

A person wearing a blue suit jacket and a black watch is holding a brown leather briefcase. The briefcase has a gold-colored clasp and handle. The background is a light, textured surface.

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Brexit Watch

Brexit

On the 31st January the UK left the European Union. The transitional period however means that nothing will really change until 31st December.

There is still scant detail on what will happen after the 31st December, but the Government has published its policy statement for a new points-based immigration system, which is expected to take effect from 1 January 2021. Employers that engage EU workers will need a sponsor licence – so we recommend applying now, as bottlenecks will be inevitable. Also, note that engaging low skilled EU nationals will be particularly difficult - so businesses that have relied on cheap labour from the EU are advised to make contingency plans now.

Corporate & Commercial

Good faith

Last year we reported on the *Bates v Post Office*¹ case which stated that good faith is likely to be implied into 'relational contracts' and listed the characteristics of such contracts e.g. the contract being mutually intended for the long term. Two recent court decisions however seem to have restricted the scope for good faith to be implied. In *Russel v Cartwright*² a joint venture partner claimed that his fellow partners had breached an implied duty of good faith by not disclosing a new project to him during negotiations about his exit. The court however refused to imply a duty of good faith stating that it would only be implied when it was obvious to a reasonable reader of the contract, or essential for the contract to work properly. A similar decision was reached in another case³ when an operator of an oil field claimed a breach of a duty of good faith when it was terminated. We recommend that parties **expressly state in the contract whether they will or won't agree to act in good faith.**

Legal privilege

The Court of Appeal has overturned the High Court decision⁴ that compelled Sports Direct to hand over legally privileged documents to the Financial Reporting Council. Sports Direct was however told to hand over non privileged documents that were attached privileged emails. Both parties have said that they will appeal.

Restrictive covenants on shareholders

Whilst Courts are often quick to strike out unreasonable restrictions on former employees, a recent Court of Appeal decision⁵ has shown that the **Courts are less likely to interfere with restrictions in a shareholder agreement**, particularly when there are agreed between experienced commercial parties. In this case the Court of Appeal rebuked an employee-shareholder's claim that a 12-month restriction after the disposal of shares was unenforceable even if there could be a considerable delay between the termination of employment and the disposal of his shares.

Who are the parties to a contract?

It is often assumed that only the named parties to a contract can enforce it, but this may not be the case. A recent court decision⁶ has shown that, unless specifically stated otherwise, if it's known that one of the named parties is acting on the instructions of another party then that party is likely to have rights to enforce the terms of the contract. Even in cases where such a relationship is not obvious the unnamed party may still have contractual rights. To avoid this risk, we recommend including **'no agency' and/or no 'undisclosed principal' provisions in the contract.**

Contract

The recent case of *Athena v Superdrug*⁷ is a good reminder of how parties can inadvertently commit to a contract. In this case a two-email exchange—culminating with 'Please go ahead with the below...' **Superdrug had committed to a binding a contract** despite arguments that the employee who sent the email had not followed contracting procedures, had not intended to commit to a contract and did not have the authority to commit to a contract.

Data Security

Age-appropriate design: a code of practice for online services

The UK Data Regulator (ICO) has finalised its code of practice for [on-line services that are likely to be accessed by children](#). The code makes specific recommendations such as **avoiding 'nudge techniques'** – techniques to encourage children to disclose unnecessary personal data or to weaken privacy controls. The code has been **criticised for defining a child as anyone under 18** which departs from other marketing laws including the GDPR which opt for a younger age. It also **fails to provide a specific definition of 'likely to be accessed by children'**

Draft direct marketing code of practice and Adtech

The ICO has also published the draft [code of practice for direct marketing](#) which is an update on the existing code. There is nothing startling about the changes which are mostly to reflect new law and new marketing techniques. **Adtech is the hot topic for marketers** – the tools used to analyse and manage information for online advertising campaigns. Despite earlier hopes of the advertising industry self-regulating, the ICO's [recent blog](#) says that it **anticipates it will need to take formal action**. The ICO is particularly concerned that **genuine consent for non-essential cookies is not being obtained** and, instead, most websites still seem to rely on implied consents with banners stating *'By continuing to use this website, you consent to our use of cookies.'*

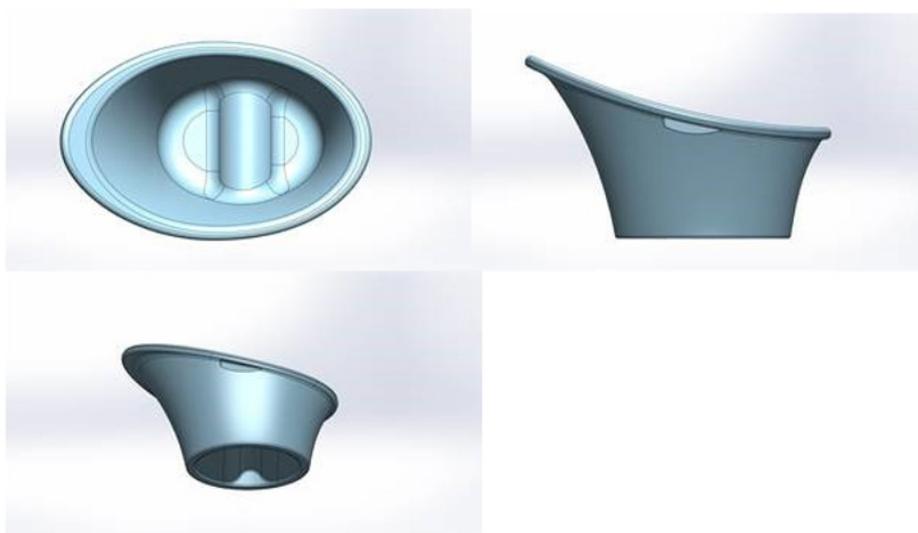
Accessing employee emails

In Hungary, the Data Protection regulator has **fined two companies for accessing employee emails accounts**. On one occasion this was after an employee had left the business and on another because the employee was absent. The Hungarian data regulator acknowledged the need for the employers to access the emails but warned that they must first have an appropriate privacy policy.

Advertising & Marketing

Registering designs and trademarks - caution needed

A recent registered design case⁸ has proven that **too much detail in a registered design may limit its scope**. In this case a registered design for a baby bath was submitted as a CAD drawing which was a grey-blue colour to highlight contrast and shape of the design, but the Judge decided that the registration was therefore limited to blue baths and said that if the applicant had wanted to register the shape of the bath it should have provided a line drawing or rendered it in monochrome shades of grey.



Save the date:

Our next Flying Solo seminar, in association with LexisNexis, for in-house lawyers will be held in London on 25th of March.

[Click here to reserve your place.](#)

Meanwhile in a trademark case⁹, the [red Babybel cheese shape mark](#) has been invalidated because it was insufficiently represented, particularly as it did not specify the tone of red that it sought protection. The decision reflects a **current trend to impose stricter registration requirements on 'non-conventional' trademarks'** (such as shape marks).



Employment

6th April changes

The following changes will apply from the 6th April 2020:

- employers will be required to pay employer national insurance contributions on compensation payments above £30,000;
- all workers must be provided with a written statement of particulars of employment which must include the days of work and, if variable, how they will be varied;
- holiday pay must be calculated on a 52-week reference period (increased from 12 weeks) - where a worker has been employed for less than 52 weeks, the reference period is the number of weeks for which the worker has been employed;
- agency workers who have an employment contract with their agency guaranteeing pay between assignments will now have the right to equal pay with comparable direct employees; and
- (subject to parliamentary approval), there will be a right to two weeks' parental bereavement leave for parents who suffer the loss of a child.

IR35

A welcome but belated announcement from the HMRC in February stated that the new off-payroll rules apply only to work completed on or after 6 April – so, effectively, a one-month postponement. The new rules make medium and large-sized end users (rather than individuals) responsible for determining whether PAYE and NICs should be paid for relevant contractors. [New guidance has been published on the Government website.](#)

Worker status and IR35 audit

Contact us for information about our Worker status and IR35 audit – fixed price £2,000.

[Learn more](#)

You can also access more IR35 materials including our webinar and a Q&A on our [blog page](#)

Non-disclosure agreements

ACAS has published new guidance on the use of non-disclosure agreements. The guidance confirms NDAs cannot be used to stop anyone whistleblowing or reporting a crime to the police and recommends that they should not be used:

- before seeing if another resolution can be found;
- to cover up inappropriate behaviour or misconduct;
- to stop someone reporting harassment or discrimination; or
- to mislead anyone.

Disclosing salary details

The Employment Appeal Tribunal¹⁰ has ruled that the dismissal of an employee who disclosed salary details of a senior employee that he had accidentally found on a photocopier was unfair. This decision is a reminder that salary details will not be treated as confidential information unless there is clear wording in the employee's contract to this effect.

Coronavirus

The [Government](#) and [ACAS](#) have published guidance about managing Coronavirus issues in the workplace on their websites. Useful information including videos are also available on the [World Health Organisation's website](#).

Cases, laws, decisions referred to in this Bulletin

1	Bates v Post Office Ltd [2019] EWHC 606
2	Russell v Cartwright [2020] EWHC 41 (Ch)
3	TAQA Bratani Limited and Others v RockRose UKCS8 LLC [2020] EWHC 58 (Comm)
4	Sports Direct International PLC v The Financial Reporting Council Case No: A3/2018/2378
5	Guest Services Worldwide Limited -v- David Shelmerdine [2020] EWCA Civ 85
6	Filatona Trading Ltd and another v Navigator Equities Ltd and others; Danilina v Chernukhin and others [2020] EWCA Civ 109
7	Athena Brands Ltd v Superdrug Stores Plc [2019] EWHC 3503 (Comm)
8	Shnuggle Ltd v (1) Munchkin Inc. (2) Lindam Ltd [2019] EWHC 3149 (IPEC)
9	Fromageries Bel SA V J Sainsbury PLC [2019] EWHC 3454 (Ch)
10	Jagex Ltd v McCambridge UKEAT/0041/19



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