

A black and white photograph of a business meeting. A man in a striped shirt is pointing upwards with his right hand, looking towards the top right. A woman with glasses is looking at him, and another man with glasses is looking down. They are gathered around a table with papers and sticky notes.

COMMERCIAL BULLETIN

September 2022

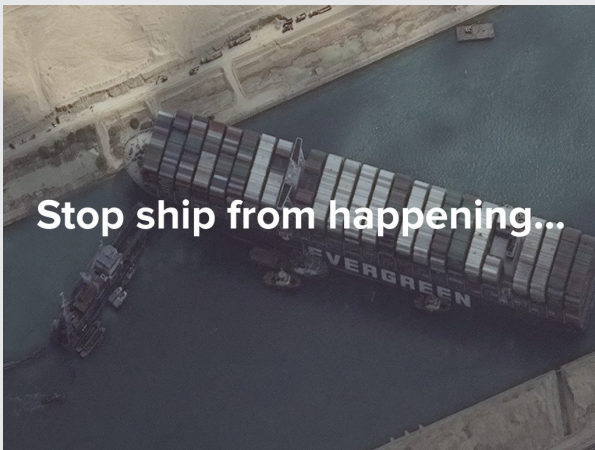
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Corporate & Commercial

Terminating contracts by force majeure

Force majeure clauses typically relieve parties from contractual obligations that they are unable to meet due to events outside of their control. The clauses often also allow for termination.

The High Court has, however, given organisations a warning¹ to not leap to using a force majeure clause to terminate a contract for a performance delay. *Unless the delay would materially undermine the contract, it is unlikely to provide a reason to terminate it.*



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Post termination non-compete clauses in business-to-business agreements

It's generally considered that you can restrict a business partner from competing with you after your relationship ends provided the restriction does not exceed 12 months and there are appropriate limitations (e.g., limited to local geographical area).

The Court of Appeal, in two recent cases, has given a warning that this cannot always be assumed.

In one case concerning a post termination restriction on a 'Drain Doctor' franchise², the Court ruled a 12-month restriction was unenforceable because there was *a significant inequality of bargaining power and there was very little goodwill to protect* - the franchise was terminated after just 18 months and there had not previously been a franchise in the area.

In another case,³ a post termination restriction was unenforceable because there was no interest to protect. The business seeking to enforce the restriction had not provided any know-how and the contracted party was simply being commissioned to organise face-to-face marketing campaigns in the area, using its existing local knowledge.

Breach of implied terms

In the recent case of *Stichd v Force India Formula One Team*⁴, Force India granted Stichd an exclusive trademark licence for Stichd to manufacture branded products, but then sold the business and did not transfer the Stichd contract – leaving Stichd with a worthless contract.

Whilst the written contract did not prevent Force India from selling its business to a third party, the Court agreed with Stichd that this should be implied into the contract.

The law allows a Court to imply terms into a contract if it would lack commercial or practical coherence without it and the term is so obvious that it goes without saying.



A New UK Subsidy Control System

The new Subsidy Control Act 2022 ('SCA') is expected to become fully applicable this autumn. The implementation of the SCA was agreed as part of the UK's exit from the EU and provides *a framework for granting and controlling public subsidies*. This was important to the EU as it was concerned UK businesses would otherwise have an unfair advantage over EU businesses that are subject to restrictions on public subsidies. The Government has produced guidance on the new regime on its [website](#).

Data Security

Ransomware

In a joint [letter](#), the UK's data protection regulator, the Information Commissioner's Office ('ICO'), and the UK's National Cyber Security Centre ('NCSC') reinforce the message that *paying a ransom should not be viewed by an organisation as a reasonable step* to take in order to protect data and will not result in a lower penalty by the ICO. The ICO has separately provided [ransomware guidance](#) on its website.

Advertising & Media

Colour trademarks

The High Court has⁵ allowed Cadbury to register the trademark for the colour purple used on its chocolate bar wrappers. This decision creates an opportunity for other brands to follow Cadbury's lead, but it will not be easy as applicants will need to provide compelling evidence of 'acquired distinctiveness' in the mind of the consumer.



Employment

The risks of lying on your CV

In 2004, Mr Andrewes lied about his experience and qualifications to secure a CEO role with a hospice. It was acknowledged that, in the following eleven years, he performed well in the role. The truth, however, caught up with him and he was dismissed and convicted of fraud, receiving a prison sentence. Following his conviction, the Crown sought a confiscation order of £643,000, his full net earnings. The Supreme Court has ruled⁶ that he must *pay back the difference between the higher earnings obtained through fraud and the lower earnings that would have been obtained if there had been no fraud.*

'Fire and rehire'

We reported in March that the High Court had issued an injunction stopping Tesco from dismissing some of its warehouse operatives and re-engaging them on less beneficial terms that the warehouse operatives argued had been promised by Tesco as a life-long commitment. The Court of Appeal⁷ has since overturned the High Court's decision saying that the High Court misunderstood the commitments that had been made by Tesco and, in any event, an injunction was not justified. Tesco is now free to progress their fire and rehire plans. *Employers should however keep an eye on a new statutory code that the [Government has announced](#) it will introduce to protect employees from 'fire and rehire' tactics.*

Long term sickness benefits

The Court of Appeal has ruled⁸ that an employer was liable to pay the level of sickness benefit payments detailed in an employee's offer letter despite the employer subsequently changing insurers that did not provide the same level of cover. We recommend that employers specifically *limit employees' benefits to the amount covered by insurance and ensure the policy terms are available to employees.*

New guidance on employment status.

The government has published its [response](#) to the 2018 consultation on employment status, confirming it will not proceed with any legislative reform. It has, however, published new [guidance](#) which includes an explanation of the differences between employees, workers and self-employed individuals, and explains how individuals can challenge their employment status.

Senior Counsel Event - Virtual Session

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The legal implications of hybrid working

28 September, 2022

Age discrimination

Superdry has been ordered⁹ to compensate a former employee £84,723 for age discrimination.

The employee was a designer with over 30 years' experience and had an outstanding record but was not offered promotion whilst other less experienced designers had been promoted.

Superdry was criticised by the tribunal for *not providing any clear explanation about why the employee hadn't been promoted or what needed to be done to achieve this and for failing to adequately address the risks of unconscious bias.* In addition, language used by senior staff had been inappropriate – particularly the employee's line manager who had referred to the employee as being 'scatty'. The tribunal commented that the term was 'loaded with subjectivity ... and ...verges on a term of abuse'.

Employer discriminated against a worker for making statement of her gender critical beliefs.

A recent tribunal case¹⁰ has held that a belief that gender is a biological fact, not capable of being changed, is a protected belief and, *provided it is expressed in a straightforward and objectively reasonable way, the worker will be protected from detrimental treatment.* In this case, it was noted that the individual concerned, Ms Forstater, had acted appropriately, including modification of her conduct and agreeing to use colleagues preferred pronouns. Accordingly, the tribunal found that her employer, having refused to renew her contract, had discriminated against her. Another tribunal has since given a very similar decision in the case¹¹ brought by a barrister, Ms Bailey, against her chambers, Garden Court Chambers.

Holiday pay

The Supreme Court has ruled¹² workers who only work for part of the year (e.g. term-time workers) are entitled to 5.6 weeks of holiday pay like employees that work all year round – even though this will result in *part-year employees' holiday constituting a higher proportion of their annual pay when compared to that of a full-time employee.*

New legislation on industrial action

In July, new legislation came into force to reduce the impact of the right to strike. The legislation *removes the restriction on employers bringing in temporary workers* to make up for shortage resulting from staff taking part in industrial action¹³. In addition, new legislation¹⁴ increases the maximum amount of damages that can be awarded against a union for any unlawful industrial action.

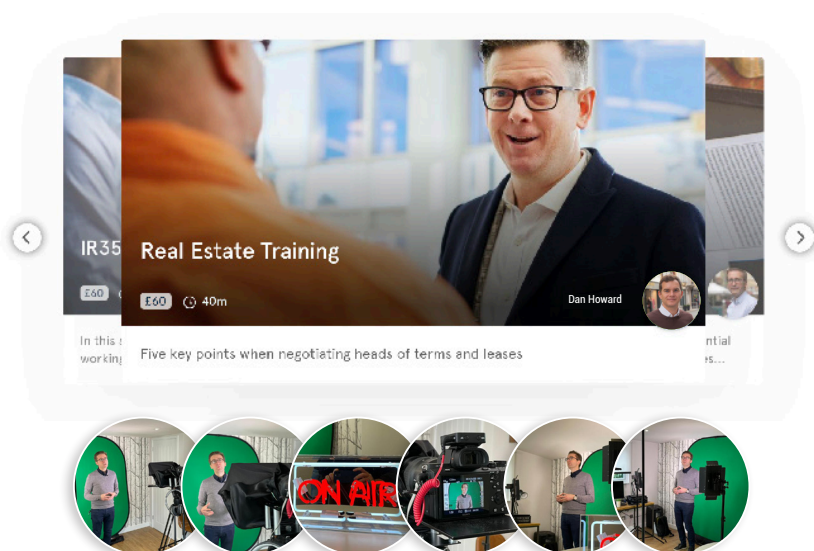
Competition

Competition and Markets Authority wage-fixing cartel probe

Traditionally, competition authorities have focussed on price-fixing arrangements within the sale of goods and services markets. However, the Competition and Markets Authority has [opened an investigation](#) into BT, IMG, ITV and Sky UK to address concerns that they *colluded to fix the rates offered to freelance workers.*

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Cases, laws, decisions referred to in this Bulletin

1	NKD Maritime Ltd v Bart Maritime (No. 2) Inc [2022] EWHC 1615 (Comm)
2	Dwyer (UK Franchising) Limited v Fredbar Limited [2021] EWHC 1218
3	Credico Marketing Ltd and Another v Lambert and Others, [2022] EWHC 2114 (QB)
4	Stichd Sportmerchandsing BV V Geoffrey Paul Rowley (2) Jason Daniel Baker (as joint liquidators of Force India Formula One Team Limited (in Creditors' Voluntary Liquidation)) [2022] EWHC 933 (Ch)
5	Société des Produits Nestlé S.A. v Cadbury UK Limited v The Comptroller-General of Patents, Designs and Trade Marks [2022] EWHC 1671 (Ch) (Nestlé v Cadbury)
6	R v Andrewes (Respondent) [2022] UKSC 24 On appeal from [2020] EWCA Crim 1055
7	Union Of Shop, Distributive and Allied Workers v Tesco Stores LTD [2022] EWHC 201 (QB)
8	Amdocs Systems Group Ltd v Joel Langton [2022] EWCA Civ 1027
9	R Sunderland v Superdry plc: 1406389/2020
10	Forstater v CGD Europe Case Number: 2200909/2019
11	Bailey v (1) Stonewall Equality Ltd (2) Garden Court Service Company (3) representatives of Garden Court Chambers 2202172/2020
12	Harpur Trust (Appellants) v Brazel (Respondent) Case ID: 2019/0209
13	Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003
14	Section 22(2) of the Trade Union and Labour Relations (Consolidation) Act 1992



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