



RADIUS LAW

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Corporate & Commercial

Battle of the forms

If two business parties agree a deal with each referring to the deal being on their standard terms – whose terms will be applicable? This is known as the **'battle of the forms'**. Usually, it is the 'last shot' fired that wins (i.e. the party that supplied its standard terms immediately before the goods or services were provided). A recent Court decision¹, however, held that the **'first shot' fired won**. In this case the buyer and seller had agreed deals in 2015 and 2016 with both parties referring to their standard terms but the buyer had overlooked that, some years earlier, in 2011 it had signed the seller's 'customer file' which referenced its standard terms and included a statement that no other terms would apply unless agreed in writing by both parties.

Parent company liability

Parent companies are generally protected from claims against their subsidiaries, but there are exceptions to this general rule. A recent Supreme Court² decision in the case of *Okpabi v Royal Dutch Shell* has **lowered the threshold for when a parent company may be attacked** and be liable for the negligence of its subsidiary. There is no longer the need to analyse the case by reference to a threefold test that had previously been required³; instead the Courts should simply consider the extent that the parent has taken over, intervened in, controlled, supervised or advised the management of the operations of the subsidiary. Requirements to comply with parent company policies may be enough to make the parent company liable.

Business interruption insurance

On 15 January, the Supreme Court ruled that **insurers had been wrong to refuse to pay business interruption claims** that arose from the COVID-19 pandemic. This means that many thousands of policyholders should have their business interruption losses paid. Inevitably there will be ongoing litigation as the Supreme Court's decision is only binding on eight insurers and will be dependent on each specific policy wording. Nevertheless, the judgement will be helpful to the other cases. The Financial Conduct Authority that brought the claim against the insurers has provided detailed guidance on its website.

Panel management of law firms – 24th March 2021

We have teamed up with LexisNexis, F-Lex and Alacrity to bring a virtual round-table discussion about how building stronger relationships with law firms. To join this *free event*, please click the button.

[Register Now](#)

Data Security

UK data adequacy

At the eleventh-hour of the EU-UK Trade and Cooperation Agreement (TCA) in December the EU agreed to a four month (extendable to six-months) interim solution to continue to allow the free flow of personal data from the EU to the UK. The interim solution was accompanied by a declaration that the Commission would look into issuing a favourable adequacy decision to allow the long-term flow of personal data. Whether adequacy will be granted is still to be confirmed and there are some doubts primarily because of the UK's surveillance regime which privacy campaigners have criticised. Even if an adequacy decision is granted it is expected that there will be legal challenges similar to the successful challenges that have already been made concerning EU-US personal data transfers for similar reasons. It is therefore recommended that businesses that are reliant on the free-flow of personal data from the EU make contingency plans.

Advertising & Marketing

ICO's adtech investigation resumes

The Information Commissioner's Office (ICO) has [announced](#) that it is resuming its investigation into the adtech industry which it has paused in May 2020 due to the global pandemic. The investigation focuses on concerns with real time bidding - the process where web adverts are sold at the 'blink of an eye' based on the user profile.

The ICO has previously stated that it considers ***all real time bidding practices to be non-compliant with GDPR.***

The industry has since produced its own guidance. IAB UK published guidance on [cookies and consent](#), [special category data](#) and [data protection impact assessments](#) and the Data & Marketing Association (DMA) and the Incorporated Society of British Advertisers (ISBA) published 'The Seven-Step Ad Tech Guide', which was produced in consultation with the ICO, but the latest announcement from the ICO suggests that industry action so far has not been sufficient.

Online green claims may be misleading consumers.

The UK Competition and Markets Authority (CMA) and the European Commission have released results of an [annual screening of websites](#) that found that ***40% of green claims made online could be misleading consumers.***

- In over half of the cases, the trader did not provide sufficient information for consumers to judge the claim's accuracy.

- In 37% of cases, the claim included vague and general statements such as 'conscious', 'eco-friendly' and 'sustainable'.

This is an early warning about the importance of ensuring that environmental claims are correct and supported by evidence. Failure to do so may lead to regulator activity and misrepresentation claims.

Employment

Uber drivers are 'workers'

The Supreme Court in a landmark decision has confirmed that ***Uber Drivers are 'workers', not self-employed contractors***. They are entitled to holiday pay and national minimum wage.

This decision will have profound consequences for other businesses that may be wrongly classifying workers as self-employed personnel.

There were five key factors that were relevant to its conclusion of 'worker' status in this case:

1. Uber dictates the rate of pay by setting the fare calculated by the app;
2. Uber imposes the contractual terms on which the drivers perform their services;
3. Uber restricts drivers once they are logged into the app about whether or not to accept a request for a ride (by imposing a penalty if too many requests are declined);
4. Uber exercises significant control over how services are delivered, including the use of a ratings system;
5. Uber restricts communications between drivers and passengers, preventing drivers from establishing a relationship with customers beyond a single journey.

IR35 reforms

The IR35 reforms delayed from April 2020 (due to the global pandemic) will be implemented on 6th April. The intention of IR35 is to ensure that appropriate income tax and national insurance contributions ('NICs') are paid by contractors who provide their services through intermediary companies. The IR35 rules bite where, but for that intermediary company, the individual contractor would be deemed an employee of the client. Medium and large businesses must carry out status determinations to assess whether IR35 applies. If they do the client is responsible tax and NICs deductions.

IR35 training and audit service

We have produced detailed **online training** to explain IR35 and its requirements – please visit our training hub to access.

[Access now](#)

We also provide an IR35 and Worker Status **Audit service**. Please click here for more information.

[Learn more](#)

Gender pay gap reporting delayed

Due to the impact of global pandemic, the Equality and Human Rights Commission has announced that large employers (employers with 250 or more employees) now have until **5 October 2021 to report their gender pay gap information** for the 2020/2021 reporting year (which uses a snapshot date of 31 March 2020 and 6 April 2020).

Employees to disclose personal email accounts.

In the recent case of *Phones 4U Ltd v EE and others*, Phones 4 U alleged the mobile network operators' senior executives had colluded unlawfully using personal email accounts. The case then centred on whether the executives were required to disclose their personal email accounts. The Court ruled that the mobile network operators **must ask their executives to co-operate**. If the executives do not cooperate then Phones 4U could apply for disclosure orders directly against the executives.

Mandating vaccinations

With the vaccination programme in full swing, we have included some Q&As here in response to some regular questions that we are being asked.

Can employers mandate staff to be vaccinated?

This is an untested area of law, but we believe mandatory vaccination policies for all staff are likely to lead to discrimination and unfair dismissal claims. It is worth noting that the Government is not mandating NHS staff to be vaccinated – so most employers will inevitably struggle to justify why it is different for them. Mandating vaccinations for specific job roles is more likely to be reasonable – for example if staff travel to other countries for work and need vaccinations

Even if an employer does choose to mandate vaccinations, it will then need to require employees to disclose their vaccination status – which will be fraught with data protection challenges and will need a Data Protection Impact Assessment to be completed first.

Can employers require new starters to be vaccinated?

This is less risky than requiring existing staff as there is no risk of unfair dismissal claims, but there may still be discrimination claims.

Can the return of employees be based on who has been vaccinated?

Possibly, but it still has discrimination risks. It may be indirectly discriminatory against younger employees who have not yet been offered a vaccination and against employees with other protected characteristics (e.g. disability, belief or pregnancy)

The Advisory, Conciliation and Arbitration Service (ACAS) has [issued guidance](#) on getting the vaccination for work.

The Chartered Institute of Personnel and Development (CIPD) has also produced a [useful guide for employers](#).

Improving workplace support for victims of domestic abuse

An estimated 2.4 million adults in the UK experienced domestic abuse in the year ending March 2019. This has been compounded in 2020 with the impact of increased home working, self-isolation and lockdown.

On 14 January 2021, the Government published its report on improving workplace support for victims of domestic abuse following its review last summer. The report sets out best practices for employers and proposed next steps. These include a recommendation that all organisations should, wherever possible, implement a domestic abuse policy and train 'champions' to recognise signs of abuse as well as other workplace support measures.

The ACAS 'Working from home during the coronavirus pandemic' [guidance](#) (available on its website) includes a new section on domestic violence and abuse.



Are you an in-house lawyer?

Do you want to share ideas, make connections or get inspiration from other in-house lawyers?

If so – join our in-house lawyer Slack group. [Register here](#), its free!

Cases, laws, decisions referred to in this Bulletin

| | |
|---|-----------------------------------------------------------------------------------|
| 1 | TRW Ltd v Panasonic Industry Europe GmbH and another company [2021] EWHC 19 (TCC) |
| 2 | Okpabi v Royal Dutch Shell plc [2021] UKSC 3 |
| 3 | Caparo Industries PLC v Dickman [1990] UKHL 2 |
| 4 | Uber BV and others v Aslam and others [2021] UKSC 5 |
| 5 | Phones 4U Ltd v EE Ltd and Others [2021] EWCA Civ 116 |

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