

Winter 2014

# Allan Janes

solicitors



## LEGAL REVIEW

Your quarterly bulletin on legal news & views from Allan Janes Solicitors

[www.allanjan.es.com](http://www.allanjan.es.com)

### Holiday pay for overtime

The Employment Appeal Tribunal (EAT) has given a landmark ruling that pay for overtime, even if not guaranteed, counts towards an employee's 'normal remuneration' for holiday pay purposes. This means that employers who regularly pay overtime will have to pay holiday pay at a higher rate. The ruling is retrospective so many employers are likely to face claims for backdated holiday pay.

#### What should employers do?

- Carry out an audit of the 'normal remuneration' of your employees to ensure that holiday pay is being calculated correctly.
- Review contracts of employment to ensure they accurately reflect how holiday pay is calculated.
- Have the relevant paperwork in readiness to respond to any claim for underpaid holiday pay.

#### How we can help

If faced with a claim for arrears of holiday pay we can assess your potential liability. The claim will not succeed unless it has been brought within 3 months of the last underpayment. Therefore, the employee must establish a 'series of deductions' with no more than a 3-month gap between deductions in order to succeed. This significantly restricts the scope of claims.



Rebecca Smith

For further information, please contact Rebecca Smith, our Employment Specialist on email: [rebecca.smith@allanjan.es.com](mailto:rebecca.smith@allanjan.es.com) or Tel: 01494 521301.

### Dementia sufferer let down by selfish nephews

When an elderly lady appointed her two nephews to act as her attorneys under a power of attorney, she could not have expected that the result would be her not having enough money to pay for her care in a care home.

The woman set up the power of attorney in 2007 and now lives in a care home as she suffers from dementia. The local authority became concerned at the handling of the woman's finances and launched an investigation, which led to a hearing in the Court of Protection.

The two nephews had committed several acts which had led to a dissipation of their aunt's estate. They had given their mother £15,000 to buy a new car, sold the aunt's house to a sister at a considerable undervalue, loaned another brother £50,000 to help him buy a property and had withdrawn other sums in excess of £60,000 for which there was no adequate explanation. Despite their claim that it was in the woman's best interests for them to continue to manage her affairs, the Court

concluded that the pair had treated their aunt's funds as if they were their 'private piggy bank' and stripped them of their power of attorney, appointing the local council in their place.

There has been a steady stream of similar cases reaching the courts for some time now. Whether holders of powers of attorney act out of ignorance or out of a desire for personal enrichment, the effects can be the same – depriving an elderly and vulnerable person of the funds they need to see out their declining years in the style they should reasonably expect.

We can assist you to create a power of attorney that will provide for competent professional oversight of financial transactions.

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## Rugby sponsorship claim fails

In an important decision for corporate sponsors and those who benefit from their financial help, a fishing company which stumped up £1.2 million in support of its cash-strapped local rugby club has suffered defeat in its legal campaign to deduct that sum from its profits assessable to Corporation Tax.

Over a three-year period, Interfish Limited had entered into a sponsorship deal which provided vital financial assistance to Plymouth Albion Rugby Football Club, which was in severe financial difficulties and badly needed funds for, amongst other things, improving its squad of players.

The main benefit to Interfish was greater public visibility for its business. It was also hoped that the exposure would make it easier for the company to obtain bank funding for expansion and that those involved with the club would 'look favourably upon the company in ways that would assist its trade'.

Interfish cited Section 74(1) of the Income and Corporation Taxes Act 1988 in its bid to write off the cost of sponsoring the club against its tax liabilities under the heading of 'advertising and marketing'. However, the deduction was refused by HM Revenue and Customs in a decision which was subsequently upheld by the First-tier and Upper Tribunals.



In dismissing the company's challenge to those decisions, the Court of Appeal noted that the payments had also been motivated by a desire to improve the financial position of the rugby club. As the money had not been paid out exclusively for the purposes of the company's own trade, it was not tax deductible.

## Theatre worker bitten by rottweiler wins damages

A London theatre worker who was attacked by a Rottweiler on her way home from work has received a four-figure sum in compensation for her injuries.

Miriam Spencer, 35, was attacked by the dog, which was not wearing a muzzle, as she walked home from the train station through Gipsy Hill after an evening performance at the Old Vic theatre on 29 June 2012.

Miss Spencer was speaking with her father on her mobile phone when the attack took place. She was taken completely by surprise as she had not made any sudden movements or been close to the dog when it happened. She was bitten on the underneath of her upper left arm as she put her hands up to protect her face.

She was taken to hospital and treated for three bite wounds on her arm. Owing to the severity of her injuries, she underwent surgery to stitch the wounds on the following day and was not able to return to work for several weeks.

Her ordeal has not only left Miss Spencer with permanent scarring from the bite marks but it has also had a marked psychological impact on her. She is now terrified of dogs and lives in fear of another attack. She is having counselling to help her overcome the trauma.

Miss Spencer claimed compensation from the owner of the dog and has won an undisclosed settlement from the owner's insurance company.

Whilst some breeds of dog are banned, any dog can cause serious injuries if it decides to attack. If you are bitten by a dog, it is important to report the incident to the police, as not only will this ensure that there is an official record of the attack but it will also enable you to find out whether the dog has been involved in any previous incidents.

**If you have been injured because a dog owner failed to control their animal, you may be able to claim compensation. Contact us for advice.**

## Restriction on goods sold breaches competition law

It is not uncommon for a landlord to want to preserve a 'balance' among the tenants trading in a commercial development and therefore to restrict the number of tenants in a particular trade.

A hidden danger inherent in this approach became evident recently when competition law was used to stop a landlord from enforcing such a policy.

The case arose when a tenant's lease came up for renewal. The landlord refused to renew it on the ground that the tenant would be selling alcohol and staple goods in the neighbourhood when there was a nearby shop selling the same sorts of products.

The landlord argued that the area needed a variety of shops selling different goods and the tenant argued that the landlord's policy had the effect of reducing competition.

The County Court agreed that the landlord's attempt to restrict the range of goods being sold was in breach of competition law.

**For advice on ensuring that all your legal agreements comply with competition law, contact us.**

## Builders liable after fire destroys £4 million eco-home

A couple who were heartbroken when their £4 million 'eco-home' burnt to the ground when it was close to completion have won the right to full compensation for their loss from a construction company involved in the project.

The couple sued the company for more than £3.5 million in damages after fire tore through the property, which was built on a private island off the south coast of England. The company disputed the cause of the blaze and denied that it was contractually bound to compensate the couple for their devastating loss.

However, in entering summary judgment against the company, the High Court found that the defective installation of a log burner and flue had sparked the fire.

Combustible materials were closer to the chimney than the 50mm distance required by building regulations. The burner had been in use for only two weeks when the fire took hold in the building's roof space, largely destroying the property.

The company was contractually responsible for the faulty installation work carried out by a subcontractor and had no viable defence to the couple's claim. A decision regarding the amount of compensation payable was deferred for agreement between the parties or for assessment by the Court at a later date.

If you have employed a contractor whose poor quality work has resulted in damage to your property, contact us for advice on how to proceed.

## Failure to notice flaw does not defeat indemnity

An argument over who was responsible for water leaks in an apartment block recently led to an appearance in the Court of Appeal for a contractor and subcontractor.

The contractor had won a contract to design and install the water system for a block of flats, using a 'boosted water' system to ensure the flow of water to the topmost flats was adequate.

This work was subcontracted to another firm. The contractor was warned about a possible danger to the system as a result of surges of pressure and arranged for the subcontractor to install two pressure arrestor valves to prevent surges from causing leaks.

The subcontractor's installation of the valves was defective, and this was not noticed by the contractor when its employees inspected the system.



The contract between the contractor and the subcontractor contained an indemnity clause in which the subcontractor indemnified the contractor for any loss resulting from the default or negligence of the subcontractor.

When a pressure surge subsequently caused a burst pipe, the question arose as to who was liable for the damage caused. At the first hearing, the court decided that the subcontractor was liable under its indemnity.

The subcontractor appealed, arguing that the contractor itself was at fault because it had been negligent when inspecting the system.

The Court of Appeal confirmed the original decision. The indemnity held good because the subcontractor had committed a negligent act which caused the damage. The indemnity clause could not be 'stretched' to mean that it included only defects that would not be visible on inspection by the contractor.

**For advice on limiting your risk in any construction contract, contact us.**

## Use of DIY executors sparks explosion of claims



Claims against dishonest executors have trebled in 12 months, according to the Law Gazette.

The increase in the number of claims is thought to result from the appointment of friends and family members as executors rather than professional executors such as solicitors.

There are many reasons for using a professional executor, such as:

- They have experience in dealing with the legal formalities and procedures, which means that they can handle these promptly;
- They have expertise in dealing with the relevant taxation etc. requirements;

- They will act objectively in dealing with the beneficiaries;
- They have a detailed knowledge of the law relating to wills and probate and are able to anticipate any issues that may arise; and
- In the unlikely event that something does go wrong, they are covered by professional indemnity insurance to cover any losses.

**Contact us if you would like advice on your will and executorship arrangements.**

## Equal pay audits

Under the Equality Act 2010, it is unlawful for an employer to discriminate between men and women in terms of their pay and conditions where they are in the same employment and are doing the same or similar work, work rated as equivalent or work of equal value. An employer only has a defence against a claim of sex discrimination with regard to pay where the difference in contractual terms is due to a 'material factor' which is not directly or indirectly discriminatory.

From 1 October 2014, the Equality Act 2010 (Equal Pay Audits) Regulations 2014 apply to Employment Tribunal (ET) claims presented on or after that date where the employer has been found to have breached the equal pay provisions of the Equality Act.

The Regulations set out the circumstances in which the ET must order the employer to carry out an equal pay audit, the required contents

of the audit and the timetable for ensuring compliance with the order.

There is an exemption for existing micro-businesses (i.e. those with fewer than ten employees) and new businesses (i.e. brand new businesses started in the twelve-month period before the complaint was made).

Where an order is made, this will include a description of the persons for whom relevant gender pay information must be included, the period of time covered by the audit and the date on which the audit must be received by the ET.

Once the audit has been satisfactorily completed, the gender pay information it contains will normally be required to be published 'in a format accessible to all affected staff', which will usually be on the employer's website, for a period of at least three years.



Failure to comply with an order may result in a penalty not exceeding £5,000, with possible additional penalties for employers who continually fail to comply with an order.

**If you would like assistance with carrying out a review of the pay and conditions of your workforce to check that these are fully compliant with equal pay legislation, contact us.**

## Businessman must live with expert share valuation

A businessman who bitterly disagreed with an expert valuation of his company's worth will have to pay more than £4 million to buy out his estranged partner's minority shareholding, following a ruling of the Court of Appeal.

The businessman owned 60% of the company's shares and his partner 40%. After the pair fell out, the partner's employment was terminated. He claimed, amongst other things, that his dismissal was unfair; however a compromise was reached whereby the businessman and the company agreed to buy him out.

It was agreed that the valuation of the partner's minority shareholding – which was no easy matter as the company's success relied largely on trust and good working relationships – would be delegated to a firm of accountants. The businessman and the company fiercely objected when the accountants reported that the partner's shares were worth £4,218,000.

Their challenge to the valuation was, however, dismissed by a judge. In appealing against that decision, the businessman and the company made wide-ranging criticisms of the accountants' methodology and argued that the partner's shares were only worth a fraction of the sum at which they had been valued.

However, in dismissing the appeal, the Court noted that the parties had voluntarily submitted the valuation exercise to the accountants and ruled that their report was binding, regardless of its alleged flaws. The Court observed, "Parties who refer a dispute to an expert must be taken to have recognised that mistakes may be made, both of fact and law, but they are prepared to take that risk because they place a high degree of confidence in their chosen expert."

**If you are in dispute with business partners or fellow shareholders, we can assist you to obtain a fair settlement.**

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