

LexisNexis In-house NewsIN

The months key commercial legal stories that could affect your business

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October 2017

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Our monthly round-up of key news and trend stories for in-house lawyers includes links to further recommended reading in Lexis®PSL. Non-subscribers can request a [free one-week trial](#) of LexisPSL to view this content.



Corporate & Commercial

Government reforms to corporate governance regime aim to enhance public trust

The government has proposed a number of reforms to the corporate governance regime, including requiring quoted companies to publish details of the ratio between CEO pay and the average worker's pay.

Further reading: [Government reforms to corporate governance regime aim to enhance public trust.](#)

Court rules on whether limitation of liability clause is effective

The Technology and Construction Court has ruled in *Royal Devon and Exeter NHS Foundation Trust v Atos IT Services UK Ltd* on the effectiveness and interpretation of limitation and exclusion of liability provisions. In 2011, the claimant (the Trust) entered into a contract with the defendant (ATOS) for the provision of health record scanning, electronic document management and associated services.

In 2014, the Trust served a notice of material breach in respect of the alleged failure by ATOS to remedy defects in the relevant system.

In 2016, the Trust served a notice terminating ATOS' services and subsequently sought damages of approximately £7.9m.

This ruling focused on the trial of the preliminary issues of whether: (a) a provision (clause 8.1.3(a)) in that contract excluding each party's liability for loss of profits, business, revenue, goodwill or anticipated savings excluded or barred claims for wasted expenditure on a reliance loss basis; and (b) whether certain limitation of liability provisions were effective and, if so, their meaning and effect.

Further reading: [Alert: Court rules on whether limitation of liability clause is effective \(Royal Devon and Exeter NHS Foundation Trust v Atos IT Services UK Ltd\).](#)

Supreme Court rules on contractual liability for remedial works

In *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd and another* the Supreme Court has held that a contractor was liable for works which were not fit for purpose despite it having met all of its other contractual obligations.

Further reading: [Contractual liability for remedial works.](#)



Data Security

Employees' rights to keep workplace emails private confirmed after court ruling

In the case of *Bărbulescu v. Romania*, the European Court of Human Rights (ECtHR) has found a Romanian man, whose employer read personal messages he sent using a work account, had his right to a private life breached.

The ruling reverses the original decision of the Romanian courts, which found the man's firm was within its rights to monitor his computer activity.

The ECtHR determined the Romanian national courts had not 'adequately protected Mr Bărbulescu's right to respect for his private life' which breached Article 8 of the European Convention on Human Rights.

Further reading: [Employees' rights to keep workplace emails private bolstered after court ruling](#)

[Violation of Article 8 ECHR by courts in respect of employer monitoring \(*Bărbulescu v Romania*\)](#)

Equal pay comparators: supermarket



Employment

workers can compare themselves to distribution depot workers

Supermarket workers are able to compare themselves to distribution depot workers in the equal pay claim brought against Asda, according to the EAT in [Asda Stores Ltd v Brierly and others](#).

The EAT has clarified that: (1) [Article 157](#) of the Treaty on

the Functioning of the European Union is directly effective in a claim founded on equal pay for work of equal value, (2) where there is a 'single source' of pay and conditions for both claimant and comparator, a comparison between them is permitted independently of whether unequal treatment arises from legislation or collective agreements and whether or not the employment is in the same establishment or service, and (3) where no comparator works at the establishment where the claimant is employed, comparison is permitted applying the 'North' hypothetical test.

Further reading: [Equal pay comparators: supermarket workers can compare themselves to distribution depot workers \(*Asda Stores v Brierly*\)](#).

Constructive dismissal: suspension not always a 'neutral' act and can amount to repudiatory breach

The issue of whether or not a teacher could rely on her employer's decision to suspend her—to investigate concerns as to the force and methods used to manage the behaviour of challenging children—as a repudiatory breach of contract entitling her to resign and claim constructive dismissal was determined by the High Court, on appeal from the County Court, in *Agoreyo v Lambeth London Borough Council*.

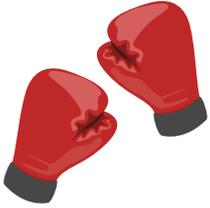
Further reading: [Agoreyo v Lambeth London Borough Council](#)

Tribunal fees

We reported last month that the Tribunal Fees Order 2013 had been declared unlawful. Consequently, until any new fees regime has been implemented, employment tribunal claims are free. The consequences of this are far reaching.

There have already been reports of claims being allowed to proceed out of time as a result of the decision and a complicated process is being implemented to reimburse fees paid.

Whether the infrastructure of tribunals that has been significantly reduced in recent years can cope with the doubtless surge in demand, remains to be seen.



Competition

CMA investigation: Infringement decision against Ping Europe's online sales ban announced

On 24 August 2017, the Competition and Markets Authority (CMA) **announced** its decision that golfing equipment manufacturer Ping Europe Ltd (Ping) infringed competition law and imposed a fine on it of £1.45m.

The fine imposed reflects that the CMA found the breach occurred in the context of a genuine commercial aim of promoting in-store custom fitting.

The CMA found that the company broke competition law by stopping two UK retailers from selling its golf clubs on their websites.

Ping must now bring the sales ban to an end and not impose the same or equivalent terms on retailers again. It may, however, require online retailers to meet certain conditions for selling, though these conditions must be compatible with competition law.

Further reading: [CMA investigation: Infringement decision against Ping Europe's online sales ban announced](#)



Bribery and corruption

Modern Slavery Act 2015

The **Modern Slavery Act 2015** requires large businesses to produce a yearly statement outlining the actions they have taken to combat slavery in their supply chains.

Despite this legal obligation it has been reported that one in three businesses are flouting the law. This lack of compliance is likely to ease the way of two private members bills that have recently been introduced to increase the MSA obligations on companies.



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