

# AFC

S O L I C I T O R S

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## EMPLOYMENT LAW CHANGES



**Employment law is one of the fastest moving in the UK. From 1st February 2009, there are new compensatory rates for unfair dismissal cases.**

The new limits are as follows:-

- compensatory award: increased from £63,000 to £66,200 (the most that can be paid for unfair dismissal unless there has been discrimination)
- a 'week's pay': £330 to £350
- maximum redundancy payment: £9,900 to £10,500

If you need to make staff redundant do take legal advice first to ensure you follow the correct procedures. Consult with staff in advance where necessary and select the correct people.

Some companies offer better redundancy pay (enhanced) than is required by law. Always check employment contracts to see what is set out there for redundancy payments and also see if there are any agreements reached with trade unions which might offer higher sums than the very modest statutory redundancy payments provide. Do not dress up dismissal as redundancy if a redundancy situation does not exist.

In a recent decision, *Stringer v HMRC*, the European Court of Justice has confirmed that employees can accrue their statutory holiday entitlement throughout their sick leave and that their entitlement can be rolled over to another holiday year. They are also entitled to be paid for any unused holiday if they are dismissed. Most employers already do this but it is wise to take note of this clarification.

Please contact us for advice if you want an update or to check whether your current employment contracts remain lawful.

## BRIBERY AND CORRUPTION

In difficult economic times, people can turn to bribery and cartels to win contracts and meet targets. Corruption proliferates and scams such as Bernard Madoff's come to light.

Obviously bribery is illegal and unwise and the new Bribery Bill will make it even more risky a practice.

Bribery has been contrary to the law at least since Magna Carta declared, "We will sell to no man...either justice or right". Most people have an intuitive sense of what 'bribery' is. However, it has proved hard to define in law. The Law Commission believes the current law is out-dated and in some instances unfit for purpose.

The proposal is for a new bribery offence. This will apply to companies and also limited liability partnerships (LLPs) registered

in England and Wales. They will breach the rules where they negligently fail to prevent bribery by an employee or agent.

This shows the importance of training for staff as the company could be responsible even though it knew nothing of the practice.

This is already the case with breaches of UK and EU competition law in the Competition Act 1998 and Articles 81 and 82 of the Treaty of Rome. Under the Bribery Bill, it would be a defence to show a company had adequate procedures in place to prevent bribery offences being committed by employees.

The Law Commission has recommended that it should be possible to hold directors and senior managers liable if they consent to, or connive in, the commission of bribery offences.

Training and good written guidance and policies in this area can reduce liability. Some companies may also include a clause in their commercial contracts that those with whom they contract have similar policies in place.

A clause about bribery and corruption is very common in UK Government contracts already.

We can draft such policies for you in addition to competition law compliance programmes.

Given that the first people have now been jailed for breach of UK competition law, now would be a good time to provide some guidance to employees and revise contracts.



## CONTRACT PROTECTION IN A RECESSION

Business clients can protect their position by legal means such as requiring payment in advance. Clients have asked us if they can agree with other suppliers either to request payment in advance or limit credit periods when a mutual customer is in known difficulties.

Such collusion could amount to anti-competitive practice when done by agreement or understanding with other suppliers under the Competition Act 1998. When simply taken as unilateral action, it is lawful. Similarly, collectively agreeing to boycott a customer with competitors is illegal. The EU is currently consulting on its competition law guidelines on horizontal agreements.

Also a large number of questions from clients lately have been about currency fluctuations, pricing changes, rights to vary a price given

and the unprecedented slump in the pound. Ensure that all contracts with businesses abroad adequately reflect currency risks.

Some companies are factoring their debts and this is obviously one solution although not favoured by many and does not always give the right impression to customers about the viability of the supplier. Also, sometimes there is a customer relations problem if the factoring company then vigorously enforces debts which result in adverse publicity for the original supplier. There have been plenty of press articles recently about council tax payers losing their homes over £1000 council tax debts many of which had been factored to aggressive debt collectors.

Many companies have no written contracts at all with key suppliers and customers. Of course it is very hard to change the status quo but it may well be possible to tell a

supplier or customer that a written agreement is needed to formalise the business arrangement. A contract may also specify that a notice period of 3 months or even a year or more must be given to terminate an arrangement. Without that in place, contracts can be terminated on 'reasonable notice' under English law. That is too vague a principle under which to operate for many businesses. So if a written contract with a fixed notice period is in place, then businesses have time to find alternative customers or suppliers to plug the gap if someone terminates an arrangement.

During these difficult times, it is wise to undertake a general review within your business now, before it has financial problems, to find out which contracts are important and what needs to be in writing.

Please contact us for help and advice.

## WHOSE LAWS APPLY – ROME II REGULATION IN FORCE

**One advantage of a low pound sterling compared with other currencies is that the export market may benefit with an increase in international contracts.**

Since 11th January, all EU states (except Denmark) have to apply the so-called Rome II regulation. This deals with which laws apply in international disputes. Then new rules apply to actions which lead to damages since 19th August 2007. In most commercial contracts the agreement will state which laws apply – English, French or whatever. We can advise you on how to deal with international jurisdictional issues in commercial disputes and agreements.

Rome II applies to what is known as "choice of law in non-contractual matters" such as disputes over patents, copyright and other matters where a contract is not involved. Where there is a contract, a regulation known as Rome I (which was agreed last year) applies and states that if the contract specifies which laws usually apply that choice is respected. Do your contracts make clear which laws apply? Do they specify which courts have jurisdiction, an issue determined in the EU usually by the contract terms under the Brussels Regulation?

For companies trading with others abroad:-

- Ensure contracts are in writing and agreed before work is done.
- Deal with currency and payment issues in the contract.
- Make it clear whether English law and jurisdiction apply or not.
- State in the contract if the English language or foreign language version of the contract applies.

## NEW FREEDOM OF INFORMATION ACT GUIDANCE

The Freedom of Information Act 2000 gives individuals and companies the right to request data of all kinds from the 100,000 public sector bodies in the UK. This could be a request for details on anything from the legal advice given to the Government on which it based its decision to go to war with Iraq, to how many people have had parking fines in your road in the last year or what expenses MPs have claimed.

The Information Commissioner has issued additional new guidance under the Act. The three sets of guidance relate to when a public body may keep information confidential. "It will not be enough for the public authority to simply speculate as to why the third party's commercial interests would, or would be likely to be prejudiced; the third party where possible must be asked for their opinions," said the guidance. "If the third party does not put forward any concerns regarding any prejudice to its commercial interests then a public authority should not speculate on their behalf".

For businesses, the concern is that information in contracts with public bodies may be disclosed to competitors. The Department of Justice also has some guidance in this field which goes into a high level of detail about what information at what stages must be disclosed by public bodies, such as the range of prices tendered.

We can draft clauses for your contracts with public sector bodies requiring the buyer to notify you in advance if they propose to disclose information about you or the contract to a competitor.



## UNFAIR ADVERTISING AND COMPETITOR CONDUCT

The European Parliament has pointed out that some countries such as the UK do not give consumers enough rights under the unfair terms directive. The UK's Consumer Protection from Unfair Trading Regulations 2008 has been in force almost a year.

Although a decision last year suggested competitors might have a right to bring action where a competitor unfairly advertises in breach of the regulations, the regulations themselves indicate that instead complaints are brought to bodies such as the ASA and Trading Standards. The EU is of the view that the regulations in the UK do not give consumers effective redress as they cannot sue for damage.

In Tiscali v BT the High Court allowed Tiscali to use an alleged breach by BT of the Consumer

Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008 to show the tort of interference with its business by unlawful means arising from a letter BT sent to Tiscali customers exhorting them to change to BT broadband. Such tort would not require dishonesty to be proved unlike the traditional tort of malicious falsehood.

The decision by the judge to allow amendment of the claimant's case in these terms suggests the regulations may indeed give competitors a means to use the regulations against competitors.

In January 2009 an employee of Belkin, the US modem supplier, admitted it had offered to pay consumers who posted positive

on-line comments on Amazon.com about its products. Such action in the EU amounts to a breach to these 2008 Regulations and the EU directive on which they are based as it must be made clear if someone posting comments on-line is connected to the advertiser or paid by them or not.

A commonly asked question about the above regulations is whether they can be used 'against' competitors rather than simply found a complaint to the ASA and thereafter enforcement by criminal penalties by trading standards officers. It seems they may be useful in litigation and against competitors following the Tiscali case.

If your competitor is not competing fairly contact us for advice on what you can do. You may be able to curb their activities.

## RETENTION OF TITLE CLAUSES

Retention of title clauses enable you to recover goods if a buyer goes out of business. Many people are not aware that unless such a clause is in a contract, the ownership of goods passes to the buyer on delivery, not payment, so they will get nothing back if the buyer goes bust.

Checking that terms and conditions apply (having the term only on the invoice is too late and accepting the buyer's conditions of purchase usually means there is no RoT clause either) is an easy step to take in terms of legal due diligence in the current market. The clauses require careful drafting as they will amount to 'charge' which is unenforceable and void (as not registered at Companies House) if they extend to finished products rather than the goods supplied. It can be wise to have an 'all monies' clause and to take legal advice on what will be needed to prove ownership to a liquidator or administrator.

Follow the rules below in drafting such clauses:-

- Ensure the written terms apply and are compliant with case law on retention of title. Then, if a customer goes bust, the seller can walk into their premises and take goods back.
- Give the seller a right of entry to buyer's premises if payment is not made.
- Require the buyer to mark the goods as the property of the supplier.
- Keep full records of which goods have been paid for and which have not. Also have an "all monies clause" or be able to prove the exact goods for which no payment has been made, where some

payment has for a proportion of the goods.

- Retain title to intellectual property where this is supplied under the contract until payment is made.
- Avoid clauses which are too complex.
- Do not retain title over goods once they are mixed with other goods of the buyer or else register that provision as a registrable charge at Companies House – a precaution worth considering for larger contracts.
- Do not retain title over goods once they are irrevocably fixed to other goods as, again, a charge is inadvertently created.
- Most importantly, ensure the terms containing the RoT clause apply and that this can be proved by a paper trail to a liquidator.
- Terms on invoices are usually too late to be valid and unless purchase order terms are rejected, the supplier often finds their own terms of purchase were rejected by the buyer and do not apply
- Remember title passes under the Sale of Goods Act 1979 on delivery, not payment, so unless there is an RoT clause a supplier is simply an unsecured creditor.

We can check your retention of title clauses for you and help enforce them if a customer goes out of business.





## INTELLECTUAL CAPITAL

Do you properly exploit your intellectual property? Many companies have unused trademarks, patents, copyright and designs which they could make money from if they sold them, licensed them or otherwise exploited them through joint ventures and the like.

The Patent Office has been struggling with definitions of patents for software inventions in a series of decisions culminating in *Symbian Ltd v Comptroller General of Patents*. If you are involved in the IT area it is worth looking at whether you adequately protect your IP rights and whether your current licensing agreements need to be updated.

In the trademarks area, the World Intellectual Property Organisation recently looked at the common situation of a dealer reselling goods who used the manufacturer's trademark as a domain name. WIPO said this was lawful even if the sales were not approved by the seller, in the USA.

They looked at an earlier case called OKI and said: "The Panel in *Oki Data* concluded that the use of a manufacturer's trademark as a domain name by a dealer or reseller (an authorized dealer in that case) should be regarded as a 'bona fide offering of goods or services' if the following conditions are satisfied:

- the respondent must actually be offering the goods or services at issue;
- the respondent must use the site to sell only the trademarked goods (otherwise, there is the possibility that the respondent is using the trademark in a domain name to

bait consumers and then switch them to other goods);

- the site itself must accurately disclose the respondent's relationship with the trademark owner; and
- the respondent must not try to "corner the market" in all relevant domain names, thus depriving the trademark owner of reflecting its own mark in a domain name."

"The Complainants argue that the *Oki Data* rationale should not apply to an unauthorized reseller," said the ruling.

"The Panel concludes, however, that the issues of legitimate reseller interests in accurately describing a lawful business, on the one hand, and of potential abuses of trademark, on the other, are similar whether or not there is a contractual relationship between the parties."

It concluded that "the *Oki Data* criteria are appropriate here to assess the rights or legitimate interests of the unauthorized reseller for purposes of this element of the Policy."

The panel deciding the matter said that *Nicoll* had "a legitimate interest in making nominative use of the ITT mark consistent with the *Oki Data* requirements; consequently this does not reflect bad faith." ITT's complaint was dismissed.

If you are a trademark owner and need advice on the use of trademarks as domain names, or on products, plus how you can lawfully describe products on website and marketing materials, please contact us for further information.

## TAX ISSUES AND CHARITIES

**The European Court of Justice has ruled that gifts to charities abroad are tax deductible.**

Hein Persche made a gift of 18,180 euros to a Portuguese charity. Critics have argued that as the definition of what is charitable differs throughout the EU states, such donations should not be classed as tax deductible in a different member state but the ECJ had ruled that they should.

The principle arises from the 'free movement of capital' rules which apply in the EU and ensure, in addition, that there are no exchange control limitations within the EU either. The court rejected arguments presented by five governments, including Britain, that the ruling would be unworkable in practice because the definition of charitable status varied between member states. They said although this is up to each state to determine, the payments should still be tax deductible. However, tax authorities in the donor's country would be entitled to check that the foreign charity met the prerequisites applicable to charities in their country. Where a body was recognised as a charity at home and was likely to be recognised as having charitable status in another member state, "the authorities of that latter member state cannot deny that body the right to equal treatment solely on the ground that it is not established in its territory".

Meanwhile, the Charities Act 2006 continues to be implemented. From 1 October 2009, exempt charities that are not subject to any other principal regulator and have an annual income over £100,000, will need to apply to the Charities Commission for registration. If you need any advice on tax or charity law, please contact us for a full update on recent changes.

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