



E-Newsletter

July 2012

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

Hello. You'll probably be mightily relieved to hear that we've decided not to include any articles on LIBOR fixing and the legal implications of this latest banking scandal. Confident that you've been bombarded with quite enough news about this, our pieces this month examine a number of new developments in the areas of commercial and employment law instead. We do appreciate though, that occasionally a little light relief is called for. So for all the tennis fans amongst you we have included a brief update on some (rather tenuously) Wimbledon related legal news at the end of this month's newsletter.



Holiday Entitlement

What happens when an employee is sick?

A European decision (which forces the hands of UK Judges) has ruled that if workers fall sick during the time they are taking their statutory annual leave they may take extra leave at a later date for the period they were sick whilst on leave. The period of absence when sick would then revert to sick leave and the employer's usual sickness rules would apply. It is therefore crucial that employers have clear policies on sick leave to ensure that workers properly report any period of sickness absence so as to avoid confusion over their entitlements. The ECJ has also ruled that where a worker falls sick just before a period of planned leave that worker has the right to have their leave re-scheduled.

We recommend leave and sickness policies are reviewed and, if necessary, brought up to date to reflect this change.

"Good Faith"

High Court considers contractual meaning

An agreement for parties to act in good faith is a fairly common provision in commercial contracts. Often used in the context of some future event which cannot be accurately legislated for at the time the contract is entered into, its purpose is usually to stop one or both parties from acting unreasonably in determining how best to address the situation at the time. It's probably fair to say that acceptance of this obligation may not be given as much thought as some other contractual terms, but a recent High Court decision (*Compass Group and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust*) might make advisors pause and think a little harder about these words.

This dispute was about a long term outsourcing contract and the decision must be viewed both in this context and in the light of other facts particular to the claims being litigated. In essence, Medirest argued that the Trust had breached a contractual obligation of good faith by imposing an irrationally high set of penalties which could only have been calculated by the Trust acting in bad faith. The judge agreed with Medirest and interestingly, said that in this case, the breach of their good faith obligation by the Trust went to the heart of

Retirement Ages

Can they ever be justified?

The cases of *Seldon v Clarkson Wright and Homer v Chief Constable of West Yorkshire Police* are the first cases considered by the Employment Tribunal and Employment Appeal Tribunal since the introduction of the Equality Act and the abolition of retirement as one of the "fair" reasons to dismiss an employee. Employers now need to be seen to only rely on retirement if its aim is legitimate, proportional and the result cannot be achieved by another means. These judgements make it very plain that it is extremely difficult for employers to rely on retirement without risking costly and length litigation and allegations of age discrimination.

At Ortolan, we recommend a very cautious approach - namely not setting default retirement ages. If there is a legitimate requirement to dismiss any older employees then you should base the decision only on actual performance grounds and not age.

Tennis

Libel and overtime

As Wimbledon fortnight concludes, these two cases may provide you with some light entertainment. The first is the case of Mr Robert Dee who concluded a period of what appears from his own website to have been a highly successful run of threatened litigation against international media organisations with an unsuccessful attempt to sue the Telegraph newspaper for libel. Having obtained apologies and in some cases considerable sums of money from organisations ranging from the BBC to the Washington Post, all of which had sought to label him as less than successful in the world of professional

the contract. It was a material obligation whose breach entitled Medirest to terminate the contract. The practical lessons which can be drawn from this are to treat any such obligation in a long term contract with more than mere lip service. It will not be sufficient simply not to act in bad faith; the parties need to act in a way which is consistent with the mutual objectives of the contract and also, in a way which is not unreasonable when looked at from an objective point of view.

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.

Ortolan Legal Limited is a limited company (7039595) registered in England & Wales whose registered office is at Genesis Centre, Birchwood WA3 7BH. It is a legal disciplinary practice authorised and regulated by the Solicitors Regulation Authority (520355).

tennis, Mr Dee lost his High Court case against the Telegraph in 2010 with the judge commenting "*His record of consecutive losses was the world record equalling worst ever run of consecutive losses on the international professional circuit*". He had claimed that articles published by the Telegraph, including one under the headline "*A British sensation - the world's worst*", were defamatory, but the court disagreed saying the articles were justified by the facts. In the USA, litigation of a different type is brewing as four US Tennis Association umpires recently filed a class action lawsuit in New York. The umpires claim they have been incorrectly classified as independent contractors. Had they been treated as employees under New York state law, they claim, they would have been entitled to considerable overtime benefits for their long working days which often started at 7.30 am. We are unaware of any similar claims being made by Wimbledon umpires this year.).

[Unsubscribe from this newsletter](#)