SIMON BURN
SOLICITORS

Spring 2022

Commercial Law UPDATE

Availability of Furlough Scheme Rendered Redundancy Unreasonable

A great many businesses were plunged into grave financial difficulties by the COVID-19 pandemic, but was it reasonable to make employees redundant at a time when the furlough scheme provided a less draconian option? An Employment Tribunal (ET) considered that issue in a ground-breaking case.

A woman who was employed as a practice manager by a consultant surgeon was dismissed after the pandemic caused a downturn in the practice's financial position. After she launched proceedings, an ET found that the surgeon had decided to cut staffing costs and that the reason for her dismissal was redundancy.

However, the ET ruled that the surgeon's failure to turn his mind to the impact of the flexible furlough scheme then in operation rendered her dismissal unfair. If she had been placed on furlough, the surgeon would have been able to bring her back to work part time whilst still having the right to claim government support providing 80 per cent of her pay for the hours she did not work.

Had he considered the furlough scheme and applied it to the woman, it was more likely than not

that she would have worked part time and resumed her full-time position when the pandemic receded and the practice's income picked up. His decision to make her redundant was, in those circumstances, unreasonable. If not agreed, the amount of her compensation would be decided at a further hearing.

Our expert lawyers have experience in handling all types of employment law issues.

This is What Can Happen If You Fail to Keep Proper Tax Records

Keeping proper tax records may be time consuming and laborious, but a failure to do so can have disastrous consequences in the event of a visit by an officer of HM Revenue and Customs (HMRC). A company found that out to its cost after failing to convince the First-tier Tribunal (FTT) that many of its records had been lost in a flood.

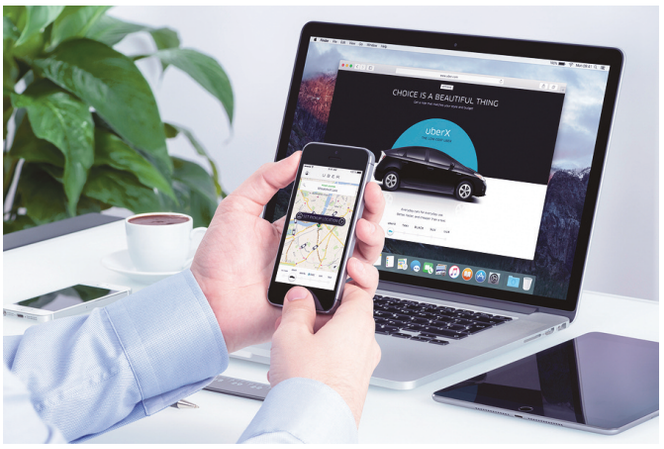
On making a compliance visit to the company's offices, an HMRC officer examined documents relating to its VAT affairs during a single quarter. She found that almost 30 per cent of them were missing or had been replaced with a different purchase invoice or a delivery note. When she asked to see documents relating to the preceding four years, she was told that they had been lost in a flood.

In the absence of documents to work from, the officer used her best judgment to raise an assessment against the company for £190,987 in VAT. She also imposed a £5,405 penalty on the company after forming the view that records relating to the single quarter had been deliberately tampered with.

Dismissing the company's challenge to those bills, the FTT described its managing director as an entirely unreliable witness. It found as a fact that he was responsible for the gaps in the records examined by the officer and that it was he who had tampered with them. The FTT also found as a fact that none of the relevant documents had been destroyed in a flood.

If you are embroiled in a legal dispute with the tax authorities, our specialist lawyers can advise you.

Uber and Other App-Based Cab Operators Must Contract With Passengers



An important feature of the business models of Uber and many other app-based cab operators is the contention that they have no direct contractual relationship with their passengers. In a landmark case, however, the High Court has ruled that, at least in London, that approach does not comply with the law.

Uber London Limited and another cab company sought a judicial declaration that an operator licensed under the Private Hire Vehicles (London) Act 1998 who accepts a booking from a passenger is not required to enter as principal into a contractual obligation with the passenger to provide the requested journey.

Rejecting that assertion, however, the Court found that the Act contemplates and requires that the acceptance of a booking by an operator will create a contract by which the operator takes on an obligation, as principal, to provide a vehicle and driver to convey the passenger to the agreed destination.

Noting the potential vulnerability of passengers using smartphone apps to call cabs late at night, the Court observed that, if a passenger's only contractual relationship is with a driver he or she has never heard of and who is unlikely to be worth claiming against, any such relationship is likely to be practically worthless.

A direct contractual relationship between a passenger and an operator was likely to serve as a powerful incentive to the latter to ensure the reliability of its drivers. If a driver failed to turn up, or something went wrong during a journey, passengers would have a legal remedy against operators that was likely to be worthwhile pursuing.

In the light of its decision that, in order to operate lawfully, an operator must take on a contractual obligation to passengers, the Court noted that Transport for London would need to reconsider its current licensing policy. Both Uber London and the other cab company had indicated that they would amend the basis on which they provide their services given the Court's decision.

Our expert lawyers can advise you on any contractual matter.

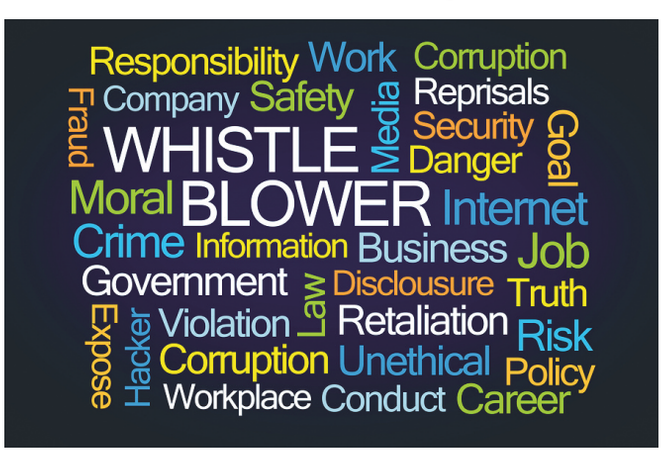
Forklift Truck Driver Sacked for Health and Safety Whistleblowing

Workplace whistleblowers operate very much in the public interest but, all too often, they are punished rather than praised for their activities. The point was made by the case of a veteran forklift truck driver who was summarily dismissed after repeatedly alerting his employer to a serious health and safety risk.

After witnessing an incident in which a pallet weighing up to 500 kg fell from a height of nine metres, the driver three times expressed concern to his employer that pallets were being overloaded. On the final occasion, he used his mobile phone to take photos of one such pallet and showed them to his supervisor.

He was first suspended and then dismissed on grounds that he had breached a strict company policy that banned employees from making mobile phone calls or sending texts on the shop floor. He launched Employment Tribunal (ET) proceedings on the basis that he had been subjected to detriment for making protected disclosures – whistleblowing – and that his dismissal was therefore automatically unfair.

In upholding his complaint, the ET found that his whistleblowing was the real and principal reason for his dismissal. Acting in the public interest, he reasonably



believed that the information he provided to the employer revealed a health and safety risk. Having taken his mobile phone briefly from his locker in order to take the photos, he had neither spoken to anyone on the device nor sent a text. By doing so, he used reasonable means to protect himself and fellow workers.

The ET also found that his dismissal amounted to a breach of contract and that the employer had failed in its obligation to pay him whilst he was suspended. If not agreed, the amount of his compensation would be assessed at a further hearing.

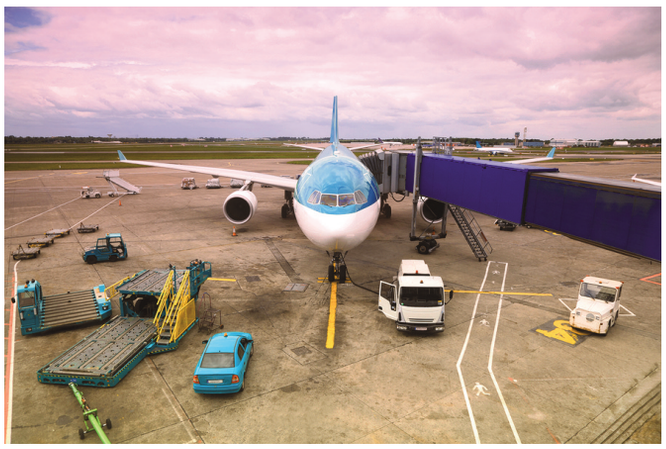
Risk of Industrial Action is a Fact of Business Life – Court of Appeal Ruling

Strike action that grounded an airline's planes did not amount to an 'extraordinary circumstance' that justified passengers being denied compensation after their flights were cancelled. In reaching that conclusion, the Court of Appeal observed that industrial action is a risk inherent in running a business.

After voting in favour of industrial action, the airline's pilots went on strike. The action followed a breakdown in negotiations between the carrier and the pilots' trade union. Mediation eventually led to resolution of the dispute, but not before numerous flights had to be cancelled. Acting in the interests of disrupted passengers, the Civil Aviation Authority launched proceedings against the airline.

Following a hearing, a judge issued an enforcement order against the airline under the Enterprise Act 2002. The order required the airline to compensate passengers in respect of cancelled flights in accordance with Regulation (EC) No 261/2004. The judge rejected the airline's argument that it should not bear financial responsibility for the cancellations because the strike represented an 'extraordinary circumstance' within the meaning of the Regulation.

Dismissing the airline's challenge to that outcome, the Court observed that external events that may be viewed as an extraordinary circumstance include a bird strike on an aircraft, a sudden mechanical fault for which an airline is not responsible or a flight cancellation arising from the behaviour of an unruly passenger. The strike did not, however, fall into that category.



The Court noted that employers often face disagreements or conflicts with all or part of their workforce. The risk of strike action did not arise from an external source and was inherent in the airline's normal business activities. The question of where fault lay for the breakdown of negotiations was not relevant, nor did it matter that the union was independent and had its own structure, external of the airline.

The Court acknowledged that, in certain circumstances, strikes are capable of being an extraordinary circumstance. That might, for example, be the case where a strike arose from demands that only a public authority could satisfy or where a sympathy strike was called for reasons wholly unrelated to an employer's activities. However, no such external factors were in play on the facts of the case.

When it Comes to Corporate Takeovers, Judges Have Shareholders' Backs

Some corporate takeovers are controversial while others are not, but, either way, judges perform a vital role in ensuring that every shareholder gets a fair deal. A proposed change in ownership of a multinational consultancy company provided a perfect example of rigorous judicial scrutiny in operation.

The company had 163 offices in 42 countries and was valued on an enterprise basis at over $2.8 billion. It had received a takeover bid from a private limited company that was established for the purpose of the acquisition. The latter was funded by a global investment firm that was listed on the New York Stock Exchange and had approximately $367 billion in assets under management.

The company's board proposed a scheme of arrangement that would give effect to the takeover. In approving the scheme under Section 899 of the Companies Act 2006, the High Court noted that the board had unanimously recommended it to shareholders. In accordance with a court order, well-attended meetings had been held of all nine classes of the company's shareholders.

Those meetings resulted in unanimous votes in favour of the scheme, under which shareholders would, at their election,

receive cash, shares in the purchaser's parent company or a combination of the two. Careful steps had been taken to keep all shareholders fully informed throughout the process.

The Court was satisfied that all statutory safeguards had been complied with in full, that shareholders were fairly represented at the meetings and that a minority of their number had not been coerced by the majority. There was no blot on the scheme and, overall, it was one that was capable of being reasonably approved by all shareholder classes.

For advice on any aspect of company law, contact us.

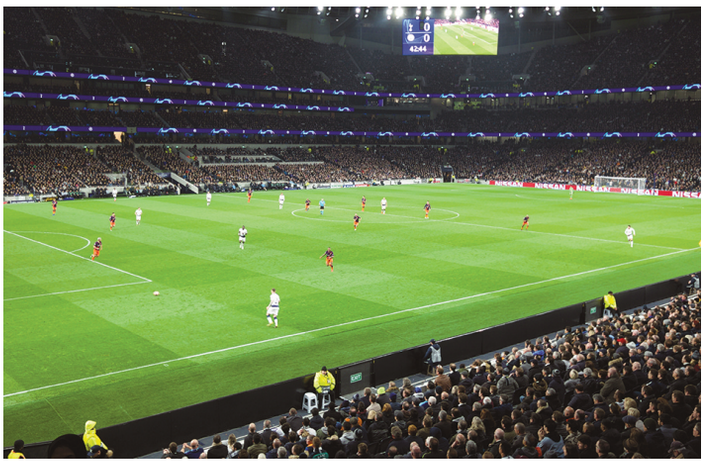
COVID-19 – Premier League Triumphs in $200 Million TV Rights Dispute

The COVID-19 pandemic caused grave disruption to the 2019/2020 Premier League season – but it did not fundamentally change the format of the competition. That was the conclusion the High Court reached in the context of a $200 million contract dispute concerning overseas television rights.

By two contracts, covering three football seasons, a Hong Kong company agreed to pay over $700 million for the right to broadcast Premier League football matches and highlights in China. In withholding instalments totalling over $200 million due under the contracts, the company argued that, due to the pandemic, it had not got what it bargained for. The Premier League terminated the contracts and launched proceedings to recover the withheld sums.

Ruling on the matter, the Court noted that the relevant Premier League season was temporarily suspended on 13 March 2020, shortly before the first lockdown. When the season resumed in June 2020, it was in very abnormal conditions. Amongst other things, matches were played in stadia devoid of fans. More than 90 fixtures had to be compressed into a period of under five weeks; kick-off times were modified and a greater percentage of matches were played mid-week.

In granting the Premier League summary judgment on its claim, however, the Court found that none of those circumstances fundamentally changed the format of the competition so as to excuse the company from paying the full contract sums. The season was completed; fixtures were played home and away; points were awarded in the ordinary manner and a league champion was duly declared.



From the company's point of view, the conditions under which the season resumed were very different and much less commercially advantageous than it had hoped. However, the Court noted that the English law of contract does not require or expect contracts to be renegotiated or rewritten simply because events turn out differently than expected. Such an approach would lead to confusion, indeed chaos.

In ordering the company to pay an aggregate sum of $212.973 million to the Premier League, plus interest, the Court found that none of its defences to the claim stood a real prospect of success. Given its findings, the Court also ruled that the Premier League had validly terminated the contracts.

Expert legal advice is essential in all litigation. Preparing the best possible evidential support is vital, as is compliance with the rules of litigation practice.

Get in touch with us if you would like advice on any of the issues raised in this bulletin or on any other commercial law matter.

SIMON BURN SOLICITORS

51 PROMENADE, CHELTENHAM GL50 1PJ
TELEPHONE: +44 (0)1242 228 444 FAX +44 (0)1242 516 888 DX 7404 CHELTENHAM
LEWIS BUILDING, 35 BULL STREET, BIRMINGHAM B4 6EQ
TELEPHONE: +44 (0)121 371 0301 FAX +44 (0)121 371 0302 E-MAIL: SIMON.BURN@SIMONBURN.COM