



For Business

CASH FLOW - MORE IMPORTANT THAN EVER

Head of the commercial department, Peter Allen, comments

So we are all back from our summer holidays and the economy continues to be positive, despite the worries over Brexit. In such cautious times cash flow is more important than ever. The new duty to report when you pay your bills may affect the willingness of someone to do business with you, in a positive or a negative way! You will also find an article that questions whether those super tough terms and conditions that you had drawn up would be worth the paper they are written on should a dispute go to court. Both these issues could affect your ability to maintain a healthy cash flow. Here on our front page, Thomas writes about zero hours contracts.

However, I for one won't have a word said against Mike Ashley of Sports Direct. I still have a tennis racket which he personally strung for me, and that's lasted since 1984!

Zero hours contracts back in the spotlight

In October 2015, Tim Ogle, published an article about developments in the law relating to zero hour contracts. In that article, he also reported on the news of 300 staff on zero hour contracts (ZHC) at Sports Direct being less than happy about being excluded from the company's bonus scheme, solely for the reason that they were employed under such contracts.

Since January 2016, it has been automatically unfair to dismiss an employee on a ZHC if the principle reason for the dismissal is that they acted in breach of a contractual clause prohibiting them from working for another employer. It is also unlawful for a worker on a ZHC to suffer a detriment because they work for another employer.

Moving to the present day, ZHC are back in the spotlight once again. Sports Direct's internal review on employee procedures found that there are problems for staff engaged on terms where they have no guaranteed minimum hours. As a result, it is reported that Sports Direct will offer its shop staff the option of a contract with a 12-hour per week minimum guarantee. Only a few days after that report was published, the Office of

National Statistics reported that there were about 903,000 people between the months of April and June 2016 whose main job did not guarantee a minimum number of hours. That is a 21% increase from the figure of 747,000 for the same period in 2015. It means that 2.9% of people in employment are on ZHC, compared with 2.4% last year.

With the media attention surrounding them and their increasing popularity with employers, Parliament could legislate further to protect workers on ZHC. It should be remembered however that workers on ZHC have the same employment rights as regular workers, although they may have breaks in their contracts that affect rights that accrue over time. What is clear is that a balance needs to be found between the rights of the employer to maintain a flexible work force and the rights of staff to enjoy the freedom of flexible working arrangements, whilst being protected from bad management practices or abuse of basic employment rights.

For advice on this or any other area of employment law, please get in touch.

Thomas Emmett
01245 453847
thomas.emmett@birkettlong.co.uk

Making the voice of Essex heard!

Government, Essex County Council and the city, district and borough councils are all saying that they want business to be at the heart of decision making and planning for economic growth and prosperity. Some may feel that they've heard this before, but, says David Rayner, commercial real estate partner at Birkett Long, this time there is real action and intent behind those words.

David is the new chair of the re-constituted Chelmsford Business Board (CBB) and, through that, sits on the Greater Essex Business Board (GEBB). He is also one of five business representatives from Essex on the Strategy Board of the South East Local Enterprise Partnership (SELEP). Indeed, Birkett Long's commitment to the communities it serves means that it has supported David's involvement with all three organisations for the past four years.

Strategic Economic Plans for the SELEP region, Essex and for the individual local government areas within Essex, are living documents which constantly evolve. They are undergoing a review at present and business has a vital role to play in shaping those plans and ensuring that business priorities are kept at the forefront of the

political agenda. What do you and your business want to see being delivered as part of future growth deals? David comments that over the past few years business demands have majored on infrastructure improvements – transport, utilities and broadband – skills, and training and housing. Those have been the focus of the bids to government for Local Growth Fund monies over the first two rounds of bidding – where SELEP competes with the other 38 LEP's across the country.

SELEP is currently delivering a £482m LGF capital investment programme, which will create up to 45,000 new jobs to boost employment opportunities in the South East and deliver 23,000 new homes to support our growing population. Already we've seen LGF expenditure of £55.7m in 2015/16 – some of this in Colchester, Basildon and Chelmsford. SELEP has been recognised by the Housing and Finance Institute as the first Housing Business Ready LEP in the country. It also has an existing EU funding programme to deliver.

A £229M bid has just been submitted for LGF Round 3, with projects being

Payment practices

New reporting duty will highlight late payers

Late payment of invoices is considered to be a widespread problem because it can cause cash flow issues that can seriously impact the ability of the business to trade, especially in the short term. The Government has recognised this and legislated to help bring to light those businesses that are good at paying suppliers promptly and those that are not.

The Payment Practices Regulations will apply to large companies and LLPs. Although the following is subject to amendment prior to the regulations coming into force, at present it is expected that businesses with two of more of these criteria will be subject to the new reporting obligations:

- a turnover greater than £25.9 million
- total assets on balance sheet greater than £12.9 million
- an average number of employees exceeding 250

Businesses to whom the obligations apply will be required to publish on their website details of their payment policies and practices, and update it every six months showing their performance. Specifically, a business will be required to publish the following information:

- Standard payment terms
- Average time taken to pay
- Proportion of invoices paid:
 - in 30 days or less

priority ranked by GEBB and then SELEP. Because of the size of the SELEP region, the whole of Essex (including the two unitary authorities) is, effectively, one combined area and GEBB is the delivery board for that federated area. That means that Essex businesses lead the way, not only in influencing which projects go forward and how they are prioritised, but also holding the relevant authority to account for delivery of approved schemes.

But business voices are not just being heard on specific projects. SELEP has, for example, delivered a growth hub and led the way in delivering the business response to the consultation from Highways England on the Lower Thames crossing. Locally, businesses are feeding into Chelmsford and other local authority plans, helping prioritise schemes for the next bidding rounds, and Essex County Council is engaging with businesses for their views on anything from business rates to skills and training.

Now is a very exciting time to participate and ensure that the voice of business is heard loud and strong.

If you would like to get involved or contribute to the shaping of Essex's future, please contact David Rayner using the details below, or Dominic Collins at dominic.collins@essex.gov.uk.



David Rayner
01245 453826
david.rayner@birkettlong.co.uk



- between 31 to 60 days
- beyond 60 days

- Availability of supply chain finance
- Whether financial incentives were required to join or remain on supplier lists
- Dispute resolution processes
- Proportion of invoices paid beyond agreed terms
- Amount of late payment interest owed and paid
- The availability of e-invoicing
- Existence of preferred supplier lists
- Membership of a payment code

The regulations are expected to come into force in April 2017. In the short-term, businesses should focus on

ensuring they are able to comply. Finance teams should be notified of the incoming requirements so that consideration can be given to sourcing appropriate solutions.

In the medium-term, businesses may wish to consider mechanisms for improving and validating payment reports.

In the longer-term, if the regulations have the intended effect, those currently paying beyond 60 days may have to carefully consider solutions for optimising payment practices in order to reduce that time.



Thomas Emmett
01245 453847
thomas.emmett@birkettlong.co.uk



terms of business

Your terms and conditions have never been at such a risk!

In the past, judges in the UK would only consider the points put before them. It was not their habit to consider points independently of the litigating parties' representations. However, that has now changed. The Consumer Rights Act 2015 (CRA) says that where cases involve consumers, the judiciary has a duty to consider the fairness of contractual terms, even when no one is asking them to do so!

In cases where the fairness of a contractual term may be a matter of legitimate dispute, the court must give its assessment. The CRA gives courts a wide scope to apply generalised criteria of fairness, which effectively allows them to assess whether terms are fair in the light of current commercial and social standards.

This assessment of fairness is undoubtedly a difficult exercise and is unavoidably influenced by the subjective views of the assessor. There are quite complex provisions in the CRA governing the terms of consumer contracts that can be assessed for fairness. For example, a term which is 'transparent' or 'prominent' is excluded from assessment. 'Transparent' terms refer to those expressed in plain and intelligible language, and, where appropriate, written legibly; 'prominent' terms are those brought to the consumer's attention in such a way that the average consumer would be aware of that term. An 'average consumer' is a person who is reasonably well informed, observant and circumspect.

Naturally, all this is subject to the interpretation, social background and attitude of the person doing the assessing! Making a decision on these provisions will undoubtedly be difficult. The danger here is that this will lead to uncertainty as to what terms can be assessed for fairness in cases involving consumers.

The case of Radlinger v Finway is a good example. It was brought before the

European Court of Justice on 21 April this year and concerned a consumer credit agreement regulated by the Consumer Credit Directive. The court was asked to decide whether the debt under this agreement was enforceable. The court said that in consumer credit cases, such as this, it had a duty to consider any relevant issue arising out of the Consumer Credit Directive, whether or not it had been raised by the parties.

This decision is binding on UK courts, which means we are likely to be left with a situation - both in unfair contract cases and in consumer credit cases - where the court is obliged to investigate such matters fully, in addition to the specific issues raised by the parties.

In consumer credit legislation the provisions are complex and technical, and are open to considerable legal argument. This is likely to put substantial pressure on the courts and may lead to considerable uncertainty. It will have to be seen how relevant cases progress as they go through the judicial system.

So how does this leave businesses in respect of the validity of their terms and conditions? It is even more important to reassess your terms and conditions and, where necessary, amend them in the light of this developing area of law. For help with this task, contact Andrew O'Brien or another member of the team.



Andrew O'Brien
01268 244148
andrew.obrien@birkettlong.co.uk

BIRKETT LONG LLP

PHOENIX HOUSE
CHRISTOPHER MARTIN ROAD
BASILDON SS14 3EZ
T 01268 244144

ESSEX HOUSE, 42 CROUCH STREET
COLCHESTER CO3 3HH
T 01206 217300

FAVIELL HOUSE, 1 COVAL WELLS
CHELMSFORD CM1 1WZ
T 01245 453800

E BUSINESSNEWS@BIRKETTLONG.CO.UK
WWW.BIRKETTLONG.CO.UK
TWITTER: @BIRKETTLONG

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