A magazine from irwinmitchell

Edition 8

Focus on Manufacturing

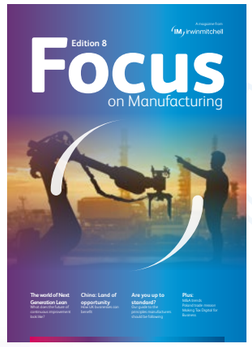
The world of Next Generation Lean
What does the future of continuous improvement look like?

China: Land of opportunity
How UK businesses can benefit

Are you up to standard?
Our guide to the principles manufacturers should be following

Plus:
M&A trends
Poland trade mission
Making Tax Digital for Business

Welcome...



...to the latest edition of **Focus on Manufacturing**

Whilst we continue to patiently await the outcome of Brexit negotiations, UK manufacturers are doing their best to focus on what can be controlled. The current uncertainty can't last forever, but by way of not succumbing to pessimism, this edition centres for the most part on opportunity. Whether that's created through exploiting technology, new trade relationships, or the opportunity to take stock in order to evade risk, we've covered it all.

Leading the theme, Simpler Consulting's Richard Jenkinson looks at how the manufacturing industry is taking advantage of machinery in order to reduce risks and errors. Turn to page 6 to read Richard's thoughts on how the future of continuous improvement might look. Following suit, Adam Kaucher, one of our Corporate partners, reflects on recent manufacturing mergers and acquisitions (M&A) and looks ahead to future trends in the sector.

Paving the way to new relationships, Commercial solicitor Anna Ai tells all about her successful trade mission to Poland, whilst Laurence Gavin, one of our Commercial partners, looks into the dynamic global ambition of China's manufacturing sector, where there are clear opportunities for UK manufacturers to benefit.

Is it worth double-checking all your emails? Hackers are constantly targeting online payments, but we've got all you need to know on avoiding becoming a victim on page 26. There's also a guide to safeguarding your supply contracts on page 24, and advice for manufacturers dealing with staff disciplinary hearings on page 20.

Associate director, Paul Haycock, discusses Legal Professional Privilege and what happens when there's suspected criminal activity in your place of work on page 28.

Finally, we look at some important legislative matters. Turn to page 14 to find out what best practice looks like in matters relating to service charges and commercial property, and learn how new tax measures are on course to make life a little easier on page 22.

All things considered, and despite a recent dip in the statistics recording orders and employment, a significant amount of UK manufacturers remain optimistic for the next 12 months. New product development, increasing capacity and new opportunities for exports are all cited as reasons for optimism. Whatever your view, we're pleased to be able to help our manufacturing clients manage the risks facing their business to achieve a stable future, and seize opportunities to grow.

Dorrien Peters
Head of Manufacturing

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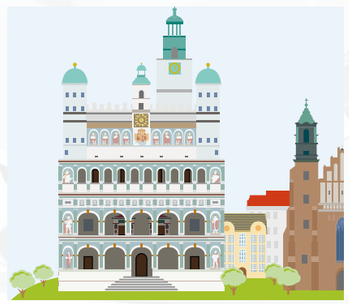

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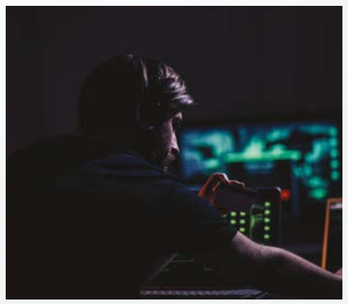

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LEAN MACHINES

As the manufacturing industry leans more and more on machinery to reduce risks and errors, what does the future of continuous improvement look like?

What is lean methodology?

Lean methodology focuses on continuous improvement and respect for people. Manufacturing led on this for many years, and employed human creativity to analyse and improve work, develop physical automation solutions and drive significant improvements in productivity and quality. Dangerous, repetitive or laborious tasks, where human involvement can introduce risk or error, are now routinely performed by machines, allowing people to focus on more value-adding aspects of their jobs. Physical systems (e.g. Kanban cards) have evolved into software that runs semi-autonomously.

Looking forward

We're moving from an age in which people are supported by processes that are run by technology, to an era in which processes are run by technology with augmented support from people.

In the past, improvement ideas have come from people's analysis and creativity. Often, the improvements have looked for physical automation to increase productivity, improve flow, reduce waste and eliminate human error (poka-yoke).

This has allowed significant improvements in the gathering of data for analysis. For example, an out-of-tolerance torque reading from a drill used to assemble components can, in real-time, trigger an alarm, allowing engineers to compare the data from previous issues. This in turn allows them to assess the risk and determine if for example, the line should be stopped, or the product should be removed from the line, or reworked at the end of the line. As your data pool (from across your network of plants) increases, your ability to deploy artificial intelligence (AI) to support those human decisions also increases.

We're now in an era where improvement ideas come from both humans and technology. Non-physical improvements, such as data-cleansing and algorithm fixes, are sources of competitive advantage.

Guided by an unwavering focus on adding value to customers, Industry 4.0 (connected assets) allows supply chains and business models to evolve. Rather than sequential, tiered supply base structures, manufacturers are increasing parts of ecosystems that share demand information in real-time and collaborate to respond effectively. Harnessing the power of data, businesses are migrating from selling products to services – using performance data to drive predictive maintenance, for example, and allowing clients to buy uptime, not assets. This allows them to focus on the real value-add part of their business model.

Improved productivity

Moreover, productivity gains (often in excess of 50%) and error-proofing in non-physical, 'Extract – Transform – Load' administrative functions are being realised through a combination of automation, AI and end-to-end process simplification. If a decision can be made in less than one second, it can easily be automated. AI solutions (such as IBM Watson) can analyse documents, images, verbal/written conversations and so forth, and either make decisions that automation will then execute, or summarise to support human decisions. This allows everyone to perform with 'full' knowledge, reducing the impact of attrition on the labour force. Aiming for the minimum required human intervention, businesses should focus their people on adding value for customers and protecting their enterprise by collaboratively seeing and solving problems (continuous improvement), rather than working in sequenced silos. The robotic process sector is growing rapidly, and whilst research shows that many businesses are investigating the technology and rolling-out some early proof-of-concepts, few are employing this so-called Next Generation Lean methodology to overhaul and future-proof their processes. As a result, many risk embalming 20th Century business procedures and missing the opportunity to create a 21st Century, digitally-enabled front/back-office.

A world in which the human workforce innovates freely, and exercises judgment, empathy and creativity, and the digital workforce executes flawlessly and improves iteratively.

This is the world of Next Generation Lean.

Richard Jenkinson, IBM

To find out more, visit
www.ibm.com/watson-health/simpler/commercial
www.ibm.com/industries/manufacturing

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Manufacturing M&A:

Values rise but volumes fall

Adam Kaucher, Corporate partner at Irwin Mitchell's Manchester office, looks at manufacturing sector mergers and acquisitions (M&A) and reflects on some future trends.

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Many commentators have remarked positively on the UK's strong dealmaking performance during a climate of economic and political uncertainty. This is despite Experian Market IQ figures showing the number of deals in the first half of 2018 didn't quite match up to levels seen in the first half of last year.

Overall, the number of completed deals fell in H1 2018 compared to last year, but it was interesting to not only see a stronger Q2 compared to the previous three months, but also a noticeable increase in transaction values.

When the total value of UK deals during the first half of this year on the Experian Market IQ database is added up, the aggregate figure is almost 40% higher than it was in H1 2017. It's also worth pointing out that, at £214 billion, this value is more than it has been for a decade.

Manufacturing

The manufacturing sector as a whole continues to attract a significant amount of this M&A activity. During the first half of 2018, it was beaten only by financial services.

If we look closely at the data produced by Experian, during the first six months of this year there were 697 deals in the sector, compared to 772 within the same period of 2017. This 9% fall in volume, however, contrasts significantly to a 229% rise in the value of those transactions. This trend is certainly not unique to the manufacturing sector. The data shows, for example, that during the first half of the year, average deal sizes in the UK also increased in the media, pharma, telecoms and retail industries.

Global trends

This shift to larger value manufacturing-related deals is also evident outside of the UK. PwC's Global industrial manufacturing deals insights: Q2 2018, for example, demonstrated a 68% increase in the value of international industrial manufacturing M&A compared to Q1 2018.

Interestingly, this significantly outpaced global cross-sector M&A which delivered a 7% growth in value over the same period. This study also highlighted the return of the megadeal in the manufacturing sector, with the first being recorded for over a year.

So what does the future hold for UK manufacturing M&A?

A good starting point when examining trends within the sector is to take a close look at how it's currently performing. There is plenty of data available, and the latest IHS Markit/CIPS UK Manufacturing Purchasing Managers' Index for September 2018, for example, revealed an improvement in growth after a disappointing dip in August. The sector has now been in growth mode for over two years, and recent results point to many companies enjoying increased levels of new business boosted by rising exports.

If we look at the most recent data from Experian for July 2017, there were 149 manufacturing-related deals compared to 145 in July this year. The total value of these deals this year stands at £12.4bn, slightly higher than the same period in 2017. The picture looks similar when August and September in 2017 are compared to the same months in 2018.

Interestingly, when we examine activity from the first three quarters of 2018 with 2017, deal numbers are lower but values are up by 25%.

Based on this data, it certainly looks like the trend for fewer but larger manufacturing-related deals will continue until at least the end of this year.

Opportunities

Of course, a key factor which makes the future difficult to predict with any certainty is Brexit.

We know from independent research, and through speaking to our clients, that leaving the EU is a major worry for a large number of businesses. Many have it as their number one priority and concern, whilst some view it as an opportunity along with other macro issues, such as the impact of Industry 4.0.

According to many industry experts, the digitisation and mass customisation of manufacturing will be the biggest driver of M&A in coming years, as weaker players are swallowed by stronger ones. Industry experts at the International Manufacturing Technology Show in Chicago earlier this year said that it would play a major role in deal activity over the next five years.

It will be interesting to see what the impact of Brexit and Industry 4.0 will be, and also for how long the trend for lower volume, bigger ticket manufacturing deals will go on. What looks certain, however, is that manufacturing will continue to be a highly resilient sector, and drive significant UK and overseas deal activity in the future.

China:

Land of opportunity

Rumours of cooling growth won't stop the dynamic global ambitions of China's manufacturing sector - and there are opportunities for UK manufacturers to benefit.

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Earlier this year, when the Chinese National Bureau of Statistics released the official manufacturing Purchasing Managers' Index (PMI), it prompted some observers to predict that China may face an economic slowdown. The PMI fell to 50.3 in February, down from 51.3 in January, with some analysts predicting contracting growth in the world's second biggest economy, with consequences felt worldwide.

At first glance, news such as this may seem to put at risk one of Prime Minister Theresa May's aims of her recent visit to Wuhan, Beijing and Shanghai: the UK securing a post-Brexit free trade agreement with China once no longer subject to full EU regulation.

However, on closer analysis, this is unnecessarily pessimistic and there is no reason to suppose that a negative prognosis should apply across much of the manufacturing sector in China.

Planning for the future

Amidst increased international protectionism, regulation and anti-pollution measures which may affect China's ability to export to the world, China's State Council's 'Made in China 2025' plan is aimed at upgrading the country's manufacturing industry. Central to the plan is a focus on not only better infrastructure, but an increased concentration on high-tech industries, and the use of automation and artificial intelligence in existing manufacturing industries.

Examples include:

- Following the news of Geely taking a $9m stake in Daimler AG, the Chinese carmaker became the top shareholder in a business which has ambitions to take advantage of the shift to electric and self-drive vehicles. As a result, Bloomberg News speculate that China's automakers and government are committed to establishing the country as the world's foremost provider of new energy vehicles
- At the same time, the Chinese government's Belt and Road initiative has launched the $480m BMC Europe Investment Fund, which seeks to acquire stakes in UK and European manufacturing companies in the tech-driven medical, chemical and environmental protection sectors
- At the end of February, Chinese solar manufacturer LONGi Solar Technology Co. Limited, the world's leading producer of monocrystalline passivated emitter rear contact solar cells, announced that it had achieved a record 23.6% conversion efficiency.

Continued overleaf >>>

These examples demonstrate a clear ambition on behalf of Chinese manufacturing to dynamically adapt in order to maintain its positon in the global marketplace.

While the European Commission is proposing a framework to allow EU member states to restrict such investment on the security grounds, a post-Brexit UK may adopt a different stance. A more accommodating UK position might lead to increased opportunities for UK manufacturers to benefit from both Chinese investment in their businesses and greater market access in China for their high-tech components and goods.

Building bridges

Many in the UK are supportive of greater partnering between British and Chinese businesses. The Vice-Chancellor of the University of Sheffield, Professor Sir Keith Burnett, writing in the Yorkshire Post, lauded the "high-tech research and the latest AI simulations," which contributed to the UK's development of the Industry 4.0 process in high-value manufacturing. Reflecting on a recent trip to China, he said: "China is transforming its economy away from a dependence on polluting inefficient factories towards high-tech innovation." Drawing on the obvious confluence of UK and Chinese interests in that regard, he urged Yorkshire (and no doubt the UK generally) to seize the opportunity to partner with (rather than rally against) one of the great economic forces of the world. He added "the combination of British innovation and Chinese dynamism is a global winner."

The UK export market to China is now a road trodden profitably, particularly by the food manufacturing sector. According to data published by the Department for Environment, Food and Rural Affairs on 11 February 2018, Chinese consumers bought more than £560m of UK food and drink last year. The Office of National Statistics also noted that UK goods exports to China rose by 34.9% in 2017. This strong demand is also borne out by findings of a February 2018 survey compiled by IHS Markit; whilst figures showed growth in UK manufacturing production hit its slowest pace for nearly a year (falling to a low of 55.2%), this was not due to a slow in demand but rather manufacturers being unable to keep up with demand as they were let down by their suppliers.

Reducing risk

As with any export market, trading with China involves a degree of risk. Many of the legal principles with which UK business people are familiar also form part of the law in China, but there are major differences (for example the doctrine of 'consideration' is not part of Chinese contract law), and these can lead to problems. It's important that exporters take advice and ensure that they will not be exposed to more risk than is acceptable.

Whether you're involved in trade with China, have the opportunity to benefit from Chinese investment, or wish to grow your business in China, Irwin Mitchell can help you grow your business safely,

Setting standards

It's important that businesses follow standards set by professional bodies - with new regulation in place, what principles should management professionals be following?

Since the inception of the service charge code 22 years ago, the Royal Institute of Chartered Surveyors (RICS) has been at the forefront of facilitating improvements to standards of service charge delivery. It has set the benchmark for the commercial property sector to follow.

The new professional statement

The launch of the new professional statement 'Service charges in commercial property,' which is effective from 1 April 2019 and has been produced in conjunction with some of the industry's key bodies, can be seen as an important step forward in regulating the actions of landlords and their agents. It also offers valuable protection for manufacturers, paying a service charge for the maintenance of common parts of the business park where their premises are located.

The aims of the statement are to:

- Improve general standards and promote best practice, uniformity, fairness and transparency in the management and administration of services charges in commercial property
- Ensure timely issue of budgets and year-end certificates
- Reduce the causes of disputes, and provide guidance on the resolution of disputes if these arise
- Provide guidance to solicitors, their clients (whether owners or occupiers) and managers of service charges in the negotiation, drafting, interpretation and operation of leases, in accordance with best practice.

The **key principles** to which professionals involved in the management of service charge accounts must act in accordance with are:

- All expenditure that the owner and manager seek to recover must be in accordance with the terms of the lease
- Owners and managers must seek to recover no more than 100% of the proper and actual costs of the provision or supply of the services
- Owners and managers must ensure that service charge budgets, including appropriate explanatory commentary, are issued annually to all tenants
- Owners and managers must ensure that an approved set of service charge accounts showing a true and accurate record of the actual expenditure constituting the service charge are provided annually to all tenants
- Owners and managers must ensure that a service charge apportionment matrix for their property is provided annually to all tenants
- Service charge monies (including reserve and sinking funds) must be held in one or more discrete (or virtual) bank accounts
- Interest earned on service charge accounts must be credited to the service charge account after appropriate deductions have been made
- Where acting on behalf of a tenant, practitioners must advise their clients that if a dispute exists any service charge payment withheld by the tenant should reflect only the actual sums in dispute
- When acting on behalf of a landlord, practitioners must advise their clients that following resolution of a dispute, any service charge that has been raised incorrectly should be adjusted to reflect the error without undue delay.

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The statement acknowledges that service charges are an increasingly complex and challenging area of commercial property management. It recognises that this needs to evolve in line with changes to business practice, and that there has to be a proportionate approach to best practice depending on issues, such as the size, nature and type of property (provided the core principles are followed). This ensures that different approaches can be justified between a manufacturing unit on a business park and a retail unit within a shopping centre. The importance of transparency is stressed (so that all parties are aware of how for instance service costs are made up), as is communication (so tenants understand what they can expect to receive and how much they are required to pay) in order to reduce the potential for disputes.

The statement provides detailed guidance on what constitutes **best practice** and highlights the following:

- Management fees should be set on a fixed-price basis rather than being calculated as a percentage of expenditure
- Any inducements or concessions to attract occupiers to a property should be borne by the owner
- Occupiers should be notified of any significant or material variances to the service charge forecast as soon as possible
- Managers should issue budgets to occupiers at least one month prior to the start of the service charge year. Annual statements of expenditure should be issued within four months of the service charge year end
- All new leases (including renewals) should make provision for either party to require the resolution of disagreements through alternative dispute resolution (ADR)
- Minimum energy efficiency standard (MEES) – any subsequent costs of improving energy efficiency might comprise a legitimate service charge item as long as there is a proportionate cost benefit to tenants.

The statement can be seen as a blueprint for landlords and their agents, including those involved in the management of business parks, to utilise with communication and consultation being key to reducing complaints and the potential for disputes.

From a tenant's perspective, the statement can be viewed as a robust set of guidelines that should improve transparency and communication on how service charges are administered by landlords. Service charges represent a significant overhead for tenants and for this reason detailed due diligence should always be carried out before a tenant enters into a lease. Tenants should try to negotiate service charge caps where possible and ensure that a landlord is required to reimburse any overpayment that has been made when the lease comes to an end.

The challenge has been set for the industry to embrace the requirements set out in the statement.

Back for business:

A Polish trade mission

Our solicitor, Anna Ai, reports back from a successful trade mission to Poland.

We get off the plane at Poznań Airport and I see the city for the first time through the eyes of a newcomer. I was a student here, and a journalist – but coming back now, I find myself looking at the city the way my fellow travellers do.

Located in west-central Poland, Poznań is vibrant and young, with good English spoken widely. With 25 higher education institutions, the city is buzzing with youthful ambition – reflective of the country's international reputation as a hotbed of professional talent.

We're here for a trade mission organised by the International Trade Forum in Sheffield, with support from Ken Cooke, the city's then-Master Cutler. We've come to explore opportunities for UK businesses in this dynamic and economically stable market.

Starting small, thinking big

We go for our first meal to a quirky restaurant in Poznań's elegant and busy city square. Over delicious freshly prepared food and Polish wine, I ask my fellow trade mission participants what they hope to get out of this trip.

Approaches vary – some have busy schedules, with pre-booked meetings with potential and current distributors and agents; others prefer to go with the flow.

Nobody here is new to trade missions – they know that building international trade relationships is a matter of trial and error, requiring solid market research. In Poland, good local contacts are essential, as the market is not easily penetrated without someone trusted doing the work on the ground. There is no promise of quick wins, I'm told, and the results of a trade mission can materialise months, even years, later.

But we're in a good place to lay the groundwork. With approximately 1,000 exhibitors, the trade fair is the largest innovation, technology and machinery event in Central and Eastern Europe. It's a hub for the latest developments in hydraulics, machine tools, pneumatics, surface technology, transportation, welding technology, work safety, and research and development.

I see major international brands at the event, but interestingly half of the exhibitors are Polish companies. They confirm that, understandably, Germany is often their first trade partner, but there is an appetite for building bridges across the English Channel.

And there is some scope for this. Poland is the 20th largest export market for the UK, but the country has plans to invest heavily in the energy, transport and infrastructure, defence and retail sectors, to name just a few. With 38 million consumers and €85.2 billion allocated to Poland through the EU structural and cohesion fund, it may just offer opportunities worth looking into.

Making business personal

A couple of days into my visit to Poland, I leave Poznań and venture to Warsaw. The capital has a metropolitan feeling – very different from Poznań, a challenger in the fight for international investment, keen to stress its independence from the established ways of Warsaw.

Nonetheless, Warsaw is Poland's international business hub, and it's here that I meet representatives from the British Polish Chamber of Commerce and the UK's Department for International Trade. Each set up to assist their compatriots in building trade connections between the two countries. In Poland, where doing business still relies on personal relationships, knowing people who know people is always a good start.

Continued overleaf >>>

Putting the pieces into place

Some weeks later, I'm in the reception room at Sheffield's Cutlers' Hall with my fellow trade mission participants to share our experiences. (We also share a midday drink of gin at the opening session of Gin Dobry Club, a tradition brought to Sheffield from the trade fair in Poznań – details of which are suitable for another article altogether…) As one would expect, there was a lot of 'hard selling' at the trade fair, but there are some success stories already. One attendee has established a new distribution relationship; someone else has rekindled a relationship with their current trade partner.

Another participant shared their experience of utilising Poland's industrial cluster scheme – a government-driven initiative aimed at concentrating sector-related know-how and expertise – to successfully target trade partners. He had learnt about the clusters from another member of our trade mission while still in Poland.

As another participant mentions their difficulties with communicating with Polish counterparts in English, and the bureaucracy inherent in the country, I already know who in my professional network in Poland may be able to assist. This is what building strong relationships – and generating value for UK businesses – is all about.

This view is shared by my next interlocutor, a fellow lawyer and a corporate partner in one of the largest law firms in Poland. The culture of nourishing trade and business relationships is crucial to succeeding, and not only in Poland. For us as lawyers, having a network of trusted partners internationally is indispensable to being able to offer our clients the service they require at various stages of their international trade journey.

"As Master Cutler, I was heading a group representing SMEs and large multi-national companies in the Sheffield City Region. With the help of Sheffield Hallam University and Lloyds Bank export portal, we were all well prepared for the foray into what was for many a new market.

In the exhibition halls at Poznan, it was interesting seeing the numerous stands and talking to the exhibitors. There was admittedly less of the innovative processes and ground-breaking technology I have witnessed back in the UK, but considering Poland's investment plans, I can see real opportunities for UK companies. I believe our cutting-edge technology can give us a competitive advantage in the future." **Kenneth Cole, Sheffield Master Cutler**

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Disciplinary hearings:

Advice for manufacturers

You've invited a staff member to a disciplinary hearing, but they've asked to postpone the hearing so their union official can accompany them. Can you refuse? And if you do, will it affect the fairness of your decision?

The law

All employees have the right to be accompanied by a trade union official or a colleague at any disciplinary hearing (which could result in a sanction) or grievance hearing. These rights are set out in the Employment Relations Act 1999.

You don't have to recognise a union, and your employee doesn't need to be a member of it either. You also don't have any say about the suitability of the representative (even if you think they're a troublemaker).

You should aim to give your employee reasonable notice of any hearing, so they can prepare and find someone to act as a representative if they want one.

Responding to a request to postpone the hearing

Trade unions officials have many demands made on their time and will often ask to postpone meetings. Technically, you only have to agree to one postponement if the rescheduled hearing can take place within five working days of the original date. If it falls outside of this period, or the employee has made a previous request, they can't complain that you've have breached their rights to be accompanied.

It is worth bearing in mind though that they may be able to argue that your refusal was unreasonable and their dismissal is unfair. (They must have worked for you for two years to bring a claim.)

You must therefore act reasonably, and this might mean rescheduling the hearing to a date later than you would have liked.

Real life example

What's reasonable depends on the circumstances.

For example, in the recent case of **Talon Engineering Ltd v Smith, Mrs Smith,** was unfairly dismissed when her employer refused to postpone a disciplinary hearing for two weeks so she could be accompanied by her union rep. She had worked for the company for over 21 years, and had an otherwise unblemished record.

The Employment Appeals Tribunal made it clear that, although the employer's refusal to postpone the hearing didn't breach Mrs Smith's statutory right to be accompanied, this didn't mean that her dismissal was fair.

That said – if you breach your employee's right to be accompanied, any subsequent dismissal is likely to be unfair.

> You don't have any say about the suitability of the representative (even if you think they are a troublemaker)

Compensation

The maximum compensation for breach of the right to be accompanied is limited to two weeks' pay, currently capped at £1,016 – but in practice, awards are often much less than this.

The maximum compensation for unfair dismissal is capped at £83,682 (or 12 months' salary if lower), and this poses a much greater financial risk. The best advice is to grant any request for a reasonable postponement, even if it means the hearing will take place more than five days after the original date.

If you need further advice, please contact our employment law expert Alan Lewis.

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MAKING TAX DIGITAL FOR BUSINESS

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Tax is a mandatory part of business and can sometimes be less than straightforward to calculate. New measures aimed at making it all a little easier are due to launch next year – what are the details?

Her Majesty's Revenue and Customs (HMRC) is introducing Making Tax Digital for Business (MTDfB) for income tax, corporation tax and VAT, to make tax administration more effective, efficient and easier for taxpayers.

The first tax to become mandatory will be VAT, with a date being set for April 2019. A MTDfB pilot was launched in April 2018, and businesses can opt-in to this now, if they wish.

WHO IS AFFECTED?

VAT registered businesses with taxable turnover above the VAT threshold (£85,000 per year) will need to comply with MTDfB from April 2019.

This includes:

- Sole traders
- Partnerships
- Companies
- LLPs
- Charities

It will be compulsory for every VAT registered business to comply with MTDfB, and it is anticipated that this will have to be done by April 2020. Businesses operating under the VAT threshold (£85,000 per year) can opt-in to MTDfB from April 2019, if they wish.

WHAT IS MAKING TAX DIGITAL?

MTDfB is the digital recording and storing of business transactions as near to real time as possible. These transactions are then uploaded to HMRC using Application Programming Interface (API) software. This software is your accountancy or bookkeeping program.

Currently, only 12% of VAT returns are submitted to HMRC via third-party software – the other 88% are submitted via HMRC online services. This will no longer be available when MTDfB is compulsory.

Initially, it's just the VAT records that need to be held digitally, but eventually it will include all income and corporation tax data. The first VAT return to be affected by MTDfB will be the first VAT quarter starting on, or after, 1 April 2019. So if your VAT quarter ends are 31 March, 30 June, 30 September and 31 December, your first VAT quarter will be 1 April 2019 to 30 June 2019.

MAKING TAX DIGITAL FOR BUSINESS

WHAT SOFTWARE WILL I USE?

HMRC will no longer be providing free software under MTDfB. Businesses will either have to buy and use HMRC approved third party software, or ask their accountant to submit the information to HMRC for them.

ARE SPREADSHEETS DIGITAL?

HMRC have been asked this question numerous times, and the answer is yes – spreadsheets meet the MTDfB requirements.

However, there must be no manual break between the spreadsheet and the submission to HMRC, and it must be able to receive information from HMRC. Therefore there will need to be software that automatically connects the two. However, anyone wanting to continue to use spreadsheets needs to be aware that, as of now, there is no HMRC approved software to do this, and it is not clear when such software might become available.

DEADLINES

The VAT return frequency, filing deadlines and payment deadlines will not change. The return must be filed, and payment made, one month and seven days after the VAT quarter end.

PENALTIES

There will be penalties for not adhering to the new digital record keeping provisions but for a short period – HMRC has proposed one year – they won't apply penalties in certain circumstances. The usual penalty regime for late filing and payments will apply.

If you need help with VAT Irwin Mitchell's accountancy team can help you with your VAT and MTDfB obligations, including helping you to register with HMRC, complete VAT returns, and advise on your VAT liability and payment dates. We also have tax lawyers who can advise on VAT.

Is your supply contract watertight?

A guide to reviewing

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As a manufacturing enterprise, you're exposed to a host of legal dispute risks – here's how to ensure your supply contracts are watertight so you don't find yourself in deep water.

If you've been unfortunate enough to be on the receiving end of a litigation matter, you will be all too familiar with how reliant you can become on particular clauses in a contract. Even the hint of an ambiguous term can leave you in deep water.

The contracts you negotiate with your suppliers and customers have been designed to protect you in the event of the unexpected. A contract can easily have the impression of being watertight. How leak-proof are yours? Let's explore some of the key issues you should look out for to limit your risk exposure.

Single points of failure

A very familiar concept on the factory floor, but how are you protecting yourself contractually? If you rely on a sole supplier for a piece of machinery, what would happen if that supplier disappeared or the supply ran dry?

Bringing to mind memories of missing fried chicken and carbon dioxide shortages, contingencies are often overlooked. You may consider that such risks have been adequately managed as you reach for your backup supplier list. But how do you recover your losses for disruption or redistribution? What would the cost be over days, weeks, months? Can you rely on a particular clause to hold your supplier to account for that figure quickly and easily? Do you have to go to court? Can you recover your losses through some other means? Working with established suppliers in trusted relationships or renewing agreements on auto-pilot increases the risk that those contracts will fail to provide adequate protection in the event of liability.

Quantity commitments

Exact quantities are often an unknown when you first engage with another party. You may be agreeing to minimum order commitments, or offering a lighter 'option to buy' contract without any commitment. A party may consider they have entered into a long-term relationship when they've only the ability to request an order. Be clear from the outset what type of supply agreement you want to create.

Reserving rights

Market fluctuations are abundant, as are contract changes in the manufacturing industry. Contract changes create risks. Consider the effect of currency or raw material price changes and how these will be incorporated into your agreements. Offering lock-in fixed-term pricing agreements can be a compelling proposition as a customer, but an inflated resource cost or sudden currency changes could bottom out profits on a supplier. Adding safeguards, such as allowing pricing reviews periodically or a right to renegotiate on certain triggering events, can be a lifeline to preserving your relationships and profitability in times of uncertainty.

Plan to escape

We report on long-term predictions and make educated assumptions that something will not come along and disrupt the market entirely. Yet products become redundant, customer trends jump erratically and new technologies do disrupt markets. Setting out an exit plan in your contract to account for uncertainty can give you peace of mind in the face of the unexpected. What termination options are available in your contracts? Is the other party free to leave at the first sign of trouble, or without needing a reason to leave at all? Measures can be included in contracts to recover costs or obligations, to offer transition support or set minimum standards for how the relationship will work in the event of termination. Planning a clear exit strategy which is fair to both parties can make it easier to preserve or recover relationships even after you have parted ways. More importantly, these terms give confidence in your organisation's ability to manage risk and deal with change effectively.

Devil in the detail

It's important to ensure handshake agreements are committed to writing, even those backed by an underlying supply contract. Having detailed written terms to lean on will carry immeasurable value if you find yourself in a dispute later down the line.

Relationships in manufacturing are rarely governed by a single document, and it's easy to get lost in the legal jargon and cross-referencing. They often link between specifications, plans, technical drawings, manuals, policies or pricing schedules. One contract may also need to back off liability from another or a number of others.

Take this opportunity to review the documents that make up your relationships. Ensure your contractual relationships continue to reflect the position in practice, particularly as Industry 4.0 continues to unfold.

_DOUBLE_CHEQUE_

Online payments always carry a risk – but hackers have developed a new type of scam that all manufacturers must be mindful of.

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PARANOID OR JUSTIFIED?

Nathan Blecharczyk, the American billionaire and co-founder of Airbnb, is quoted as having said that, "with commerce comes fraud." Sadly, this appears to be universally true and, despite the commonly held belief that we can rely on the security of our trusty email accounts, the reality is that this level of paranoia may be justified.

In a society that's more dependent on technology than ever before, countless businesses are falling victim to the latest trend in the scam operations of online hackers. Moving away from more 'traditional' operations, these online con-artists have taken to the interception of emails containing payment details that are routinely sent between businesses. Once in possession of such an email, the hacker replaces the intended recipient's bank details for the hacker's own, which then leads to the victim unwittingly transferring their payment of a legitimate invoice directly into the hacker's bank account.

In the majority of cases, the money transferred to the hacker cannot be recovered. Furthermore, the original invoice remains unpaid and the victim of the fraud is still legally liable for payment.

The recent decision of **J Brazil Road Contractors v Belectric Solar Ltd [2018] (Case No: C1EQ331C2 County Court at Canterbury 22 January 2018 WL 01993147)** demonstrates the position and is one of only a few reported cases on this type of fraud (despite the frequency of its occurrence).

The customer received an invoice from their contractor but, unbeknown to the customer, the contractor's email account had been hacked. The payment details on the contractor's invoice were changed and sent to the customer on a separate email from the same email account by the hacker. Relying on the payment information they'd received, the customer subsequently paid the invoice amount to hacker and not the contractor. Due to non-payment, the contractor later made a claim against the customer for the full amount of the invoice which, in the view of the contractor, remained outstanding.

The customer argued that they were entitled to rely on the instructions for payment as stated on the email from the contractor's email address, and that the law of agency applied.

The Court found that both parties were innocent victims of the scam but, nevertheless, held that the customer remained liable for payment of the invoice. The customer appealed but the case was dismissed.

In dismissing the appeal, the appellate judge commented that the law of agency didn't apply in these circumstances. Furthermore, whilst estoppel wasn't pleaded, in order for an estoppel argument to succeed there must exist a representation by words or conduct of the payee that the content of its email was secure.

WHAT SHOULD YOU TAKE AWAY FROM THIS JUDGEMENT?

Despite being the innocent victim of a crime, if you're duped by fraudulently amended payment details it's unlikely that the Courts will release you from your obligations to make payment on the terms agreed between you and a third party. You should therefore exercise caution and be mindful of the fact that email accounts are not secure (unless otherwise stated) and are susceptible to hacking.

PROTECTION TO BE INTRODUCED BY BANKS TO COMBAT FRAUD

As recently as October 2018, The Guardian reported that in an attempt to, "halt the rising tide of bank transfer fraud," many (but not all) UK banks will soon begin to check the names of UK bank customers against the name on their bank account when money transfers are made. Effectively this will close the current procedural loophole whereby banks only verify the payee's account name, account number and sort code; any disparity between the payee's account name against the payee's name is not currently checked.

The new "confirmation of payee" system requires customers to confirm that the identity of the recipient is correct in the event that the name of the payee and the name of the payee's bank account do not match. This welcome innovation presents a further impediment to the fraudsters and will, hopefully, lead to a sharp decline in the incidence of such cases.

TIPS FOR CUSTOMER PROTECTION

1. Consider the circumstances of the email. Was an invoice expected at this stage? Have the payment details changed without notice? If so, contact the individual/business directly over the phone to confirm the payment details are correct
2. Insist that payment information is sent via a secured or encrypted email
3. Always exercise caution when dealing with the transfer of money.

Internal investigations:
Legal Professional Privilege

What happens when there's suspected criminal activity in your place of work, and how do you gain access to protected evidence in order to prove your innocence?

Imagine you work for a company that discovers there may have been criminal activity taking place in its midst. The Board becomes rightly concerned about its legal exposure, and quickly instructs an external firm of lawyers to conduct an internal investigation and report back. The findings of that initial investigation result in the company making a 'self-report' to the Serious Fraud Office (SFO) about the suspected wrongdoing. Having gone through various processes and discussions with the SFO, the company ultimately manages to secure a Deferred Prosecution Agreement (or DPA).

Now imagine it from the human's perspective.

As an employee of the company, you find that you were part of that original internal investigation by the law firm and that you're suspected of some wrongdoing. You're relieved of your duties, but worse still, you then find by reason of the 'self-report' that you're being investigated by the SFO. Things turn from bad to worse when the SFO decides to charge you with suspected criminal offences.

This is where your troubles **really** begin, as you try to defend your case and seek to gain access to material that you want to use as part of your defence.

An example case

The **DPA in The Queen (AL) v SFO & XYZ Limited and Others [2018] EWHC 856** arose out of such circumstances, and concerned events connected to only the second DPA to be concluded by the SFO. It tackled, for the first time, a number of important issues, such as disclosure required by human defendants in their parallel criminal proceedings which originated out of the company's internal investigations. There were claims of legal professional privilege (LPP) over the material. It reviewed the SFO's obligations to human defendants where there is a co-operation term in existence on the company, under the DPA, to divulge such material to the SFO when requested, and to which an LPP claim cannot attach. In particular, the Court examined whether 'first account' interview material could be subject to LPP in such circumstances.

The result

This case has seen some difficult and novel issues raised. The SFO's disclosure duty towards a defendant under these specific circumstances has come under the microscope of the Divisional Court. Whilst the Divisional Court found that the Crown Court was the most appropriate forum for resolving disclosure disputes, it has to be said that the SFO didn't come out of this matter particularly well. Indeed, the Court found that numerous public law errors had been made. This exacerbated the investigators' failures to challenge the company's assertion of LPP over the first account material in the internal investigation, which led to the 'self-report' and its present stance on the viability of such a claim, despite there being clear settled law on such privileged claims. The net result of the judgment is a useful analysis of the scope and nature of a Prosecutor's duty of disclosure in the context of a concluded DPA. There may even be wider implications for criminal trials in general.

The company's internal investigation saw the engagement of outside lawyers to look into the alleged bribery of agents acting for overseas customers between June 2004 and June 2012. The central issue at the core of the judicial review claim concerned the human defendant's lawyers seeking access to the full first account interviews provided by senior company employees to the company's lawyers, and which were undertaken as part of that investigation. The interviews had been lengthy, but the company's lawyers sought to provide brief summaries of those only to the SFO, not the actual factual accounts given. The company refused to waive LPP over the product of the investigation, or to accept that LPP could not apply on the basis of existing case law.

An alternative solution?

This impasse could have been resolved in a different way. The DPA comes with a number of clauses attached. One of these clauses requires the company to co-operate in the future, and that includes the need to disclose to the SFO all material and information in its possession that is not protected by a valid claim of LPP or any other legal protection. Despite the fact that the SFO had made it clear to XYZ's lawyers that the claim to LPP was untenable, the SFO refused to trigger the breach clause within the DPA or to issue a witness summons (under Section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965). Had either of these options been utilised, the issue of LPP could have been determined by the trial Judge.

Continued overleaf >>>

The SFO did not have the first account material in its possession. The trial Judge, based on the submissions of the SFO, concluded that he did not have the power to examine the SFO's failure to trigger breach proceedings in relation to the DPA. The trial Judge therefore ruled that he could not order the SFO to obtain the material, despite the Attorney General's Guidelines on Disclosure. But the Divisional Court concluded that according to Parliamentary intent, trial matters such as disclosure should be determined within the Crown Court rather than the High Court, and that there were alternative remedies available. The SFO therefore succeeded in its submission that the High Court was not the appropriate venue for matters of disclosure to be heard. However, the Court did not stop there. The Court's wider observations represented something of a significant defeat for the SFO in its approach to the issue of disclosure and its treatment of the company's LPP claim.

The Court's judgment

The court concluded that: "The SFO failed to address relevant considerations, took into account irrelevant matters and applied the wrong legal test to the assessment that it made. These public law errors were material. If, on proper analysis no privilege applies (either per se or because of waiver), then XYZ Limited should simply disclose the interview records forthwith."

It was also suggested that the SFO have been in breach of the Attorney General's Guidelines on Disclosure in its approach to XYZ Limited, in that it did not enjoy the level of discretion it asserted that it had. The Attorney General's Guidelines, Article 6 of the European Convention of Human Rights, and the common law right to a fair trial were all key limitations to the SFO's discretion and indeed were cited as potentially giving grounds in the future for a possible abuse of process application, if other remedies fell short of obtaining the material. The SFO has a duty to explore privilege claims properly. In this present case, though, it appears it simply accepted the company lawyers' assertion that LPP applied even though the SFO questioned that claim, and the case law supported the SFO's position that the claim could not be sustained.

A bad day at the office

What appeared to be a 'bad day at the office' for the SFO was compounded by the fact that the Court had declined to make an order for costs against the Claimant. The SFO had won the battle on the basis of jurisdiction but lost the war as all of the substantive issues raised by the Claimant were upheld by the Court.

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