SIMON BURN
SOLICITORS

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Commercial Law UPDATE

# Employer Pays for Bypassing Trade Union – Supreme Court Ruling

Employers cannot with impunity make direct offers to trade union members with the aim of pre-empting the collective bargaining process. The Supreme Court made that point in confirming awards of compensation to 57 workers whose employer bypassed their trade union in search of a pay deal.

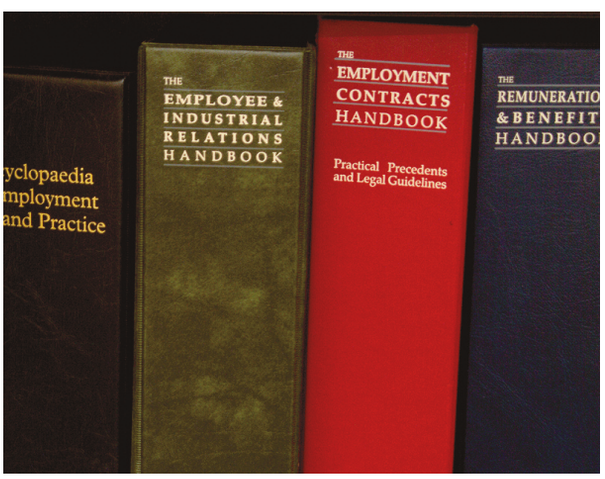
The manual and shop floor workers were all members of a trade union. Following a ballot of workers, their employer recognised the union on a non-legally binding basis and they commenced formal annual pay negotiations. A pay offer was made but, after a further ballot, it was rejected.

The employer's response was to make pay offers directly to workers, thus bypassing the union. Workers were warned that they might be given notice if no agreement were reached and 97 per cent of them accepted direct offers. The employer then reached a collective agreement with the union on similar terms to the direct offers.

The workers involved in the case complained to an Employment Tribunal (ET) that the direct offers contravened Section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992. Their claims were upheld and they were each awarded £3,800 in respect of each direct offer that had been made to them. The awards were confirmed by the Employment Appeal Tribunal but the employer later appealed successfully to the Court of Appeal.

Ruling on the workers' challenge to that outcome, the Supreme Court noted that, in certain circumstances, Section 145B confers on workers who are members of an independent trade union which is recognised, or seeking to be recognised, a right not to have offers made to them by their employers.

The provision takes effect where the acceptance of an offer by a group of workers would have the prohibited result that terms of their employment would not, or would no longer be, determined by collective agreement with a union. Employers bear the burden of proving that their sole or main purpose in making such offers is not to achieve that prohibited result.




In upholding the appeal, the Court noted that what Section 145B prohibits is an offer which, if accepted by all the workers to whom it is made, would have a particular result. It is the causal link between the presumed offer and the prohibited result that matters, rather than the particular content of the offer. There must at least be a real possibility that, had an offer not been made and accepted, workers' terms of employment would have been set by collective agreement.

On the basis of that interpretation, the Court ruled that there is nothing to prevent an employer making an offer directly to its workers in a matter which falls within the scope of a collective bargaining agreement provided the employer has first followed, and exhausted, the agreed collective bargaining procedure.

What the particular employer had done, but could not do with impunity, was to make a direct offer to its workers, including union members, before the collective bargaining process that it had agreed, albeit in honour only, to follow had been exhausted. The workers' compensation awards were restored.

**Legal advice is essential if you want to avoid falling foul of trade union legislation. Contact us for guidance.**

## Google Sees Off £3 Billion Data Protection Claim – Supreme Court Ruling


Digital technology and the onset of the internet age has greatly increased the risk of mass harm arising from wrongful processing of personal data. In a landmark case, however, Google has seen off a £3 billion claim lodged on behalf of four million people who were alleged to be victims of such unlawful conduct.

The claim was commenced by an individual, Richard Lloyd, who sought to represent the interests of a class encompassing Apple iPhone users. He alleged that, for several months in 2011 and 2012, Google secretly tracked the internet activity of four million iPhone users in England and Wales.

The company was claimed to have unlawfully used personal data thereby gathered for the commercial purpose of enabling advertisers to target adverts at users based on their browsing history. Mr Lloyd argued that a uniform sum in damages – £750 was suggested – should be awarded to each affected user. Given the number of potential claimants, the claim was valued at around £3 billion.

On the basis that all members of the class had the same interest in the claim, Mr Lloyd contended that there was no need to prove either that each individual's data had been unlawfully processed or that they had suffered damage as a result. His case was blocked by a judge who refused permission for him to serve the proceedings on Google at its Delaware headquarters. That decision was, however, subsequently reversed by the Court of Appeal.

Ruling on Google's challenge to that outcome, the Supreme Court noted that, save in the field of competition law, there is no legislative basis for representative class actions of the kind proposed. However, the longstanding practice of English judges has been to permit such actions to proceed where members of a relevant class have the same interest in a claim.

A two-stage process could have been followed whereby a value would have been placed on each individual's claim in the event that Google was found liable. That course had, however, not been taken, presumably because the litigation would not be economic if it were necessary to prove loss on an individual basis. Mr Lloyd asserted that all members of the class had suffered non-trivial loss of control over their personal data and that uniform damages could be awarded without any requirement to prove facts particular to individual cases.

In unanimously upholding Google's appeal, the Court found that the representative action could not succeed. In order to recover compensation, it was on any view necessary to prove that unlawful processing of personal data relating to a given individual actually occurred. It was also necessary to show that each individual had suffered damage, such as financial loss or mental distress, arising from the unlawful processing of their personal data in contravention of the Data Protection Act 1998.

The attempt to recover damages without proving either what, if any, unlawful processing of personal data occurred in the case of any individual or that the individual suffered material damage or mental distress as a result of such unlawful processing was unsustainable.

## Renewal of Commercial Leases – Intention is More than Mere Contemplation

The legal right that many commercial tenants enjoy to have their leases renewed can be overcome if their landlords 'intend' to occupy the premises for their own business or residential purposes. However, as a High Court ruling made clear, the concept of intention involves more than mere tentative contemplation.

The case concerned the tenant of a restaurant whose lease was protected under the Landlord and Tenant Act 1954. The landlord served notice terminating the lease and opposed the grant of a new tenancy on the basis that he intended to open his own hospitality venue on the premises. Following a preliminary hearing, however, a judge found that he had failed to establish such an intention.

In rejecting the landlord's appeal against that ruling, the Court noted that the case hinged on Section 30(1)(g) of the Act, which excuses landlords from the usual obligation to renew protected commercial leases if they intend to occupy relevant premises, or part of them, as their residence or for the purpose of themselves carrying on a business.

The Court noted that, for a project to be 'intended', it must move out of the realm of tentative, provisional or exploratory contemplation into the valley of decision. The judge made no error of law and, in considering the landlord's state of mind, was entitled to find on the evidence that he lacked the firm and settled intention required by Section 30(1)(g).

**We can advise you on any matters relating to commercial property law. Contact us for guidance.**

## Tax Dodgers Beware – You May Be Sacrificing Your Employment Rights

Tax evaders rarely understand the potential consequences of their wrongdoing. That was certainly so in the case of two cab drivers who underdeclared their earnings to the tax authorities and, in doing so, came perilously close to sacrificing any claim they might have to employment rights.

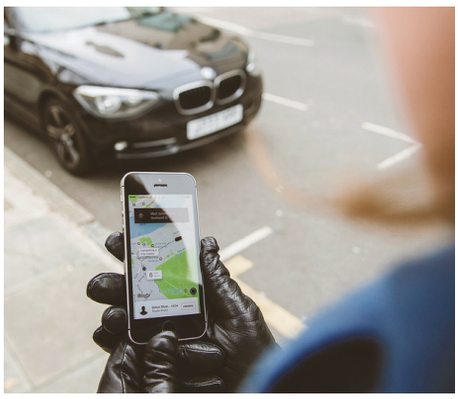
The drivers launched Employment Tribunal (ET) proceedings against a private hire company, complaining that they had not received holiday pay or work breaks. The company asserted, amongst other things, that their claims should be dismissed because they were founded on the illegal performance of their contracts. That argument was considered at a preliminary hearing.

There was no dispute that the drivers had underdeclared their earnings from the company. The company contended that it was an express term of their contracts that they would comply with their tax obligations. It was crucial to the company's business model that drivers were honest in conducting their tax affairs. Permitting them to proceed with their claims would offend against public policy and undermine the integrity of the legal system.

For their part, the drivers asserted that there was no illegality in the performance of their contracts. Their work for the company was legal and they were properly and lawfully paid for their work. Their failure to accurately declare their earnings had nothing to do with the overall purpose of their contracts. They had been fined by HM Revenue and Customs and it would be disproportionate to disqualify them from enforcing their employment rights.

Ruling on the matter, the ET expressed no sympathy for the drivers, who had underdeclared their income in a deplorable manner. Given the purpose of their relationship with the company, however, their claims were not founded on illegal acts. The rights to holiday pay and rest breaks were health and safety matters that pertained to the wellbeing of workers generally.

Rejecting the company's illegality defence, the ET found that ensuring the health and safety of workers is an overriding consideration, even if they may be involved in tax evasion. To rule



otherwise would be to suggest that all workers must submit their tax returns for scrutiny before being permitted to enforce their employment rights. That, the ET noted, would amount to overkill.

The ET emphasised that permitting the drivers to proceed with their claims was not an endorsement of their conduct. The ruling opened the way for a full hearing of their cases, in which the central issue would be whether they enjoyed the protected status of 'workers' under the Working Time Regulations 1998 and Section 233(b) of the Employment Rights Act 1996.

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

## Obey Court Orders Or Else! Businessman Receives Maximum Sentence

Judges mean business and those who defy their orders face severe punishment, up to and including loss of liberty. The Court of Appeal resoundingly made that point in confirming a prison sentence imposed on a businessman whose acts of contempt were perhaps the most serious ever to come before an English court.

A commercial dispute reached its culmination in 2014 when the businessman was ordered to pay a shipping company over $37 million. The judgment debt remained largely unsatisfied and, with interest, it had since ballooned to over $70 million. The company's attempts at enforcing payment had been repeatedly frustrated by the businessman's flagrant breaches of numerous court orders.

Over a period of nine years, he had presented false affidavits and consistently failed to fully disclose his assets. He failed to provide access to email and social media accounts, did not comply with a search order and took steps to dissipate assets. Despite being jailed for contempt of court on no fewer than three occasions, his determined disobedience had continued unabated.

His latest sentence of two years' imprisonment – the maximum term available – was imposed after he admitted 20 acts of contempt. He challenged that punishment on the basis that it was manifestly excessive and plainly wrong in principle, in that his mitigation had not been taken into account.

Rejecting his appeal, however, the Court found that there was no material mitigation available to him. His admissions were made at a late stage

and the judge who jailed him was entitled to take the view that his apologies amounted to meaningless lip service. The sentence accurately reflected the gravity of his conduct.

**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.**

# High Court Exonerates Care Homes Provider Accused of Exploiting Clients

It is important not to under-rate the good sense of the average consumer. The High Court resoundingly made that point in exonerating a care homes provider that was accused by the Competition and Markets Authority (CMA) of levying unfair and exploitative administration fees on its clients.

The fees were in most cases equivalent to the cost of two weeks' accommodation in a care home. They were charged to self-funded residents on admission to a home and were said by the provider to fairly reflect the costs involved in the admissions process. Following an investigation, however, the CMA launched proceedings.

The CMA said that the administration fees were unfair, misleading and exploitative. It alleged breaches of the Unfair Terms in Consumer Contracts Regulations 1999, the Consumer Rights Act 2015 and the Consumer Protection from Unfair Trading Regulations 2008. The CMA argued that consumers had suffered loss as a result of the unfair fees and that the provider should be ordered to repay administration fees it had received over a period of almost three years.

Ruling on the matter, the Court recognised that choosing the right care home for an elderly or disabled loved one can be a difficult and stressful task. It found, however, that average consumers could be expected to make such choices after careful consideration. The degree of stress involved was not so great as to impair the objectivity and rationality of an average consumer's decision-making.

Dismissing the CMA's case, the Court found no reason of principle why the provider should not charge prospective residents or their relatives separate fees in respect of the significant cost of providing pre-admission material and services. The fees did not cause a significant imbalance in the contractual relationship and the provider had a legitimate interest in imposing them.

The Court noted that the majority of residents paid the fees without demur and that there were very few complaints about them. Average consumers would have understood pricing information they were given and the evidence did not suggest that they would have viewed the fees as exorbitant or unreasonable. They would have readily understood that,

for simplicity's sake, the fees were set on a standard basis and might be more or less than the specific costs of admitting an individual resident.

There was no basis on which the provider could be described as having aggressively exploited a position of power over consumers. It was logical and reasonable to discuss the administration fees once a prospective client had visited a home and confirmed his or her interest. Given that they represented only a very small proportion of the total fees charged to a typical resident, their existence was in any event unlikely to have made any material difference to an average consumer's transactional decision-making.

**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.**

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