



employees and resignation



When does an employee resign and when is it constructive dismissal entitling them to claim damages?

In a recent case, an employee was called into a meeting without knowing what it would be about. He was told his contract was over. Later in the meeting, they discussed the terms of his departure and he agreed those terms, so the employers therefore argued this was resignation, not dismissal. In that case, there could be no unfair dismissal claim.

The Employment Appeal Tribunal agreed but the Court of Appeal did not. They held that the key issue was that the employee had had no opportunity to consider the inevitability of termination, nor to

negotiate. The court said "Resignation implies some form of negotiation and discussion: it predicates a result which is a genuine choice on the part of the employee. Plainly, if the employee has had the opportunity to take independent advice and then offers to resign, that fact would be powerful evidence pointing towards resignation rather than dismissal." If instead, there had been more than one meeting and the employee had the chance to consider his position, then it may have been resignation, not dismissal.

Many people do not follow proper procedures before terminating employment contracts and even if there were grounds to dismiss they are still then obliged to pay the employee damages if a claim is made.

Take legal advice before disciplining or sacking any employee to ensure the correct processes are followed. The legal position can sometimes be aided in advance by having well drawn up employment contracts which set out the obligations of both parties carefully.

For advice on employment issues, please contact us.

commercial agents

Many people work as commercial agents. In an important recent judgment (Lonsdale v Howard & Hallam Ltd), the court of appeal looked at the law that protects such agents under the Commercial Agents (Council Directive) Regulations 1993.

The regulations provide that self employed agents marketing goods are entitled to a lump sum in many cases when their agreement is terminated, even where proper notice of termination has been given.

In addition, where the agent dies or is too old or ill to continue, compensation may be payable. This cannot be excluded by contract terms although it can be

capped at a year's commission if the agreement provides for this by way of what is called an 'indemnity'. Some of the earlier cases had held that, as a rule of thumb, a payment of two years' commission (in the absence of an indemnity clause) would be payable.

However, in this latest court of appeal judgment the judge held that:

- the correct way to calculate damages payable to the agent is the loss of the agency business including goodwill, (similar to sale of a business in general) - this will sometimes require an expert witness to give evidence on valuation issues
- the starting point for compensation is not two years' commis-

sion as that is too arbitrary in assessing an agent's loss.

- also there was no 'just and reasonable' test to be used in assessing compensation

In addition, the regulations set out when commission should be paid and address the duties and obligations of agent and principal to each other. They do not apply to distribution arrangements where a distributor buys goods and resells them, only to agents who never own the goods and simply find the customers who contract with the principal/supplier.

Please contact us for further information. It is wise to have good contracts in place to protect your legal position so that the duties of the parties are clear.



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data protection

The Information Commissioner has found that Orange Personal Communications Services has not processed personal data properly. New members of staff were allowed to share usernames and passwords when accessing the company IT system. In a separate case, it also found that Littlewoods Home Shopping had breached the Data Protection Act 1998 where a customer could not stop the company using her data for direct marketing even after she informed them.

The July Annual Report of the Information Commissioner describes many recent breaches of the law by businesses.

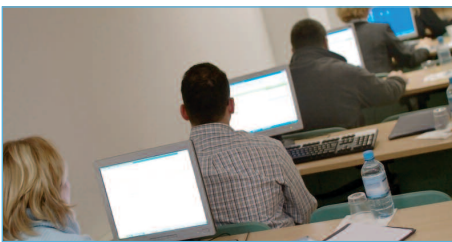
We advise a wide range of clients on their obligations under the DPA and related regulations. At present the IC is consulting on a new code to replace the current Code of Practice on CCTV under the 1998 Act.

All those who use CCTV at work need to comply with the current code until the new one is in place. It requires signs to be placed (amongst other requirements) so that people who are being filmed are aware of the filming.

In a related development, the European Court of justice held that the EU acted unlawfully in allowing private personal data about EU passengers travelling to the US to be passed to the US authorities without their permission. Therefore a new solution had to be found. The EU has now come up with a new passenger name records (PNR) arrangement.

If you gather customers' data and do mailings to them you should ensure you comply fully with the data protection rules. We can advise you on the law in this field and draft documents for you, such as employee email and internet policy documents, for use with staff.

fee for unlicensed software



The Business Software Alliance (BSA) has agreed a £250,000 deal with a company for use of unlicensed Microsoft, Adobe and Autodesk software on

hundreds of computers. The company is in the infrastructure and public services sector.

This case highlights the importance of ensuring that all software used within a business is properly licensed. It is wise to do regular audits and ensure all licences and certificates are kept in one place. Under the Copyright, Designs and Patents Act 1988, use of software without permission is an infringement of copyright. Even where a user buys the product from a dealer who has made illegal copies, the user still must buy the legitimate product and cease to use the unwittingly used infringing product.

revised guidance on unfair terms

The Government has revised its guidance on when 'Terms and Conditions' are valid and when they might be 'unfair'. The Office of Fair Trading guidance on what is an unfair term in a consumer contract is very helpful in practice for those who supply goods or services to consumers. This is a very interesting document as the OFT sets out which terms it regards as unfair and which it does not. We are often asked to draft contract terms for clients and it is surprising how some companies have no written terms of business at all.

Some of our clients also have internet websites and need terms and conditions for those too. As the law changes fairly frequently in this field it is wise to take legal advice.

Software licensing is usually also only granted to one limited company not all companies within a group. It is worth - when negotiating licences as a buyer/licensee - improving the standard contracts offered, perhaps taking legal advice on these documents and consider including clauses on licensing such as the following:

- rights to use the software within a group of companies
- rights to pass the software to a buyer of the assets of the business
- rights to enable not just employees but also agents and contractors and self employed consultants to use the software on your behalf
- rights to move the software to another location or use it on different hardware
- a clear definition of any restricted number of uses of the software including clarity over what is meant by 'concurrent users'
- rights to allow third parties to maintain or support the software.

Contact us if you want advice on a software licence agreement. Too many licensees simply accept the standard terms they are offered.

Sometimes a term which appears very helpful saying there is no liability on the part of a supplier is invalid as the law ensures that unreasonable or unfair terms in some contracts are invalid. This is why it is sensible to take legal advice to ensure the terms limit and exclude liability as much as possible to protect your position but do not go too far in excluding so much liability the entire clause is void.

Also anyone who employs salesmen to sell their goods or services needs to prepare for new laws due in December which will prohibit 31 listed trading practices used to put pressure on customers and make other 'unfair trading' practices subject to challenge.

We can draft standard terms of sale or purchase and advise you on how to ensure your terms stick.

legaleye



breaches of competition law

Most local clients know they cannot reach agreements with competitors about the prices they will charge to customers. This is a serious breach of the Competition Act 1998 and could land them in jail. However, not all are aware that acting alone they could also breach the competition rules if they are in a local 'dominant market position'. In May, the Office of Fair Trading provisionally found that the council-owned Cardiff Bus Company engaged in predatory behaviour designed to eliminate a competitor.

The company deliberately made a loss after another bus company, 2Travel plc, entered the market. Cardiff Bus is accused of providing a new 'no-frills' bus service which operated below cost and was withdrawn once 2Travel left the market.

The OFT found that the Cardiff Bus Company, which carries an estimated 80,000 people each weekday in Cardiff, used its dominant position to run its 'no frills' services with revenues so far below costs that it was impossible for its competitor to remain in the market.

In another case this year, the OFT announced it was carrying out a number of on-site searches as part of a criminal investigation into suspected cartel conduct in relation to the market for marine hoses used to transfer oil. Searches were carried out at two addresses in the UK, one of which was a home address. This is the first time that the OFT has carried out a search at a home address as part of a cartel investigation.

The allegations under investigation relate to a possible worldwide conspiracy between executives of a number of companies to rig bids, fix prices and allocate markets in the supply of marine hoses. Marine hoses are typically used by customers in the oil and defence industries to transport oil between tankers and storage facilities. The suspected cartel may have affected contracts worth hundreds of millions of pounds. The OFT's criminal investigation has been coordinated with investigations by the US Department of Justice and the European Commission. The OFT's investigation is being carried out under the Enterprise Act.

If you are concerned about conduct of another company, or indeed that of your own business, call us for advice on competition law.

smoking ban



The new 'no smoking' ban has been in force since 1st July 2007. We have been advising local businesses on the new law.

They need to make sure that:

- they have all the required no smoking signs in place;
- staff, customers, members or visitors are aware that the premises and vehicles are legally required to be smoke free; and

- all existing smoking rooms have been closed or removed.

Premises are 'enclosed' if they have a ceiling or roof and are wholly enclosed either on a permanent or temporary basis (except doors, windows or passageways).

Premises will be considered substantially enclosed if they have a ceiling or roof, but have an opening in the walls, which is less than half the total area of the walls. The area of the opening does not include doors, windows or other fittings that open or shut. A smoking shelter that has a roof, back and two sides will be substantially enclosed.

If a company decides to provide an unenclosed smoking shelter it must check with the local authority as there may be planning permission required, licensing, building control and noise issues to consider.

Private clubs and company cars are also subject to the ban. Those using their home for work purposes will also be subject, in those places where clients/customers go, to also abide by the rules and to put up 'No Smoking' signs. On the spot fines of £150 can be imposed as well as other penalties.

If you want legal advice on these new rules or any other health and safety issue relating to your business call us.

revised OFT consultation in mergers

Many of our local clients buy or sell businesses. Sometimes they own a limited company and sell its shares and assets and in other cases they trade in partnership or as a sole trader and are selling assets to the buyer.

In June, the Office of Fair Trading issued a consultation on revised guidance in merger cases. Some mergers, particularly in narrow local markets where the parties' market shares are over 25%, may need to be cleared by the OFT.

Under the Enterprise Act 2002, the OFT has a duty to refer certain mergers to the Competition Commission.

The exception allows the OFT to decide not to refer where the markets involved are not of sufficient importance to justify a reference.

Existing guidance suggests that the OFT may consider a merger in a market worth as little as £400,000 per year to be of sufficient importance to justify a reference to the Competition Commission. The revised guidance will raise this level.

We provide advice and guidance on business sales and purchases and can ensure you are properly protected legally in all contractual documents relating to the sale or purchase.

ownership of copyright in software – Landamore v Wrenn

One of the most common areas of dispute for those commissioning computer software programmes is when clients and their programmers fall out over who owns the rights in software.

Most readers will know that under the Copyright, Designs and Patents Act 1988 the author owns the rights unless they are an employee producing works in the course of their employment. In that case the employer will own the rights. If the individual is self employed, the default position is that they retain ownership and the customer/client obtains merely a licence to use the rights. However, all that can be reversed by agreement so most standard buyers' consultancy agreements provide that rights in the works will be owned by the buyer.

In a recent case, a company was ordered by the courts to pay royalties for systems which had been developed. The development was agreed without there being any proper written agreement in place so it was left to the courts to determine if money was paid to the software developer.

Stephen Landamore, the programmer who wrote the software, had sued Laurence Wrenn who had commissioned the work. The court ordered Mr Wrenn to pay Mr Landamore £45,000 in royalty payments.

The High Court held that there was an implied licence for Wrenn to use Landamore's material.

The two men formed a company in which they each held 50% of the shares. However, they still had to agree who owned the rights to the software that was created before the company was formed.

Wrenn argued that his hiring of Landamore should have implied an assignment of the copyright in the works from him to Wrenn. Landamore said that only a non-exclusive licence should have been implied, though his lawyers later accepted that it should be an exclusive licence.

There was also a dispute about what was to be paid. The programmer said he was promised royalties for every unit sold. Wrenn said he promised a results-based payment but said that he was "uncomfortable" with the word royalty. The judge preferred the programmer's evidence and thought Wrenn was "a short tempered person, very dismissive of anyone who did not say or do as he wished". He awarded the royalties that Landamore claimed of £45,324.24, plus interest.

Call us for any information on copyright ownership issues and for contracts which deal with these issues.

recycling of electrical waste



On 1st July, the UK brought into force the EU Waste Electrical and Electronic Equipment (WEEE) Directive. This imposes new requirements for disposal of electrical waste.

The WEEE directive covers a wide range of products such as:

- Large household appliances: fridges, freezers, microwave ovens, washing machines
- Small household appliances: vacuum cleaners, toasters, coffee machines, electric toothbrushes
- IT and telecommunications equipment: PCs, laptops, monitors, keyboards, printers, cordless phones
- Consumer equipment: radios, TVs, DVD players, video recorders
- Lighting equipment: low-energy Compact Fluorescent Lamps (CFLs) are classified as WEEE
- Electric tools: all tools such as drills, saws, sewing machines. Only large, stationary industrial tools are exempt

- Toys, sport and leisure equipment: electric trains, game consoles, cycle computers
- Medical devices: implanted or infected products are exempt
- Monitoring and control devices: smoke alarms, thermostats etc
- Automated devices: this classification covers all appliances that automatically deliver products, e.g. drinks, food, money etc.

Businesses which sell these items can either give consumers the right to return the goods to the shop when they are going to be thrown away in replacement for a new item, or they can opt to fund centralised recycling.

There are at least 36 different 'producer compliance schemes' manufacturers and importers can join. The schemes arrange collection, delivery and disposal of affected waste without further charge to the customer. The average cost of each device subject to the regime is estimated to be less than £1 per item sold.

Many of our clients are affected by the new rules and indeed, began preparations for the new regime before the 1st July implementation date.