



COMMERCIAL BULLETIN

Your guide to the latest legal updates
from the team at Radius Law.

JANUARY 2024

Nº 81

CORPORATE & COMMERCIAL

Ensure Your Employees Understand the Business' Terms and Conditions

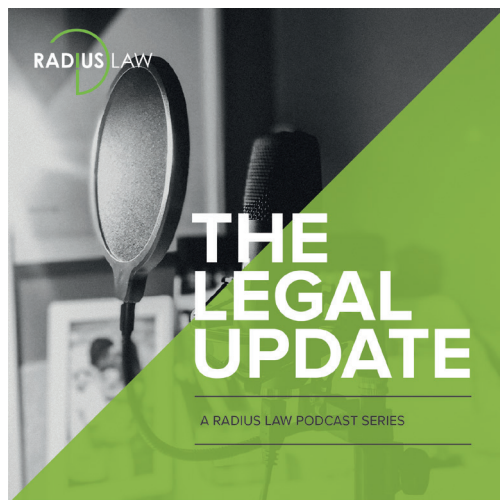
'His evidence was significantly vague both on the contractual details and their effect.... I infer that he had not been given sufficient training on contractual matters'

Mr Healy-pratt, Deputy High Court Judge
 Microise Ltd v James Kemball Ltd [2023] EWHC 579 (KB)

These were the comments of the Judge in a recent High Court case¹ about the Sales Manager involved in the dispute.

The sales manager had issued various Quotation / Order forms that had different references to his company's terms. In some cases, the company's general terms and conditions were attached, in others the Order forms referred to standard terms and conditions 'available on request' and in another case the company's Supply of Products and Services Agreement ('SPSA') was attached. None of the forms were ever signed.

Unsurprisingly, when a dispute arose the first challenge was to identify which terms applied. Ultimately the Judge decided that that SPSA were the applicable terms. The moral of the story here is **to ensure that there are clear contracting processes and that sales staff are provided with adequate training.**



NEVER MISS A RADIUS LEGAL UPDATE.

Follow on Spotify or Apple Podcasts today.



Unfair contract terms.

The Unfair Contract Terms Act ('UCTA') states that terms excluding or limiting liability are subject to reasonableness. **A key factor in assessing reasonableness is whether the parties to the contract terms are of equal bargaining power.**

UCTA was considered in the recent case of Last Bus v Dawson Group². Last Bus leased buses from Dawson under Dawson's standard terms which purported to exclude almost all liability.

The High Court, without a full trial, dismissed Last Bus's claim that the terms were unfair. The Judge decided that as the parties were of similar size, they had equal bargaining power and the Court should not therefore interfere with the agreed terms.

Last Bus appealed. The Court Appeal disagreed with the High Court. *The parties being similar sized businesses does not automatically mean they have similar bargaining power.* Dawson’s terms were similar to its competitors so Last Bus had little power to insist on changes.

The Court of Appeal also noted that the High Court had failed to consider previous case law³ that has determined that *contract terms that leave a party without any remedy are at, first sight, considered to be unreasonable under UCTA.* The case will now proceed to a full trial.

Corporate liability for fraudulent acts

Since 26th December 2023, *organisations may be liable for fraudulent acts committed by their senior managers* under the new Economic Crime and Corporate Transparency Act 2023. Unlike the ‘Failure to Prevent Fraud’ offence under the same Act (that is not yet in force) there will be no defence of having reasonable prevention procedures.

The Insolvency Service Drops Carillion Disqualification Proceedings

In January 2018, Carillion plc entered compulsory liquidation with liabilities totalling approximately £7 billion.

The Insolvency Service brought disqualification proceedings against each of Carillion’s directors. The executive directors agreed to disqualification undertakings but the non-executive directors (‘NEDs’) contested the proceedings and in October 2023 the Insolvency Service discontinued its proceedings against them.

Whilst the discontinuation of proceedings leaves a lack of clarity on the duties of NEDs, it’s likely to be seen as an acceptance that *NEDs are only required to interrogate information put before them.*



ADVERTISING & MARKETING

AI Machines cannot be Inventors.

The Supreme Court has ruled⁴ AI Machines cannot be Inventors. This decision is in line with the majority of other courts around the world on similar patent applications.

A critical feature of these cases was the absence of a human inventor; the Applicant claimed that the inventor was DABUS and DABUS alone, contrary to the Patents Act 1977.



The ASA's Active Ad Monitoring System Catches Airline Providers Out

We reported in our [November Bulletin](#) on the Advertising Standards Authority's (ASA) new Active Ad Monitoring System and its ability to identify online sustainability and green claims that may be non-compliant.

The AI tool recently identified 3 airline advertisements that potentially breached advertising rules. As each of the ads failed to substantiate or provide a basis for their respective claims: 'travel better and sustainably', 'fly more sustainably' and 'environmental advocacy', the **ASA determined that the airlines had misled consumers about the sustainability of air travel.**

You can read more about the ASA's updated [guidance](#) on misleading environmental claims in our [September Bulletin](#).



DATA SECURITY

EDPB Bans Meta from Processing Personal Data for Behavioural Advertising Across EEA

Behavioural advertising uses online habits such as website browsing to determine which adverts are delivered to the user.

It's generally considered that such activity is intrusive, so regulators expect a high level of caution by organisations.

Meta had previously stated that its lawful basis for behavioural advertising was complying with its contract but subsequently changed its position arguing that its lawful basis was its own legitimate interests. **The European Data Protection Board ('EDPB') has ruled Meta's actions to be unlawful.**

Meta has now changed tact again and said it will only conduct behavioural advertising where the user has consented. **Many however doubt whether Meta's process for seeking consent will meet the legal requirements.** It's been dubbed 'pay or okay'; the user is given a binary choice to either pay to not be shown advertisements or agree to receive the advertising.

The UK Information Commissioner has not yet given its comment.

Popular Websites Aren't Offering Fair Cookie Consent Options

The Information Commissioner's Office published a statement providing some of the UK's most visited websites are failing to offer users choices in their cookie consent banners fairly. **The regulator has written to the companies operating the websites and given the respective businesses 30 days to bring themselves into compliance with data protection laws.**

The ICO will provide an update on the work this month and confirmed it will name and shame those that fail to address concerns.

EMPLOYMENT

Changes to Working Time and TUPE

The Government has laid down regulations⁵ introducing changes to working time and TUPE.

From 1 April 2024, new rules will apply to calculating holiday pay of part-year and irregular hours workers, including:

- ‘rolled-up’ holiday pay will be allowed, provided it is calculated at 12.07% of all pay for work done and it is itemised separately on the payslips.
- leave will accrue at the rate of 12.07% of hours worked and will be paid at the rate of 12.07% of pay in a pay period, subject to a maximum of 28 days per year.

From 1 July 2024, employers that do not already have worker representatives in place will be able to consult directly with employees on a TUPE transfer, if:

- The business has fewer than 50 employees, or
- The proposed transfer involves fewer than 10 employees.

Amendments to the Rehabilitation of Offenders Act 1974

From 28 October 2023, some offences with custodial sentences of more than four years, become spent seven years after the sentence has been served and will not need to be disclosed to employers after that point. The [Government](#) estimates that over 120,000 former offenders will benefit from the change in the law.

National Minimum Wage Increases

From 1 April 2024, the National Living Wage will apply to workers aged 21 and over. The following rates will apply:

- £11.44 per hour for workers aged 21 and over
- £8.60 per hour for workers aged 18-20
- £6.40 per hour for workers aged 16-17 and apprentices.

DIVERSITY AND INCLUSION

Financial Services Sector

The [Financial Conduct Authority](#) and the [Prudential Regulation Authority](#) have issued consultation papers⁶ setting out draft rules to implement diversity and inclusion reporting and disclosure requirements, in the financial services sector.

Menopause

The Government has published a [policy paper](#)⁷ providing guidance *“to help recruit, support and retain women experiencing menopause and stop women considering giving up their employment”*. The paper introduces a four-point plan to improve menopause support in the workplace, which will initially focus on the hospitality, retail, care, manufacturing, and professional and technical sectors.

Deliveroo Delivery Riders Are Not Workers

The Supreme Court⁸ has confirmed that Deliveroo delivery riders are not workers of Deliveroo within the meaning of s.296(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 because they had a “*virtually unfettered*” right of substitution. The right was not limited to other Deliveroo riders and could be exercised before or after a rider accepted a job. This means that Deliveroo riders cannot be represented by unions for collective bargaining purposes.

Resignations in the “Heat of the Moment”

In this case,⁹ the Claimant appeared to resign during an altercation with his line manager. He wished to retract the resignation, which was not accepted, and his employment ended. He claimed unfair and wrongful dismissal.

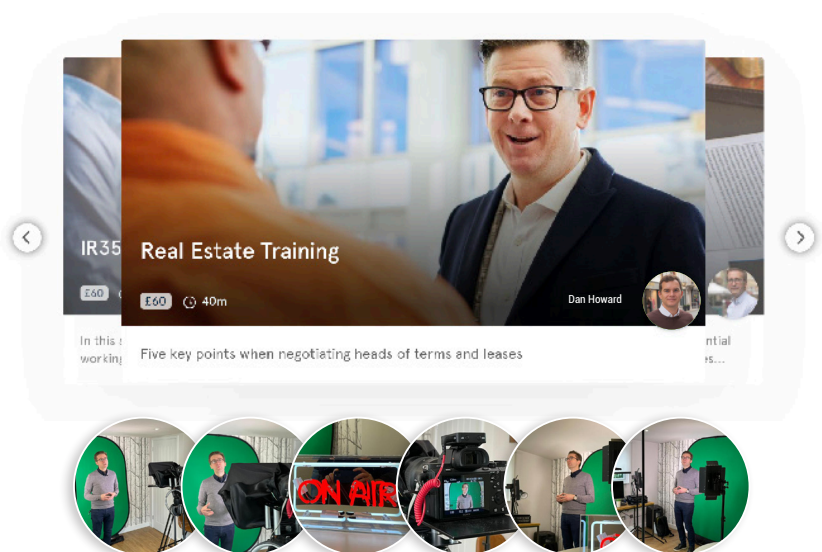
The Employment Appeal Tribunal gave guidance on how to treat a “heat of the moment” resignation or dismissal, including:

- Notice of resignation or dismissal cannot be unilaterally retracted.
- A tribunal must assess how the words were heard objectively and subjectively.
- The words must indicate an immediate intention to dismiss or resign.
- The person hearing the words must understand that there is a genuine intention to resign or dismiss, and that the speaker was ‘in their right mind’.
- leave will accrue at the rate of 12.07% of hours worked and will be paid at the rate of 12.07% of pay in a pay period, subject to a maximum of 28 days per year.

RADIUS LAW TRAINING HUB

Online and in-person courses starting from *only* £50+VAT

[Learn more](#)



UPCOMING EVENTS

31st January, 2024



Senior Counsel Event – Effective Feedback and Difficult Conversations for In-House Leaders

Online

Our interactive virtual sessions are an opportunity for in-house counsel to share experiences, insights and best steps to protect your organisations.

[Book Now >>](#)

28th February, 2024



Senior Counsel Event – Commercial Law Update

Online

Our interactive virtual sessions are an opportunity for in-house counsel to share experiences, insights and best steps to protect your organisations.

[Book Now >>](#)

Cases, laws, decisions referred to in this Bulletin

1	Microlise Ltd v James Kemball Ltd [2023] EWHC 579 (KB)
2	Last Bus Ltd v Dawsongroup Bus and Coach Ltd [2023] EWCA Civ 1297
3	Lease Management Serviced Ltd v Purnell Secretarial Serviced Ltd [1993] Tr.L.R. 337
4	Thaler v Comptroller-General of Patents, Designs and Trade Marks [2023] UKSC 49
5	The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023
6	Consultation Paper CP23/20*** and Consultation Paper CP18/23
7	No Time to Step Back: the government’s Menopause Employment Champion
8	Independent Workers Union of Great Britain v Central Arbitration Committee & Anor [2023] UKSC 43
9	R Omar v Epping Forest District Citizens Advice [2023] EAT 132



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!

Disclaimer

Nothing in this Bulletin, or on the associated website, is legal advice. We have taken all reasonable care in the preparation of this Bulletin, but neither we nor the individual authors accept liability for any loss or damage (other than for liability that cannot be excluded at law).