

Commercial Law

Retention of Title Clauses



Unless otherwise agreed, a buyer acquires ownership of goods when it receives possession of them, even if, as is often the case with materials or wholesale goods, it hasn't yet paid for them. If the buyer subsequently becomes insolvent, the supplier will be an unsecured creditor, with very limited protection and no rights over the goods it has supplied to the buyer but not yet been paid for.

An ROT (retention of title) clause overrides this position by providing that the seller continues to own the goods until the buyer has paid for them. Alternatively, an ROT clause can provide that the seller retains ownership of the goods until the buyer has paid the seller all moneys it owes to it, not just the purchase price of the goods in question. If the buyer becomes insolvent, the seller merely takes repossession of goods which it has continued to own all along.

To be effective, an ROT clause must entitle the seller to enter the buyer's premises to repossess the goods in certain circumstances. Those circumstances will include the appointment of a receiver or liquidator, but should also cover other events indicative of insolvency, such as the presentation of a statutory demand. With items such as plant or equipment, which may become attached to the buyer's premises as fixtures or fittings, the ROT clause should provide the seller with, as well as the right of entry and repossession, the right to sever

the goods from the buyer's property.

An ROT clause should also require the buyer to store the seller's goods separately and identify them as the seller's. This will not work, and ROT clauses generally do not work, where the goods are mixed with other goods by the buyer in such a way that they cannot subsequently be recovered in their original form or without damaging other goods. The classic example of this was resin which was subject to an ROT clause. The effectiveness of the ROT clause was held to have ended once the resin was mixed with wood chip to make chipboard.

Different Forms of Insolvency

An ROT clause CAN be effective against a company:

- in liquidation;
- over which a receiver has been appointed; or
- over which an administrative receiver has been appointed.

An ROT clause will NOT be effective against a company in administration (not to be confused with being under an administrative receiver), unless the administrator agrees or a court order is obtained.

Proceeds of Sale

An ROT clause can be expressed to grant the seller security over any sale proceeds which the buyer receives for the goods in the event of it selling them. In order to be effective against a buyer company, the seller would have to register a charge against the buyer at Companies House within 21 days of creation. For most businesses, this would not be a practical course of action for its daily trading activities. Even if registered, pre-existing charges, such as might exist in favour of a bank, may take priority over one registered by the seller.

Dealing with Disputes

New employment legislation due to come into force in April this year will repeal the statutory dispute resolution procedure. In place of the statutory procedures, employers will be encouraged to follow guidance set out in the revised ACAS Code of Practice. Although a failure to follow the Code will not make employers liable to proceedings or make a dismissal automatically unfair, under the new Code if a tribunal feels that an employer has unreasonably failed to follow the guidance set out then they can increase any award they have made in such cases by up to 25%.

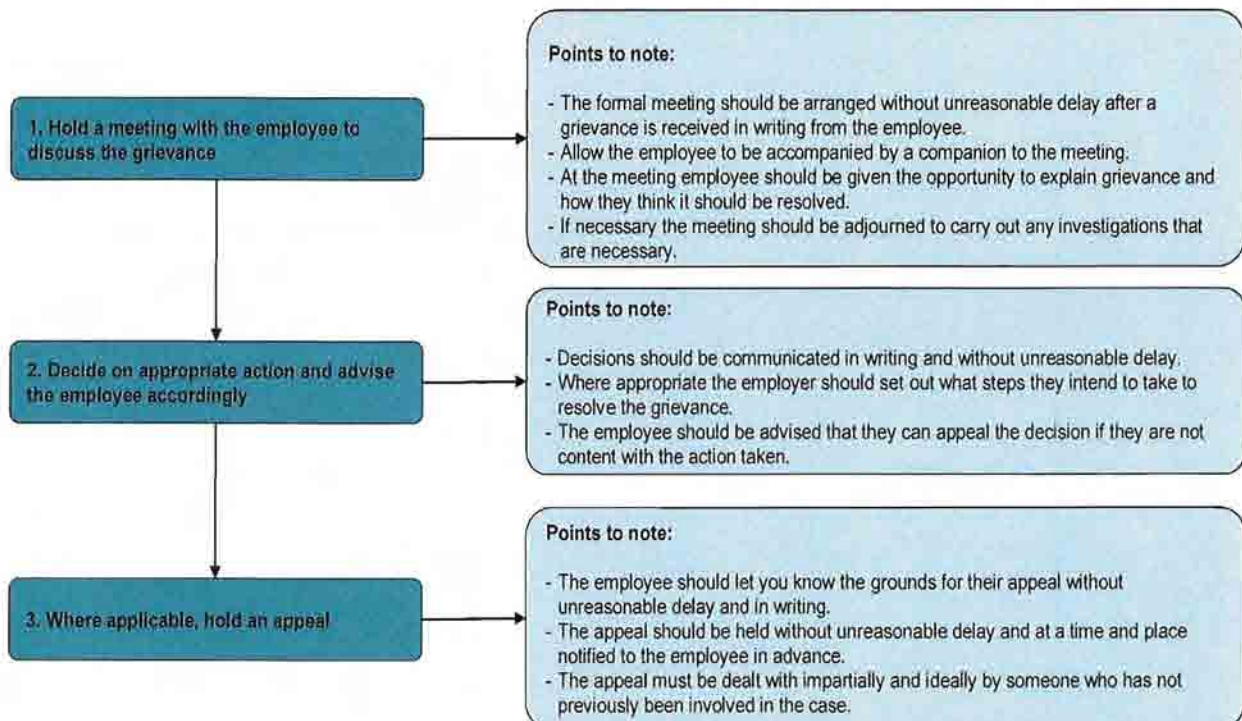
How to Act Fairly

1. Address issues promptly;
2. Act consistently;
3. Investigate the facts of the case where necessary;
4. Inform employees of the basis of any problem and let the employee provide a response before any decisions are made;
5. Allow employees to be accompanied to any formal grievance or disciplinary meeting.

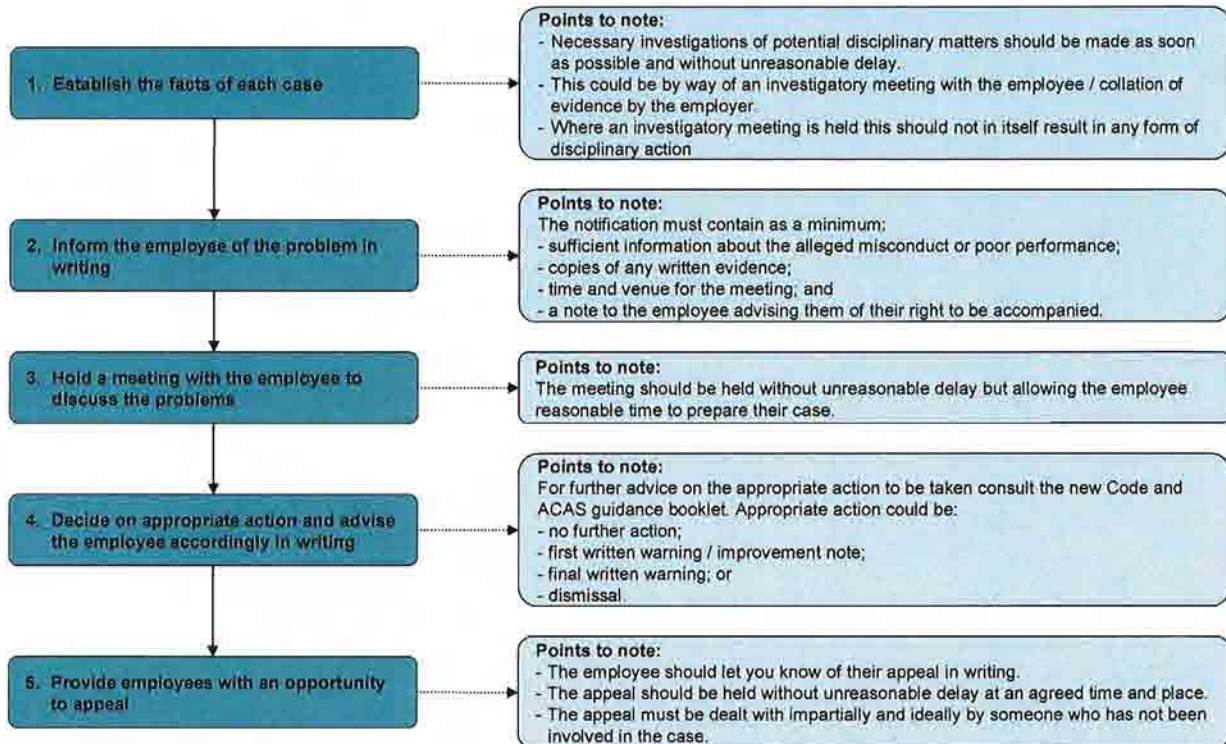
Top 5 guiding principles from the new Code:

- Always seek to resolve disciplinary and grievance issues in the workplace. Where this isn't possible—use an independent third party to help resolve the dispute.
- Try to resolve any potential disciplinary or grievance issues informally. Obviously, where this is not possible then the case should be pursued formally.
- Keep a written record of any disciplinary or grievance cases you deal with.

Grievance Procedure under the new Code – an overview



Disciplinary Procedure under the new Code – an overview



- Consult the ACAS guidance booklet or the Code. Unlike the Code itself, employment tribunals are not required to have regard to the guidance booklet, but it does provide more detailed advice as well as sample disciplinary and grievance procedures.
- Remember that whenever a disciplinary or grievance procedure is being followed, it is important for employers to act 'fairly'.

Service of Process - An Innovation

Australian law firm Meyer Vandenberg was facing frustration when acting for lender MKM Capital. MKM had lent money to Carmel Corbo and Gordon Poyser to refinance the mortgage on their house, and the couple had defaulted on their payments. The couple didn't appear in court to defend the case, leading to judgment against them in default. The problem was that the judgment had to be served on them in order to allow MKM to repossess the property, from which they had disappeared. After 11 failed attempts to serve judgment on them in person, Meyer Vandenberg found the couple on Facebook. With evidence from Facebook as to their dates of birth, email addresses and mutual friends, the firm were able to persuade a Canberra Court that they had found the correct defendants, and, in what is believed to have been a world-first, the Court granted permission for the default judgment to be served on the couple through Facebook.

Last In, First Out – A Redundancy Update

The Employment Equality (Age) Regulations 2006 made it unlawful for employers or potential employers to discriminate on the basis of age. Since, there has been uncertainty as to whether the traditional 'last in, first out' criterion for selecting people for redundancy from a pool is still permissible, or whether it breaches the regulations by discriminating on the basis of age. The recent High Court case of *Rolls Royce PLC v Unite the Union* has gone some way to removing some of the uncertainty.

In the case the employer and the union agreed a matrix of five criteria to be taken into account when selecting candidates for redundancy from a pool, including the expertise and versatility of the individual candidates, with employees being awarded between 4 and 24 points in respect of each criterion. The employees with the lowest scores would be those most eligible for redundancy.

One of the five elements of the matrix was length of service, with employees

being awarded a point for each year of continuous service, subject to deductions for unauthorised absences. The Court had to decide whether the use of the length of service criterion constituted age discrimination in favour of older workers, and therefore against younger workers.

The Court found that the inclusion of length of service in the matrix did indeed constitute age discrimination, but that the discrimination was permissible under specific exemptions contained within the age discrimination regulations. The basis for the permissibility of the discrimination rested on two factors: first, it was held that the discrimination constituted a legitimate benefit that could be awarded as a reward for long service (in the same way as employers may award extra days' annual holiday or provide medical insurance cover to employees after they had been continuously employed for a number of years); and second, it was held that the discrimination was a proportionate

means of achieving a legitimate aim, namely a fair redundancy selection process which was capable of peaceable implementation.

Interestingly, the Court commented that the use of length of service as a criterion protected older employees from entering the job market at a time when their age may make it difficult for them to find employment. In a sense, this was an admission as to the ineffectiveness of the Regulations in protecting job seekers against discrimination on the basis of age.

The Court also commented that if the sole criterion for selecting candidates for redundancy had been the traditional 'last in, first out' mechanism, then the Court would probably have found the age discrimination regulations to have been breached. It therefore appears that 'last in, first out' as a sole determinant for selecting redundancy candidates from a pool has had its day, but that it still has a valid place as part of a matrix of criteria that can be taken into account.

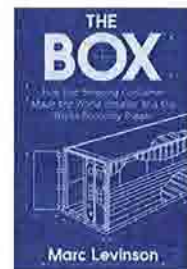
The Box

Marc Levinson's book, *The Box*, tells the story of the development of the shipping container and its role in globalisation. Originally aimed at economists and logistics specialists, the book has won several awards and has had remarkable success amongst mainstream readers. It is easy to see why: it is one of those books which is so well written that it will grip you irrespective of the subject matter.

In any event, far from being a dry topic, the story of the shipping container is a roller-coaster ride of innovation, entrepreneurial spirit, political battles, union battles, the

devastation of communities, the birth of new ports, boom & bust, and even the Vietnam War. This book is good enough to be highly recommended for people who have no connection with logistics or shipping whatsoever; for those who have such a connection, it is essential reading.

The Box is published in paperback by Princeton University Press; ISBN: 978-0691136400; RRP: £8.95



The Box on the BBC

Marc Levinson's book, *The Box*, is also the inspiration behind a year-long BBC project to deliver stories about globalisation and the world economy by tracking the progress of a single container by GPS. At the time of writing, *The BBC Box* was in Santos in Brazil waiting for its cargo of American household goods to be unloaded. You can track the progress of the *BBC Box* on www.bbc.co.uk/thebox

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