

# E-Newsletter

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Ortolan  
Legal Ltd



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

Hello. It has been a busy time for Ortolan Legal recently; both in terms of the breadth and complexity of advice our clients have been seeking, as well as the preparations we are making as we gear up for the new regime of outcomes focused regulation which the Solicitors Regulation Authority brings into force - together with a new code of conduct for law firms - from 6th October this year. This move to a more flexible and less prescriptive form of regulation is something we welcome and the fact that it is a regime designed to enable lawyers to achieve the right outcome for their clients while ensuring you are adequately protected is a positive for firms like ours. Because of our innovative structure and way of doing business, we sit more comfortably in a regulatory framework which promotes flexibility and our more entrepreneurial approach.

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.

## TUPE

### *Transfer of collective agreements*

The Transfer of Undertakings (Protection of Employment) Regulations 2006 deal with automatic transfers of employees, but only in certain circumstances. Where there is a sale of assets or a transfer of a business, employees may transfer to the purchaser or new business under TUPE. More frequently, though, staff might transfer where a new service provider is appointed. When staff transfer, they have continuity of employment and retain all their existing terms and conditions. This includes the right to be represented by a union. Following the case of *Parkwood Leisure Limited v Alemo-Herron*, the Supreme Court has held that the issue of trade union rights should be referred to the European Court of Justice. The issue is whether a transferee must only comply with terms which are in place at the date of transfer, or whether it must also comply with future terms agreed between the transferor and the trade union. It is thought that the outcome of the ECJ hearing will be of particular interest to private companies who bid for and are awarded contracts which were previously in the public sector, as many private sector employers do not recognise trades unions.

## Contracts

### *Mental capacity to enter into a contract*

In order to form a legally binding contract, there are essentially six required elements of which capacity is a key component. This requires an individual to be mentally capable of realising the legal effect of signing the contract. Two recent cases have highlighted the need for a party to the contract to ensure that the other party is aware of what is happening and can validly and legally consent to entering into the contract. In *Wychavon District Council v EM*, the judge found that a profoundly mentally and physically disabled individual did not have the necessary mental capacity to enter into the contract. In the second case, *Hackett v Crown Prosecution Service*, one party to the contract was deaf, dumb and barely educated. The judge held that where a signatory was suffering from a mental impairment or learning difficulty, the court would look at whether that person's decision was based on full, free and informed thought. In each case, the contract was held to be invalid and unenforceable due to lack of mental capacity of one of the parties.

## Payment Surcharges

### *OFT decides on "super-complaint"*

The Office of Fair Trading (OFT) has considered a complaint received from Which? on payment surcharges. Such surcharges are common within the passenger transport industries, covering sectors such as airlines and railways. They effectively penalise a purchaser for paying by particular methods of payment such as credit and debit



## Disciplinary Proceedings

### *The right to legal representation*

It is generally accepted that an employee is entitled to be accompanied by a third party at a disciplinary hearing. Potentially any hearing, where an employee is not allowed to be accompanied, could be deemed to be unfair procedurally and this would make any subsequent dismissal an unfair dismissal, in law. The Supreme Court, in *R (on the application of G) v Governors of X School*, has decided that the employee should be allowed to have legal representation when the outcome of any disciplinary hearing will have a substantial effect on or could profoundly damage the employee's future career. Although the Court accepted that legal representation would not have affected the final outcome in this instance, the case reiterates the need for employers to ensure that they follow recommended practices and procedures for dismissals. This is particularly important as dismissed employees can recover substantial damages where the employer has made substantive and procedural failures during the dismissal process..

card. However, the OFT found that many retailers advertise headline prices do not include a reference to the surcharge payments and the purchasers were often not made aware of those surcharges until the transaction was close to completion. The OFT found that many such practices misled customers and prevented transparency in purchases. The OFT further found that many purchasers were unable to make an informed decision due to those misleading practices. As a result of its findings, the OFT is recommending that retailers should not be allowed to charge surcharges where purchasers pay by debit card. The aim is to ensure that, in all cases, purchasers know which payment types will not attract a surcharge and this is intended to provide uniformity and consistency in all transactions.

## 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](mailto:cgerrard@ortolangroup.com)

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