

# Quorum

November 2011

## Legal update on Commercial issues



### Employment tribunal fees - an end to vexatious employment claims?

Currently employees who bring employment tribunal claims do not have to pay a fee. This means that the full financial burden of the employment tribunal system falls on the tax payer. The Government is to change this and ensure that the cost of the system falls on those who use it. It is proposing to introduce fees to bring employment tribunal claims from 6 April 2013.

#### Proposed fees

Whilst little detail has been issued about the proposed fee structure, it has been reported that it will cost in the region of £150 to £250 to submit a claim to a tribunal, and a further £1,000 if the claim proceeds to a hearing. Where the value of a claim is more than £30,000, it is further proposed that the fees will be increased. If an employee wins their case, their fees will be refunded. Claimants with 'no money' will have their fees waived.

One glaring issue at present is that we do not know what the phrase 'no money' means. If it means someone claiming social security benefit, this is likely to catch a high proportion of employees who have been dismissed and are out of work. If it is going to be more of a means tested approach, the administrative time spent by government officials deciding who should and should not be charged a fee could outweigh the financial benefit of introducing a fee in the first place.

#### Will this reduce the number of claims?

Whilst the introduction of fees may reduce some claims being made by those unable to pay, £250 is of little consequence to the more senior and wealthy employees who are seeking a larger settlement. Furthermore, with financially strapped claimants, could their 'no win no fee' lawyer pay the fee for them on condition that it is refunded out of settlement/compensation monies?

Additionally, what happens if an employee wins their claim and so gets the fee refunded but then the case goes to appeal and they subsequently lose? Will they have to re-pay the fee? Will government administrators spend time (and money) trying to get the money back?

#### Good news or bad?

Without getting into discussions about the impact this change will have on an individual's ability to access the justice system, it seems likely that introducing a fee will reduce claims from being made and this can only benefit employers. Whether it will weed out the undeserving and vexatious claims is questionable. We suggest it will stop the claims from those who are unable to pay regardless of the merits of their case.

Consultation is due to take place on fee introduction over the next few months so hopefully all will become clear.

**For further information please contact Jayne Sinclair on 01865 813655 or [jayne.sinclair@manches.com](mailto:jayne.sinclair@manches.com)**

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## Beware when negotiating property contracts by email

The law prescribes certain formalities for the creation of enforceable land contracts, so as to avoid rights being created inadvertently. A recent High Court case suggests that it might be possible to comply with such formalities and create a binding land contract through an exchange of emails.

### Signing off

The Electronic Communications Act 2000 includes provisions to amend existing legislation to facilitate electronic conveyancing. Eleven years later, no amendments have been made, nor are they likely to be in the near future. This Summer, the Land Registry announced that its plans for full electronic conveyancing have been put on hold, in the light of stakeholders' reservations about e-signatures and the potential for fraud.

In the meantime, we have section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. This section, enacted before the advent of email as a habitual means of correspondence, was intended to reduce fraud and prevent parties from unintentionally entering into land contracts. It sets out specific statutory requirements for the creation of an enforceable land contract, namely, that the contract must:

1. incorporate all the terms agreed by the parties,
2. be in writing, and
3. be signed by all the parties.

In a recent High Court case, *Green (Liquidator of Stealth Construction Ltd) v Ireland (2011)*, the judge suggested that these requirements do not necessarily exclude the creation of a land contract by email.

### What happened?

Mrs Ireland had a legal charge granted in December 2008 over a property owned by Stealth Construction Ltd, a company part-owned by her sister. Mrs Ireland had lent Stealth £300,000 to buy the property. When Stealth went into liquidation in June 2009, the liquidator claimed that the charge was a preference which should be set aside under the Insolvency Act 1986. A company gives a preference to one of its creditors by doing something which puts that person into a better position than he or she would have been in had that step not been taken, and the company is either insolvent at the time of the preference, or becomes insolvent as a result.

Mrs Ireland argued that the charge had been entered into pursuant to an agreement made in October 2007, which was contained in an exchange of emails between her and her sister, at a time when the company was not insolvent. The charge was therefore not a preference, but the perfection of a previously-agreed security.

### What the court said

The judge ruled that the creation of the charge was a preference. There had been no contract, but this was because the exchange of emails did not refer to all the terms which had been orally agreed between the parties, and the emails did not suggest binding

obligations on the parties, not because the alleged 'contract' had not been signed.

Although it wasn't necessary to the outcome of the case, the judge went on to consider the requirements in section 2 for signature by both parties. Had this been satisfied by the sisters inserting their names at the end of their emails? They had only included their first names, but the liquidator had accepted that the emails had been signed, and the judge did not disagree. He said that an email and its reply, when taken together, could constitute a single document for the purpose of section 2, where, as in this case, the second email is sent as a reply and creates a string of emails, in contrast with the position where the recipient creates a new email to type a reply. The former, he said, was the electronic equivalent of a hard copy letter signed by both sender and recipient.

In an earlier case, *J Pereira Fernandes SA v Mehta (2006)*, the High Court had ruled that if a party sends an electronically created document, then he or she will be treated as having signed it to the same extent as having signed a hard copy of the same document. The judge in that case said that the appearance in an email of the name of the sender did not amount to a signature if it had been automatically generated - it must be placed so as to show that it was intended to give authenticity to the whole document.

### What does this mean in practice?

Although no enforceable contract was found to exist in this case, the decision is one more in a series of cases suggesting judicial recognition of electronic contracts. To some extent, this reflects the reality of business in the 21st century, which is often conducted by means of a lengthy chain of email correspondence.

However, section 2 of the 1989 Act was designed to prevent parties from inadvertently entering into land contracts. *Green* suggests that an exchange of emails may, in some cases, satisfy the requirement for signature in section 2, but the judge made some very fine distinctions that may not stand up to scrutiny. With many email systems, replying to an existing email involves choosing 'reply with history', whilst sending a new email requires you to select 'reply without history'. Most people do not give much thought to which method they select, but if this distinction catches on, a typed name at the end of an email chain may one day be construed as a signature for the purposes of entering into a land contract.

### Think before hitting 'SEND'

There hasn't yet been a case where parties have been found to have exchanged land contracts by email, but nevertheless, you should take care when negotiating by email, as the courts are starting to imply that it is possible.

- Mark emails subject to contract.
- Try to avoid creating a string of emails.
- Don't type your name at the end of emails.

Written by Deborah Caldwell.

**For further information please contact Richard Smith on 01865 813708 or [richard.smith@manches.com](mailto:richard.smith@manches.com)**

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## Workers on sick leave are entitled to statutory holiday pay only when they have made a holiday request

In *Fraser v St George's NHS Trust*, a worker who was on sick leave could not claim holiday pay under regulation 16 of the Working Time Regulations 1998 (WTR) as she had not given notice to her employer of her intention to take leave under regulation 15 of the WTR.

### The Facts

Mrs Fraser's employment as a nurse was terminated in October 2008. She had been on sick leave since November 2005 and did not return to work before being dismissed. She was paid in lieu of her final year's statutory holiday entitlement (in accordance with regulation 14 WTR). She was not paid in lieu of untaken statutory holiday from the previous two years, and so made a claim to the employment tribunal for these amounts.

### The Tribunal's Decision

It was held that she had accrued the right to the statutory holiday throughout her time on sick leave. But, as she had not given notice under regulation 15 WTR to exercise the right to take the holiday, her right to that holiday extinguished at the end of each leave year (in accordance with regulation 13 WTR). Therefore, she was not entitled to be paid in lieu of that extinguished holiday.

Mrs Fraser appealed to EAT, arguing that the fact that she had not taken the holiday during the two years of the sick leave in question, should not preclude her from being paid in lieu.

### The EAT's Decision

The EAT upheld the decision of the tribunal. It would go against the purpose of the WTR if workers were to be paid for holiday regardless of whether they had taken annual leave or not, as this would incentivise workers not to request annual leave.

In reaching its decision, the EAT held that an earlier case *Canada Life Ltd v Gray*, in which it was held that on termination a worker should be paid for the previous years untaken statutory holiday entitlement, had been wrongly decided.

Another case was referred to: *Pereda v Madrid Movillad SA*. In this case the European Court of Justice held that workers on long term sick leave have the option of choosing whether to take their statutory annual leave whilst they are on sick leave (and be paid for this), or to make a request for their annual leave to be deferred until they make a return to work (even if this means carrying the leave over into another leave year). The EAT interpreted this by saying that where a worker on sick leave wants to take their statutory holiday in another leave year; they must make a request to do so.

Mrs Fraser did not make any such leave request and so her right to statutory holiday pay disappeared at the end of each leave year. She was only entitled to statutory holiday pay for the current leave year at the time of dismissal.

### What does this mean in practice?

The judge's decision in the case is likely to be persuasive in the future (bearing in mind that technically, the decision in *Canada Life* will not be overturned by *Fraser*).

In general it seems that the position will be as follows: those workers who do not take their statutory leave during any given leave year will sacrifice their statutory holiday entitlement, and will sacrifice the right to payment in lieu of that entitlement upon the termination of their employment.

Workers on sick leave will have to make a request of their employer if they wish to be paid their statutory holiday entitlement whilst on sick leave, or will have to request to take their holiday after they return to work.

For further information please contact Eugene Wojciechowski on 0118 982 2649 or [eugene.wojciechowski@manches.com](mailto:eugene.wojciechowski@manches.com)

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## Purple Reigns - Cadbury successfully defend colour mark

Cadbury has successfully defended its trade mark for “Cadbury” purple (otherwise known as Pantone 2685c), following a three-year legal battle with confectionary rivals Nestlé.

Cadbury originally succeeded in registering the mark in 2008 only to be challenged by Nestlé who argued that the mark lacked sufficient “distinctive character” to be eligible for registration and that the mark had been registered in bad faith. Whilst the UK Intellectual Property Office (IPO) have now granted Cadbury the right to use the colour, the trade mark is limited to use on chocolate bars and drinking chocolate. The IPO sided with Nestlé with regard to the mark’s application to cakes and chocolate assortments and refused to grant Cadbury the right to register a trade mark in respect of these products. Nestlé’s arguments that the mark had been registered in bad faith were rejected as “absurd”.

The scarcity of colour marks is largely due to high threshold applicants must meet before the colour acquires sufficient distinctiveness to be eligible for trade mark registration. In the UK this effectively means showing that the colour in itself is distinctive in its own right regardless of the medium to which it is applied. The registrar was satisfied that the colour purple had built a distinctive character associated with Cadbury and that the use of the colour in relation to certain chocolate products was synonymous with the brand. He drew attention to Cadbury’s use of the colour in its advertising, in particular the ever popular advert showcasing a gorilla playing the drums to the dulcet tones of Phil Collins with nothing but a purple background to link the scene to Cadbury.

The IPO has historically been reticent to grant the registration of colour marks and it is consequently a feat that only few have achieved. Orange with its particular shade of the eponymous colour and Ikea with its blue-and-yellow colour scheme are two of those who enjoy the protection of a registered colour mark.

The hesitancy of international trade mark registrars toward colour marks is arguably well founded. Whilst some organisations are able to show strong links between their brands and a particular colour, the registration of such a mark raises fundamental questions about whether it is right that a commercial organisation is able to

monopolise a colour. Such monopolisation has the potential to restrict competition – particularly in creative industries.

The trials and tribulations of fashion house Christian Louboutin highlights the balancing of creative freedom with the protection afforded by registration of a colour mark. Louboutin manufactures high-end footwear with the distinctive trait of bright red soles, which have long been associated with the designer and protected by a trade mark registration in the USA since 2008. (You may even have hazy memories of Jennifer Lopez’s 2009 non-hit Louboutins in which the songstress implores her listeners to “Watch these red bottoms”.)

Louboutin has been active in seeking to prevent rivals from selling shoes that also have red soles. Thus far, however, it has been unsuccessful in persuading the court to uphold its rights to trade mark protection: red soles were found to be functional on allegedly infringing products (and therefore not capable of being protected by a trade mark) because they were designed to make the shoes “energetic” and “sexy” thereby enhancing them and making the product more competitive. It was also decided that in the context of fashion it was not right for the sake of creative freedom that one designer was able to monopolise the use of a colour. The ruling does bring into question the point of Louboutin having the registration at all if it is not capable of being protected. Meanwhile, Louboutin continues to seek protection for its red-sole branding and has since received support from jewellers Tiffany & Co. who are seeking to trade mark their own “Tiffany” egg-shell blue.

Those organisations, such as Cadbury, who have succeeded in registering and defending the registration of colour marks in the UK (and elsewhere) have found that registrars are only prepared to grant trade mark protection for a colour in relation to a very narrow field of products. Hence Cadbury have not been granted the right to monopolise the colour in relation to its confectionary as a whole, but only in relation to chocolate in tablet form and drinking chocolate. The confectionary industry as a whole will therefore still be able to make use of Pantone 2685c. It remains to be seen whether courts will be prepared to uphold the registration of colour marks in relation to more creative industries. In the meantime, fans of the Quality Street “purple one” manufactured by Nestlé can rest assured that this particular treat won’t be changing its colour any time soon.

**For further information please contact James Howarth on 01865 813714 or [james.howarth@manches.com](mailto:james.howarth@manches.com)**

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**Manches LLP**  
9400 Garsington Road  
Oxford Business Park  
Oxford  
OX4 2HN  
Tel: +44 (0) 1865 722106  
Fax: +44(0) 1865 201012

**Manches LLP**  
Reading Bridge House  
Reading Bridge  
Reading  
RG1 8LS  
Tel: +44 (0) 118 982 2640  
Fax: +44 (0) 118 982 2641

**Manches LLP**  
Aldwych House  
81 Aldwych  
London  
WC2B 4RP  
Tel: +44 (0) 20 7404 4433  
Fax: +44 (0) 20 7430 1133