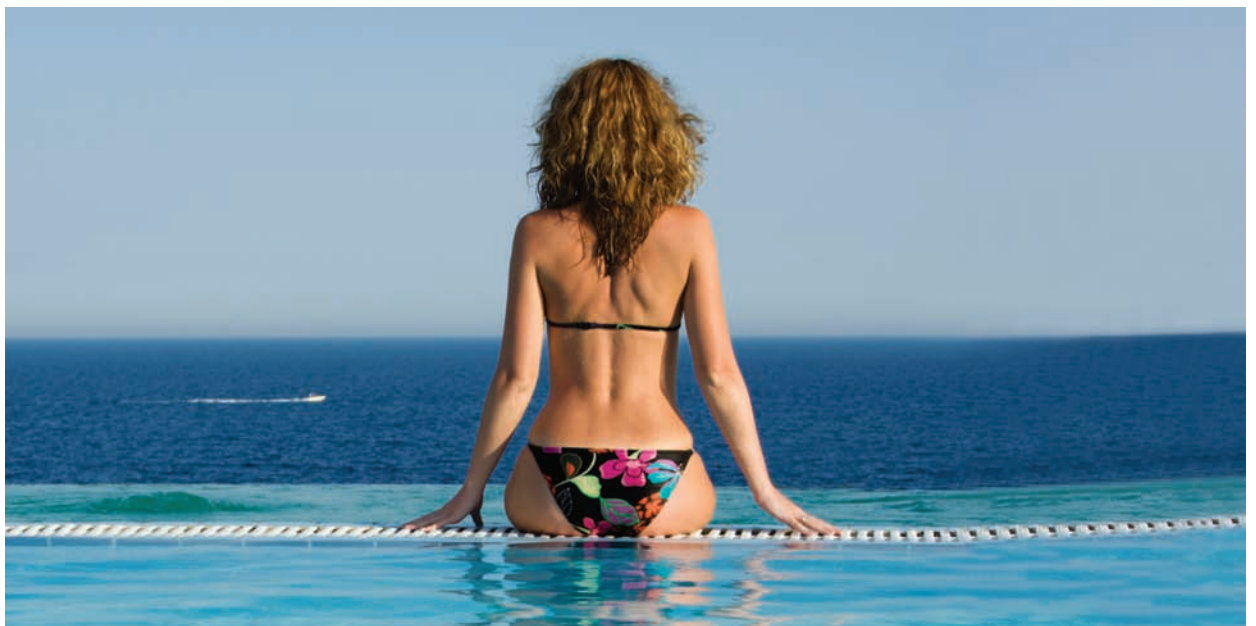


Business News

The newsletter for Business & Commercial Clients of **hodgehalsall** Spring 2010 Issue no.5

Worried about your image?



"Image Rights" consist of an individual's proprietary rights to prevent unauthorised use of their name, likeness, or other characteristics such as a signature or nickname. They are most commonly associated with footballers and other high profile sportsmen whose image is a financial asset which is protected by litigation where necessary. However, similar rights apply in less

dramatic circumstances highlighted by a recent decision of the Advertising Standards Authority who upheld a complaint from a security guard about the unauthorized use of his image. Photographs of members of staff are often used in brochures and on websites of businesses large and small. The security guard in question complained that his image had been used by the advertiser without

consent. The advertiser alleged that consent had been given verbally but the ASA decided that written consent should have been obtained before the image was used. Businesses should therefore ensure that they have the written consent of employees and others before using an image in this way in an advert, on a website or in some other medium. Mere verbal consent will not suffice.

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Welcome to Hodge Halsall's Newsletter For Business and Commercial Clients

This Newsletter is designed to summarize various areas of law that may impact upon your business. It is a periodic publication of Hodge Halsall LLP and is intended for legal guidance only. It is not to be construed as a substitute for legal advice. For advice specific to your circumstances please contact your Hodge Halsall representative.

We are interested in your opinion. If you have any suggestions about how we can improve Business News or if you would like us to cover a specific topic please contact: Derek Alman at derekalman@hhlegal.co.uk or call 01704 531991.

Fire & Ice - an employer's nightmare



Just as businesses were recovering from the worst winter for 30 years, and the disruption the weather caused to employees travel-to-work arrangements, a volcano erupts in Iceland and leaves thousands of workers stranded abroad.

This may be inconvenient for the employee but it is potentially disastrous for businesses already having to cope with the recession and economic downturn. Do businesses have to pay employees who, through no fault of their own, are unable to attend work?

The rather confusing answer is no and yes. The basic principle is that an employee is not entitled to be paid if they have not attended work and have not performed their duties in accordance with their contract of employment. However, any deduction (without consent) by the employer of wages due to non-

attendance because of adverse weather or travel delays could be classed as "unauthorised". This may result in a claim by the employee to an employment tribunal.

Before taking any action employers should consider:-

- What is in the contract of employment and/or workplace policy documents? Is there provision for a deduction from wages in specified circumstances?
- What action has the employer taken in similar circumstances previously? Consistency of approach is all important
- Is the absence genuine? Employers can ask to see travel documents if they consider an employee may be trying to gain an advantage
- What efforts has the employee made to attend work? Staff should make all reasonable efforts to make the journey to work but

employers must be careful not to force employees to travel when doing so is obviously dangerous

- Could the employee work from home/abroad? This may be possible if the employee is stuck at home because of the snow – it is unlikely if they are stranded at an airport.

Given the almost unprecedented problems faced by staff over the past few months employers should consider introducing policies to cover such circumstances. The most likely option is to require employees to take time from their annual leave entitlement. This is more likely to be favourable to staff than a deduction from wages but employers may wish to offer employees the opportunity to choose the option they prefer. For shorter periods of absence employers may consider staff making the time-up.

Before introducing any new workplace policies employers should take appropriate advice. Hodge Halsall can offer specialist advice on all employment matters including the writing of contracts of employment and workplace policies. Please contact Mark Robinson (markrobinson@hhlegal.co.uk) on 01704 531991.

Contract negotiations and drafting

The recent Supreme Court decision in *RTS Flexible Systems Limited v Molkerei Alois Muller* provides a reminder for businesses of the need to exercise caution during contractual negotiations. Muller began to negotiate with RTS for the supply and installation of machinery at one of Muller's factories. RTS provided a quotation which referred to its standard terms and conditions and was later awarded the contract. RTS began work on the project whilst the formal terms of the contract were still being negotiated. When a final contract was drafted it included a

term that the contract would "not become effective until each party has executed a counterpart and exchanged it with the other". Because of the rush to get the work done this never happened. When a dispute arose and proceedings were issued the Supreme Court found that, although the parties never signed the draft contract, the agreement had come into effect and overturned decisions to the contrary in the lower courts. The Court made the observation that the fact there had been different decisions in the courts below demonstrated the

problems of beginning work without agreeing the precise basis on which it was to be done and the uncertainty this created. The Court stated that "the moral of the story is to agree first and start work later".

The decision demonstrates that contractual negotiations should not be allowed to drift without reaching a firm conclusion. Businesses should ensure that they properly document any rights and obligations during the period when contractual terms are being debated if work is allowed to start before a signed formal contract is in place.



Protection for Philosophical Beliefs

A recent decision of the Employment Appeal Tribunal (EAT) in *Grainger v Nicholson* [2009] has been described as potentially opening the floodgates for claims relating to philosophical beliefs.

Tim Nicholson, a surveyor, was dismissed from his position as head of sustainability with his employer stating he had been made redundant for operational reasons. Mr Nicholson claimed he had been unfairly dismissed because of his strongly held views on climate change which amounted to philosophical beliefs under the Employment Equality (Religion and Belief) Regulations 2003.

Mr Justice Burton said that "the belief asserted by the respondent in this case, by reference to alleged philosophical belief in anthropogenic climate change, if established, is likely to be characterised as a political

belief." He also held that whilst support of a political party might not meet the description of a philosophical belief, this did not mean that belief in a political philosophy or doctrine did not qualify and ruled that "a belief in man-made climate change, and the alleged resulting moral imperatives, is capable, if genuinely held" of being a philosophical belief under the regulations.

The ruling has raised concerns amongst employment lawyers of how employees with extremist views may use this ruling to their advantage. It has been recommended that employers should tread carefully when dealing with employees with what might be considered strong philosophical views at least until the ruling is clarified either in the higher Courts or by further legislation.

The EAT set out criteria which must

be met if a belief is to be classed as a philosophical belief :-

- the belief must be genuinely held
- it must be a belief and not an opinion or viewpoint based on the present state of information available
- it must concern a "weighty and substantial" aspect of human life and behaviour
- it must attain a certain level of "cogency, seriousness, cohesion and importance", and
- it must be worthy of respect in a democratic country, and not be incompatible with human dignity and the fundamental rights of others.

Hodge Halsall is able to provide assistance to employers on equality legislation and in all areas of employment law. Please contact Judith Bond at our Southport office on judithbond@hhlegal.co.uk or 01704 531991.



Fit notes replace sick notes

With effect from 6th April 2010 a Statement of Fitness for Work (fit note) replaces the old "sick note" having been designed to provide more useful information on how an employee's medical condition affects what they do and how he/she might be able to return to work. The fit note will either state that an employee is not fit for work or that they might be fit for work under certain circumstances. The doctor will be able to suggest changes that would assist a return to work. The general purpose of the fit note remains as evidence that an employee is unable to work due to injury or illness and normally will not

be required to be produced until after the seventh calendar day of sickness. Present arrangements for statutory sick pay and occupational sick pay will not change. The main adjustments are :-

- the form has two options. Firstly, that the patient is "not fit for work" or "may be fit for work taking account of the following advice".
- there are four alternatives listed on the fit note for the GP to tick which are :-
 - i) a phased return to work
 - ii) altered hours
 - iii) amended duties
 - iv) work place adaptations
- a space is provided for the doctor

to give more information on the medical condition and how it may affect what the patient does.

There is no option for the doctor to say that a person is "fit for work" and at that stage the procedure simply provides for no new fit note to be issued.

As the emphasis behind fit notes appears to be to get employees back to work sooner by allowing a doctor to suggest what might be done to achieve that aim the system would seem likely to be of far more practical benefit to employers than the previous sick note.



The Equality Act 2010 - What happens post election?

Pre-Election on 6th May 2010 the then Labour Government had provided that the bulk of the provisions of the 2010 Equality Act were to be brought into effect in October 2010. However, this timetable was planned by the previous Labour Government and may not be followed by the new Coalition.

The Equality Act has two main aims:

- to harmonise discrimination law, and
- to strengthen the law to promote

progress on equality

Discrimination law is currently found in various legislation from the Equal Pay Act 1970 to the Equality Act (Sexual Orientation) Regulations 2007. The Equality Act 2010 brings all previous legislation together in one place, and includes a number of new provisions including the extension of the age discrimination legislation to the provision of goods and services and the

extension of the obligations of public bodies to promote equality of opportunity.

Both the Conservatives and LibDems had promised to support the Act pre-election but the Conservatives had said they may not introduce all the measures proposed. There is also likely to be slippage on the timescale originally envisaged by the previous Labour Government.

Commercial Property Warnings

4 Regulations to Remember

Owning or occupying commercial property demands a knowledge of various legal obligations and responsibilities that can carry significant penalties if not complied with. Amongst the more important obligations are :-

Fire

The Fire Authority is responsible for enforcement of the regulations under the Regulatory Reform (Fire Safety) Order 2005 (FSO) and may serve improvement, alteration and prohibition notices.

The FSO applies to all non-domestic premises in England and Wales and provides that a responsible person must undertake a fire safety risk assessment and implement and maintain a fire management plan. Those to whom the law applies include :-

- anyone responsible for business premises
- an employer or self employed person with business premises
- anyone responsible for part of a dwelling where that part is solely used for business purposes
- a contractor with a degree of control over any premises

The risk assessment must assess the risk, including necessary remedial work, not merely for the workforce but any relevant persons, including visitors and neighbouring land owners, who may be affected. The risk assessment is personal to the responsible person and criminal liability cannot be delegated.

The obligations extend far beyond any previous requirement for a Fire Certificate

and are not dependent on the size of the enterprise or number of staff. Furthermore, the common parts of blocks of flats are defined as non-domestic premises.

Smoking

Premises used as a place of work by one or more people (even if they do not work there) at the same time or only intermittently or which are open to members of the public and in either case are enclosed or substantially enclosed are subject to the Smoke-Free (Premises and Enforcement) Regulations 2006. Businesses should display "no smoking" signs in all premises and within company vehicles and must take reasonable steps to ensure that all staff, customers, members, guests and visitors are fully aware that both premises and company vehicles are legally required to be smoke free and that enforcement action may be taken should the Regulations not be complied with.

Energy Performance Certificates (EPC)

Subject to certain exceptions when a building is to be sold or rented out (including the assignment of an existing lease) the seller or landlord must provide any prospective buyer or tenant with a valid EPC and a recommendation report, free of charge, at the earliest opportunity [Energy Performance of Buildings (Certificate and Inspections) (England & Wales) Regulations 2007].

It is sufficient for the seller or landlord to provide a copy of a valid EPC and an

electronic copy is permissible if the recipient consents.

Hazardous Waste

Hazardous Waste is defined widely and includes much IT equipment, as well as batteries, fridges and fluorescent tubes. Under The Hazardous Waste (England & Wales) Regulations 2005 it is an offence to remove hazardous waste from premises unless the Environment Agency is notified – or the premises are exempt. Exempt properties include shops, offices and domestic premises but only if they produce less than 200kg of hazardous waste in any twelve month period. Extensive record keeping is required whether the property is exempt or not.



For advice relating to commercial property regulations please contact Gordon Hatton (gordonhatton@hhlegal.co.uk) on 01704 577171 or Paul Leadsom (paulleadsom@hhlegal.co.uk) on 01704 531991.

We use the word 'Partner' to refer to a member of the LLP. Hodge Halsall LLP registered Office: 18 Houghton Street, Southport, Merseyside PR9 0PA Tel: 01704 531991. Also at: 565 Liverpool Road, Ainsdale, Southport PR8 3LU Tel: 01704 577171. Partners: Mark P Robinson, Judith Bond & Gordon Hatton. Hodge Halsall LLP is a Limited Liability Partnership registered by the Solicitors Regulation Authority. registered No. OC328351

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