Business

Deliveroo and dentistry

Sarah Buxton considers the implications of warranties and indemnities in self-employed associates' contracts

At FTA Law, we advise sellers who are staying on post-completion of the sale of their practice, and associates who take advice on their agreements before signing.

It has come to our attention that some practice owners are incorporating warranties and indemnities into their agreements, which requires the associate not to bring an employment-related claim, and to indemnity the practice owner if they do.

This reminded us of a similar report regarding Deliveroo, the company that will pick up and deliver food to your home or place of work. The couriers are engaged on a self-employed basis, but of course that does preclude the fact that the couriers could claim they are workers or employees. It is the case that Deliveroo requires its couriers to warrant that they will not bring an employment-related claim and to indemnity the company if they do.

The warranty is a promise not to bring a claim and this would be unenforceable, as the current legislation prevents an individual from wavering their employment rights and protections.

Enforceability

The question of the enforceability of a costs indemnity requires closer consideration. There must be a good argument that a full indemnity – which is applicable whether or not the worker is successful with their claim – would be void on public policy grounds. The differing bargaining positions in an employment relationship would make this even more likely to be the case.

But could the position be different if the indemnity was limited to the reasonable legal costs incurred by the employer if the claim were unsuccessful? The answer may depend upon where the claim is brought and how the issue of costs is determined.

In an employment tribunal, costs are very rarely awarded to the winning party. Costs are only awarded in very specific circumstances where a party has acted in a vexatious manner, abusively, disruptively or otherwise unreasonably in the bringing or conduct of the proceedings (or where the claim had no reasonable prospect of success). The employment tribunal would not have the power to award costs under the indemnity principle.

The current legislation prevents an individual from wavering their employment rights and protections

If the employment tribunal declined to award costs, the employer could then try and enforce the indemnity in the civil courts. However, the court in those circumstances would be mindful whether the matter of costs had already been determined by the employment tribunal, and whether it would be an abuse of process to raise the issue in fresh proceedings.

The question of costs

The lack of litigation on this point could be due to a general perception that such a clause would be unenforceable, or concern that the inclusion of such a clause may not present the employer in a particularly favourable light before the employment tribunal.

Costs were awarded in only 870 out of 61,306 claims brought in the employment tribunal in 2014/15, so most claimants pursue their claim relatively safe in the knowledge that a costs award is unlikely. If a costs indemnity were enforceable in an employment claim context, then it is likely that it would become common practise to include such a provision in employment contracts and all self-employed agreements.

It will be interesting to see how these clauses are incorporated further into associate agreements, but in any event, it does highlight the importance of why associates and sellers who are remaining at their practice post-completion, should take advice before signing an associate agreement. D

Sarah Buxton is a director and employment and HR solicitor at FTA Law, which specialises in acting for dentists. The team at FTA Law advises dental principals, associates and practice managers on all of the legal aspects of buying, selling and running dental practices. With extensive experience in the dental sector, the firm is ideally placed to understand and respond to the needs of dental practitioners and practice managers.

FOR MORE INFORMATION, contact **0113 834 3740** or email **sarah.buxton@fta-law.com.**