

However, green leases are likely to have immediate drawbacks - not least the cost of implementing some of the provisions which may not benefit a tenant where the lease term is relatively short. In addition, without the added impetus of supportive legislation, they are bound to evolve slowly and to be of limited effect.

Government is unlikely to introduce legislation for mandatory green provisions in leases at the moment - not least as there is currently no meaningful and sufficiently mature concept of green leases. However, we would anticipate this changing when the economy

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No second chance when it comes to adjudication

The philosophy which underpins adjudication as a means of resolving construction disputes is the need for quick and binding determination at a sensible cost in order to improve and protect cashflow. This objective is generally achieved.

Section 108(3) of the Housing Grants Construction and Regeneration Act 1996 – the statute that introduced adjudication – provides that the decision of an adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement. The effect is that once an adjudicator has reached a decision in relation to a dispute, it cannot be referred to adjudication for a second time.

Birmingham City Council v Paddison Construction Limited [2008] EWHC 2254



Once an adjudicator makes a decision in a dispute it cannot be referred to adjudication again. Or can it? MATTHEW PHIPPS reports.

(Technology and Construction Court) provides a useful illustration. Birmingham City Council engaged Paddison Construction Limited to carry out works at a new community centre in Handsworth, Birmingham.

Completion of the works was delayed and Paddison, who alleged that BCC was responsible for these delays, sought a variety of orders and declarations from the adjudicator, including a full extension of time to cover the period of delay and reimbursement of its direct loss and/or expense.

BCC disagreed and denied that Paddison was entitled to a full extension of time or any further sums by way of loss and/or expense above those which had already been granted. Paddison referred this dispute to adjudication. The adjudicator granted a full extension of time to Paddison.

However, the adjudicator considered that he was unable, on the basis of the information before him, to determine Paddison's claim for loss and/or expense.



Deal or no deal: whatever the dispute there can only be one adjudication.

He gave Paddison leave to start a fresh adjudication, which seems inconsistent with the adjudicator having decided against Paddison. BCC's adjudication scheme applied, which provides that "an adjudicator shall resign where a dispute arises that is the same or substantially the same as one that has previously been referred to adjudication and a decision has been taken in that adjudication".

Paddison argued that no decision had actually been made regarding loss and/or expense and invited BCC to reassess its claim. BCC refused to do this, on the basis the adjudicator had finally decided the matter. Paddison then launched a second adjudication and another adjudicator was appointed. BCC asked the second adjudicator to resign on the basis the dispute referred to him had already been determined. He refused, and BCC applied for declarations from the Court to the effect that the dispute referred to the second adjudicator was substantially the same, as that which had been referred to the first.

Paddison's primary case in response was that the first adjudicator had not made any decision on their entitlement to loss and/or expense and gave leave to adjudicate again. The judge found that the first adjudicator had given consideration to Paddison's claim; had decided to refuse to award any further monies and that the information provided was insufficient to justify a decision awarding any further payment to Paddison. In other words, the first adjudicator had already made a decision on Paddison's entitlement.

Paddison's secondary case was that the claims advanced in each of the two adjudications were not in fact the same. In the first adjudication, Paddison claimed, amongst other things, reimbursement of direct loss and/or expense but without the benefit of any extension of time having been granted. In the second, Paddison claimed payment of loss and/or expense arising out of the first adjudicator's decision to grant a full extension of time. This extension, which had not previously been granted, gave a new basis for the claim. Alternatively, Paddison claimed damages for breach of contract. The Court found there was no real difference in the claims. Both were for loss and/or expense which were based on delayed completion and the materials relied upon were essentially the same.

BCC obtained the declarations sought. The judge said to arrive at any other conclusion would have enabled Paddison to have a second bite at the same cherry. In the context of adjudication, allowing a second bite will frequently place an even greater burden on the other party as there is often no provision for recovery of costs. BCC would not have been entitled to recover costs regardless of the outcome of the second adjudication. The moral is that the court will be vigilant to ensure that a party is not subjected to successive adjudications of the same dispute. In this case, it is arguable that the disputes were not the same.

For more information, please contact Matthew Phipps on 01926 880767 or via email.

matthew.phipps@wrighthassall.co.uk

What constitutes a nightclub?

Back in the 1970s, '80s and '90s the term 'nightclub' had a clear meaning – it was a place you went after the pubs had shut to drink, dance and socialise. They had a dedicated dance floor, probably a DJ and needed a "Special Hours Certificate" and a PEL. After normal pub closing hours, alcohol was secondary to the provision of food. You were expected to turn up reasonably sober and smartly dressed; if not the door staff would turn you away.

In planning terms, a nightclub was a sui generis use which meant it was not "exchangeable" for any other use. By contrast, a restaurant or a bar was A3 (although now, the former is A3 and the latter is A4).

The Licensing Act 2003 heralded a general relaxation of licensing hours. Suddenly a plethora of restaurants and bars have been allowed extended opening hours that had previously been the sole domain of nightclubs. But does that mean they are now nightclubs? They serve food and drink and may stay open late for one or maybe two nights a week, have doorman on those nights, charge admission and play music.

However, over the course of an average week, the bulk of their trading will probably take place in the day, they may not have a dedicated dance floor, floorshow or DJ and, being either A3 or A4 premises, have no sui generis consent. Therefore, are they in breach of planning control?

A nightclub appears to have no legal definition but the dictionary definition attaches importance to activities specifically geared to



Changes to the licensing law have brought restaurants and bars into an ambiguous category and possibly in breach of planning control. ANDREW POTTS explains why.

night time entertainment i.e. a dedicated dance floor and floorshows. Clearly, many of these bars are arguably not operating as nightclubs though it appears to be a matter of "fact and degree". This is a matter of some importance as substantial investment in time and money has often been made in premises on the assumption that the proposed activities are authorised.

It is not unknown for a council's licensing committee to approve proposed trading activities only for the planning department to flag up a breach of planning control because a bar/restaurant is operating as a nightclub (even though the planning authority had voiced no objection as a responsible authority at the time of the licensing application).

We believe that this is an issue which is coming to a head and will eventually result in significant litigation. We have been involved in at least two disputes of this nature recently. If you have any concerns or queries please contact Andrew Potts, Pritpal Singh-Swarn, Ian Besant or David Elliott on 01926 886688.

Green leases

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starts to emerge from the recession and the green agenda gathers momentum. More informally, however, the London Climate Change Agency (a forum for large commercial and public property owners in London) is currently formulating a set of principles with some best practice recommendations for sustainable lettings. This will lead ultimately to a model memorandum of understanding and standard clauses for green leases.

On a more positive note, green leases bestow immediate benefits such as reduced energy consumption and cost. Carbon reduction is synonymous with corporate responsibility and this is an increasingly important factor for the public sector. These factors will ultimately provide sufficient incentive to embrace this brave new world. For more information, please contact Mark Miller on 01926 880736 or via email.

mark.miller@wrightshassall.co.uk

Landmark date for land control law

The Town and Country Planning Act 1947 – which came into force on 1 July 1948 – was 60 years old last summer.

This was the first mainstream piece of legislation introducing public control over land use in the country and the basic principles it introduced have stood the test of time. It made all land the subject of planning control and created local planning authorities with enforcement powers and powers to deal with the preservation of trees, buildings of architectural or historic interest and the control of advertising displays.

The 1947 Act was consolidated in 1962 and 1971 and again in 1990. On 24 May 1990 the Town and Country Planning Act, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990 and the Planning (Consequential Provisions) Act 1990 came into force. The main Act consolidated the 1947 and 1971 Acts; the other Acts consolidated legislation dealing specifically with buildings and areas of special architectural or historic interest, hazardous substances and repeals, amendments and transitional provisions linking the former legislation with the new legislation.

Substantive changes to the planning legislation came in the shape of the Planning and Compensation Act 1991. It made important changes leading to a development plan lead system; it also amended legislation relating to Enforcement Notices, listed buildings and other matters.

This was followed by the Environment Act 1995 and the Planning and Compulsory Purchase Act 2004. The former created the Environment Agency, National Park Authorities and an update of mineral planning permission, the latter introduced changes to the development plan system and planning control. Spatial development strategies and local development schemes were introduced to replace existing development plans. Crown immunity was abolished. Development was to be commenced within 3 years, not 5 years, a restriction was placed on "twin tracking" applications and yet more reforms were introduced by the Planning Act 2008. Among other changes, this Act will introduce the creation of a new single regime called the Infrastructure Planning Commission dealing with all key infrastructure projects (e.g. nuclear power stations). This Act also introduces the Community Infrastructure Levy (CIL) replacing the Planning Gain Supplement – another form of land tax to invest in infrastructure. All of which brings us bang up to date – so happy 60th birthday to the system of land use control in this country!

For more information contact Pritpal Singh-Swarn or David Elliott.

Further regs for Standards Committee

The Standards Committee (Further Provisions) Regulations 2009 are expected to come into force in May this year.

These will permit the Standards Board to:

- suspend the initial assessment functions of an authority.

The Standards Board may get involved if an authority fails to follow their guidance, comply with their directions, or if the standards committee or monitoring officer fails to carry out their functions properly. They may also be invited to get involved by the authority or standards committee. The Standards Board will notify the authority if it intends to suspend its initial assessment function, giving reasons and asking for any observations. The authority must publish details of any directions made in a local newspaper or any other publication the Standards Board thinks

appropriate. The Standards Board will revoke the directions as soon as the reason for them ceases to exist.

- Enable an authority to establish joint standards committees

Joint standards committees will be able to deal with any or all functions of a standards committee, however there can be no concurrent functions. The joint committee's terms of reference must include:

- functions they are to have
- administrative arrangements
- where written allegations should be received for each authority involved in the arrangements
- number of members and their terms of office
- any allowance they will get
- how to withdraw from the joint arrangement

Finances are to be shared as agreed between the

authorities involved, however in default of an agreement it will be decided by an arbitrator appointed by them.

- Amend the powers of standards committees to grant dispensations to members who would otherwise be unable to take part in authority business because of a prejudicial interest.

The ability to acquire a dispensation remains when more than 50% of the members who would be able to vote are prevented from doing so by the Code of Conduct. A new provision clarifies that members can ask for a dispensation where the political balance of the meeting would be sufficiently upset to prejudice the outcome of voting on the issue.

For further information please contact David Elliott.

david.elliott@wrightshassall.co.uk

Consultation – more than window dressing

Many functions, both duties and powers, place an obligation on the decision-maker to "consult" before reaching a decision. The obligation can be expressly worded in the statute or the regulation.

On the other hand, reasonable decision-making (bearing in mind *Wednesbury*, and Human Rights Act and Enforcement Protocols, Codes of Practice and the emerging doctrine of "legitimate expectation") may require the decision-maker to consult where there is not an express obligation to do so (though the courts cannot impose a duty where no duty exists). Therefore, it is important to know what adequate consultation means as a matter of law.

The courts seriously considered the ingredients of adequate consultation in the mid-1980s in *R v Brent London Borough Council ex parte Gunning (1985) 84 LGR 168*. This case involved the proposed closure and merger of a number of schools by a Local Education Authority. A final consultation paper issued to parents gave little time for response and was vague in detail. The judge quashed the proposals. The appellants argued there were four ingredients to



It is important to go through the correct procedure when it comes to consultation. Otherwise you risk a decision being set aside as DAVID ELLIOTT explains.

proper consultation. These were:

- (a) consultation must occur at a formative stage;
- (b) sufficient reasons must be given to allow proper consideration and response;
- (c) adequate time must be given for consideration and response;
- (d) the result of the consultation process must be factored into the final decision making.

This raises the question: at what stage does the decision-maker need to consult?

The thrust of subsequent case law indicates that the decision-maker can formulate a range of options beforehand and consult on those options providing he does so with an open mind, taking care not to exclude any option that is obviously of central importance to the decision to be made.

In terms of what constitutes adequate time to respond depends on the facts of each case. The Code of Practice on Consultation, which all public bodies are encouraged to follow, was issued by the Cabinet Office and recommends a minimum of 12

weeks for written consultations.

Consultation should be at least partly in writing and, only in exceptional circumstances, should be for a period of less than 12 weeks. The reasons for the shortened period must be highlighted along with an acknowledgment that the process will be intense and what extra methods of consultation will be employed. Sometimes a longer period may be appropriate, for example in the holiday period.

Failure to consult properly can result in a council decision being set aside.

In *R (Sardar) v Watford BC [2007] ACD 19* the council consulted on the question of limiting the number of hackney carriage licences it granted but only after it had made the decision to do so. The judge decided that whilst a decision-maker could have preferred options in mind and whilst the council had broadly consulted in the correct fashion it should have consulted before making the decision and not afterwards. The decision was set aside.

Therefore it is clear a consultation is not just "window dressing" but is a legally important process that should be properly observed.

If you have any queries on consultation or matters of governance generally please contact David Elliott on 01926 880756 or Pritpal Singh-Swarn on 01926 880795 or via email.

prital.singh-swarn@wrightshassall.co.uk
david.elliott@wrightshassall.co.uk

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