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Empowering Small Businesses – The New Small Business Commissioner

The Enterprise Act 2016 (“the Act”) establishes the Small Business Commissioner (“the SBC”). The SBC’s role is to:

- provide general advice and information to small businesses when dealing with larger businesses, for example, advice on contract negotiation and statutory rights;
- provide information on dispute resolution services, for example, ombudsmen and alternative dispute resolution providers; and
- consider complaints made by small businesses about payment issues when supplying goods and services to larger businesses, making recommendations where appropriate.

The Small Business Commissioner (Scope and Scheme) Regulations 2017 (“the Regulations”) provide further detail on the workings of the SBC and should be implemented shortly. It is likely that the office of the SBC will become operational in early 2018 with a website providing information, advice and access to the complaints scheme. The workings of the SBC will have implications for all businesses, whatever their size.

Why is the SBC needed?

For many years, there have been concerns about the problems experienced by small businesses when dealing with larger businesses. A government report in 2015 considered the vulnerability of small businesses to unfavourable or unfair practices, for example, unfavourable contract terms and non-payment for goods and services. The report stated late payment was a key issue and noted the negative impact this has on small businesses, often stifling investment, growth and job creation and, in extreme cases, leading to insolvency. The report identified other practices that lead to disputes, for example, excessively long payment terms, ‘pay to stay’ clauses (where businesses pay to be retained on a supplier list) and prompt payment discounts. There was recognition of the power imbalance between many businesses, noting larger businesses may use their market strength to impose unfavourable terms on smaller businesses.

The government is seeking a ‘culture change’ in how businesses deal with each other, encouraging fairer treatment for all businesses. The aim is for the SBC to empower small businesses by providing access to advice and information and by disincentivising poor payment practices.

What is a small business?

The Regulations state that a small business is a ‘relevant undertaking’ with:

- less than 50 staff at the date of initial contact with the SBC;
- if using the SBC complaints scheme, less than 50 staff at the date on which the matter linked to the complaint occurred or started to occur; or
- an average of less than 50 staff during any ‘assessment period’, for example, the last financial year prior to the date of contact with the SBC.

‘Relevant undertaking’ means a business with a registered office or principal place of business in the UK. ‘Staff’ includes employees, apprentices, directors and, if a partnership, partners. The Regulations provide further detail.

Advice and information

The SBC will provide advice and information considered useful to small businesses when dealing with larger businesses, either as a buyer or seller of goods and/or services. This may include advice on:

- contract law, statutory rights and obligations and dispute resolution; and
- complaints-handling bodies, ombudsmen and regulators who may be able to assist with dispute resolution or provide advice.

The SBC Complaints Scheme (“the Scheme”)

The SBC will administer the Scheme, considering ‘relevant complaints’ and making recommendations on how complaints can be resolved or mitigated. A ‘relevant complaint’ is a complaint which:

- is made by a small business with an actual or potential agreement to supply goods or services to a ‘larger business’ (see below);
- relates to a ‘payment matter’ (see below); and
- is not excluded (see below).

A ‘larger business’ is any business with a place of business in the UK which is not a small business or public authority.

‘Payment matters’ include acts or omissions relating to payment, for example, failure to pay, late payment, changes to payment terms (timing or amount) and imposition of fees and charges by larger businesses. Preventing a small business from using the Scheme can also be a matter of complaint.

Excluded from the Scheme include complaints:

- relating to the appropriateness of the price payable for goods or services;
- already subject to legal or adjudication proceedings or the jurisdiction of an ombudsman, regulator or public authority; or
- about matters occurring before 6 April 2017.

Procedure

Before making a complaint to the SBC, the small business (“the complainant”) should inform the larger business (“the respondent”) of its complaint and give the business a reasonable opportunity to deal with it. If the SBC considers that informing the respondent would cause significant detrimental effect to the commercial interests of the complainant then a complaint can be made direct to the SBC.

A complaint must be in writing and include details confirming it is a matter that can be the subject of a valid complaint.

The SBC can dismiss a complaint, for example, if it is vexatious or already the subject of legal proceedings. If a complaint is dismissed both parties must be notified.

Time limits

Complainants have 12 months from the date on which the matter of the complaint took place, or started to take place, to make a complaint. This period can be extended by the SBC for

various reasons, for example, where physical incapacity prevents the complainant from meeting the time limit or the respondent consents to an extension.

The SBC may set time limits for the conduct of the complaint, for example, time periods for the complainant and respondent to make representations.

Matters to consider

The SBC must act impartially and may ask the complainant and respondent to provide relevant information and documents. The respondent must be given the chance to make representations; the complainant may be given the chance to do the same. The SBC is obliged to decide complaints by reference to what is 'fair and reasonable', taking account of the facts, law, conduct of the parties, their relative bargaining powers and the impact of the practice concerned. The SBC's decision must be provided in writing and include reasoning. The SBC's decision may contain recommendations as to how the parties should resolve the complaint and prevent future similar issues. However, the decision is not legally binding.

Publication of reports

The SBC can publish a report on a complaint, identifying the complainant only with their consent. The SBC decides whether to identify the respondent, allowing the respondent to make representations if it disagrees with identification. In making this decision, the SBC must consider various factors including:

- whether the respondent engaged positively in the complaints process and tried to resolve the complaint amicably and fairly;
- whether the respondent intentionally or recklessly provided information to the complainant or the SBC that was materially false, misleading or deceptive;
- whether the respondent exerted undue influence or pressure in dealing with the complainant;
- whether the respondent acted on any previous SBC recommendations it had received; and
- the seriousness of financial loss, inconvenience or other adverse effect caused to the complainant.

The SBC must also consider the impact of identifying the respondent on deterring future similar acts or omissions and in encouraging other businesses to adopt good practice.

Whilst the SBC's recommendations are not legally binding, the adverse publicity for a respondent if identified may ensure compliance with recommendations. The prospect of referral to the SBC should encourage businesses to deal quickly and fairly with complaints as soon as a complaint is received. Ultimately, the prospect of any involvement with the SBC may lead to potentially unfair payment practices no longer being commonplace.

Other requirements relating to payment practices

Regulations made under the Small Business, Enterprise and Employment Act 2015 place a statutory duty on larger companies and LLPs to report twice a year on their payment practices, policies and performance. This information is published. A business is required to report for a financial year if on its last two balance sheet dates it meets specified statutory thresholds. This reporting duty does not affect all businesses but the introduction of the SBC underlines the government aim to tackle unfair payment practices at all levels.

Business approach

- Businesses should review payment practices, ensuring such practices are fair. This should include a review of standard terms and conditions of business, ensuring payment terms are fair, reasonable and clearly drafted. The same approach should be adopted when negotiating contracts and when considering changes to payment practices, for example, introducing a fee or lengthening a payment period.
- Clauses in standard terms and conditions of business that attempt to exclude or restrict contractual liability are also subject to the test of reasonableness in the Unfair Contract Terms Act 1977 so it is a good opportunity to consider this as well when undertaking any review.
- It appears that the government is not proposing to make potentially 'unfair' practices illegal; the aim is promote a cultural change in the way businesses interact. However, the 2015 report suggests that action could be taken if self-regulation fails.
- Larger businesses are not required to cooperate with the SBC, for example, there is no requirement to respond to the SBC or to provide documents or information. However, failure to do so may have implications for the SBC's decision and possibly lead to identification in any report and potential adverse publicity. The best approach would be to deal with any complaint at an early stage, before referral to the SBC. If the SBC does get involved, businesses should cooperate fully and if possible, comply with any recommendations made. Familiarisation with the Regulations is critical.