

E-Newsletter

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Ortolan
Legal Ltd



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

Hello. We are well into the holiday season now and hope our readers have either enjoyed a decent summer break already or will be gearing up for one in the next few weeks. Usually we find that things get a little quieter for us at this time of year, but we have never been busier and are actively recruiting for new lawyers to join Ortolan Legal. So if you know anyone who might enjoy working with us and who is an experienced in house lawyer, please ask them to get in touch (end of advert!).

Our newsletter this month ranges across a broad mix of commercial and employment news; I hope some if not all of the pieces make interesting reading for you. Do let us have your feedback on topics you would like to see covered in future newsletters. We would like to tailor this as much as possible to reflect the topics which are of interest to you. As always, we hope you enjoy reading our newsletter and please feel free to forward it on to anyone you know who might find it of interest.

Sick Leave

Employee's right to statutory annual leave

Under the Working Time Directive 1998, employees have a statutory entitlement to paid annual leave of four weeks. In the recent case of *NHS Leeds v Larner*, the Employment Appeal Tribunal (EAT) had to determine whether an employee was entitled to paid leave during a period of illness. The key facts were that the employee had been absent for the entire annual leave year and had not requested any statutory holiday during that time. However, the EAT found that the right to statutory annual leave carried over to the following year and, when the employee's contract was terminated, she was entitled to be paid for unused leave. The case follows on from a number of decisions, most notably *Pereda*. However, it is still unclear whether an employee who is sick during annual leave is entitled to reclaim that leave from an employer.

ASA

Upholds complaint against British Gas

The Advertising Standards Authority (ASA) has upheld complaints about the wording of British Gas advertisements, which stated that they were "committed" to attending to customers if they called before 1 pm. In particular, the complaints surrounded whether the word "committed" amounted to a guarantee. The complainants had not received same day repairs and, in one instance, a customer did not receive a new boiler until a week later. On that basis ASA stated that British Gas could not always provide a same day repair service and the adverts were, therefore, misleading.

Employment Status

Employment contract may not be binding

The status of being an employee confers a number of benefits, such as statutory employment protection and the right to be paid a minimum wage. However, contractors and other self-employed people cannot benefit from such rights. Often parties will use an employment contract or sign a service agreement to confirm the status of the individual. In the case of *Autoclenz v Belcher*, the Supreme Court had to decide whether car valeters, whose contracts described them as self-employed, were genuinely contractors or employees of Autoclenz. The contract stated that the individuals were sub-contractors. They could substitute someone if they were unable to work and could refuse to work for Autoclenz. The Supreme Court decided that the individuals were employees, despite the express wording of the contract. In reaching its decision, the Court looked at the actual legal obligations of the parties. This means that any contract for services needs to be carefully drafted in order to avoid creating employee status for a self-employed



Agreement To Agree

Not legally enforceable

As previously reported, there have been a number of recent court decisions surrounding the formation of a legally binding contract. The High Court in *Barbudev v Eurocom Cable Management* had to consider the effect of a side letter and whether it could form a valid contract. The side letter under review stated that the parties would enter into good faith negotiations to execute a further agreement. However, the judge held that this was not sufficiently certain to form a contract and the letter did not contain all the elements needed for a valid contract. Although the case dealt with established principles of contract law, it is noteworthy since many parties often rely on agreements to agree, without realising that such agreements are not legally enforceable.

Restrictive Covenants

Non-solicitation clause upheld

Restrictive covenants are generally used in two particular circumstances. The first is in an employer/employee situation and controls how the employee can behave once their employment has terminated. The second common use is commercially as part of the sale of a business. In the employment scenario, courts have tended to be

contractor.

About Ortolan Legal

Ortolan Legal is a radically different law firm providing pragmatic and commercially focussed legal advice. We are all experienced in-house lawyers, based remotely so 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 Claudia Gerrard on 0844 5611 638 or e-mail her at cgerrard@ortolangroup.com

less stringent in upholding restraint of trade clauses, particularly if a clause is lengthy, too wide or would prevent the employee from reasonably earning a living. However, the recent High Court decision in *Baldwins (Ashby) Limited v Maidstone* illustrates how courts view restrictive covenants in the second scenario. In the case, the court upheld a wide restrictive covenant preventing solicitation of former clients for a two year period. The case shows the importance placed on restrictive covenants in sales of business, so that the seller cannot diminish the goodwill which a buyer should acquire as part of the sale. It is also clear that, unlike the employment scenario, the courts will imply restrictions, even if there is no clear restrictive covenant in the contract of sale

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