



E-Newsletter

August 2012

Your latest commercial legal update from Ortolan Legal, the virtual in-house law firm

Hello. Resisting the urge to include any Olympic themed articles this month, we have confined ourselves to the more prosaic issues of commercial and employment law. Continuing our theme of holidays and sick leave from last month's newsletter we think the recent Court of Appeal decision reported below will add to businesses' administrative burden as well as their cost of compliance with employment law. Maybe there is some good news on the horizon for employers if Vince Cable's initiative can make its way into law.

Our parking industry case will be of interest to businesses operating in many other industry sectors. It is interesting to see the courts affirming principles established in 1915 that a charge which is imposed as a deterrent will not be enforced - in this case in the context of a car parking contract.

In the absence of any article about it though, we can't resist the urge to add our congratulations to Team GB; what a fantastic Olympics. We hope you enjoyed it and didn't lose too much productivity as a result...!

Unfair Terms In Consumer Contracts

Law Commission updating its 2005 review

Any company which does business with consumers would be well advised to read the Law Commission's recently released [issues paper](#) on unfair terms in consumer contracts. This comprehensive paper (it runs to 125 pages!) updates their 2005 report on unfair terms in consumer contracts and has been produced in preparation for a new Consumer Bill of Rights which is scheduled to start its passage through Parliament in the 2013/2014 session.

With the objective of consolidating the sometimes overlapping provisions of the 1977 Unfair Contract Terms Act and the 1999 Unfair Terms in Consumer Contracts Regulations (UTCCR), this new legislation also ought to clarify which terms of a consumer contract should be exempt from review under the UTCCR. This issue came to prominence in the 2009 bank charges litigation where the Supreme Court ultimately ruled in favour of the banks, saying that charges for unauthorised overdrafts fell within the exemption and could not, therefore be assessed for their fairness or otherwise under the UTCCR.

Companies which do not trade with consumers are unlikely to be affected by this consultation. Although the Law Commission's report in 2005 did address B2B contracts, they have made it clear that this element of their 2005 report will not be carried forward into the current review.

Third Party Harrassment

Employers will no longer be liable

The Home Office has announced a series of reviews and consultations relating to various aspects of the Equality Act 2010. Among the significant changes are



Annual Leave

No need to request while on sick leave

The Court of Appeal has confirmed that a worker who is unable to take the four weeks annual leave accrued under the Working Time Regulations due to sickness absence does not have to make a request to carry their untaken leave over into the next leave year. The Court confirmed that upon its reading of the Working Time Directive this happens automatically and without any requests being required by the employee or worker. If a worker or employee is dismissed before they can take the leave, they are entitled to payment in lieu of the leave accrued. Yet more bad news for employers!

No Fault Dismissal

Will it happen?

Business Secretary Vince Cable has this month advanced a proposal which would make it easier for employers to remove under-performing workers in return for a pay-off by using settlement agreements.

Under these measures, employers would be able to offer settlement agreements before a formal dispute arises. It is hoped that in many cases this will avoid the need to undertake the (sometimes!) pantomimed and protracted improvement/capability process when both parties realise it is the end of the line. The proposal would ensure that employers would be legally protected from this offer being used as evidence in an unfair dismissal tribunal case and thus would differ from the current position whereby an employee could produce a draft compromise agreement or any evidence of settlement discussions to show the decision to dismiss him or her had

plans to repeal the third party harassment law, which will mean that employers are no longer liable for the harassment of an employee by a third party.

Car Parking

Court strikes out charges as unfair penalties

An ever increasing number of car parks are monitored by automatic number plate recognition (ANPR) cameras. They record the time of entry and departure and a penalty notice is automatically despatched to the registered keeper of infringing vehicles.

In a recent county court decision (*Excel Parking Services Vs Ms Hetherington-Jakeman*) a driver successfully argued that a demand for £100 was excessive, did not reflect a genuine loss on the part of the car park operator and was, therefore, a penalty rather than a genuine claim for contractual damages. It has been well established for many years in English law that a penalty (which in legal terms effectively means a deterrent rather than a genuine pre-estimate of a party's loss) will not be enforced by the courts and it appears that was the view taken in this case. Although it is a decision of a junior court and does not set any binding precedent, it is a good and timely example of this important aspect of English law. It is not unreasonable to impose a contractual 'fine' for people who breach the terms of their parking contract, but the level of any such payment needs to be supported by a genuine and demonstrable loss on the part of the business seeking to enforce its rights.

About Ortolan Legal

Ortolan Legal is a radically different law firm providing pragmatic and commercially focussed legal advice. We are all experienced in-house and commercial lawyers, based remotely so our overheads are kept to a minimum. Our pricing structure is entirely flexible; we will adopt your preferred structure and simply ask to earn a fair margin for our work. We don't charge administrative costs. Dealing with ad hoc work or retainer work, we can assist where there is no in-house legal function and also provide holiday cover or supplement existing in-house legal teams. Our work covers non-contentious company commercial and employment law, contracts, tendering, purchase, supply, distribution, franchising agreements and pre-litigation reviews. We also provide general 'Legal Health Checks' and a 'Legal Hotline' offering legal support for a set number of hours each month.

If you require any advice in connection with the content of this bulletin, or on any other issues, please contact Nick Benson or Carrie Beaumont on 0844 5611 638 or e-mail us at nbenson@ortolangroup.com.

already been made and that the disciplinary procedure was unfair and predetermined.

Under the proposals employees will continue to enjoy full protection of their employment rights, as they can choose to reject the offer of a settlement agreement and proceed to a tribunal.