

FINAL ADJUDICATION

Hudson Contract Services Ltd
1 Mill Lane
Bridlington
North Humberside
East Yorkshire
YO16 7AP

Case number: A11-168326
Media: Internet (on own site)
Sector: Business
Agency:

Number of complaints : 1

Background

Summary of Council's Decision:-

Two issues were investigated and both were Not Upheld.

Ad

Claims on www.hudsoncontract.co.uk, a website for construction payroll and contracting services stated in a heading "We have a 100% Guarantee in Tax and Employment issues".

Text underneath stated "Hudson Contract's unique legal standing means we have case law on our side. Our self-employment solutions are lawful, ethical and proper. That is why we are the only company in the country able to offer clients a full guarantee - backed by an indemnity... Only Hudson Contract can give you a watertight tax and employment guarantee... THE HUDSON CONTRACT EMPLOYMENT GUARANTEE: if an [sic] freelance operative challenges the status of his or her contract to work on your sites through Hudson Contract, we will provide and pay for the legal team to argue the case. Should we lose, we'll pay the fines... Hudson Contract clients are protected from the expense - and stress - of Employment Tribunals... We have defended a number of these claims over the years - and have never lost a case... We are sometimes asked if we have an insurance policy to back our Guarantee, or whether we use risk assessors. The answer to both questions is 'no'. Our standing in law negates the need for a safety net. Guaranteed..."

Issue

Acton Jennings LLP challenged whether:

1. the claim "100% Guarantee in Tax and Employment issues" was misleading and could be substantiated, because they did not believe that it was possible to guarantee Hudson Contract's ability to successfully defend all claims; and
2. the claim "we are ... able to offer clients a full guarantee - backed by an indemnity" was misleading and could be substantiated, because this was contradicted by the claim "We are sometimes asked if we have an insurance policy to back our Guarantee... The answer... is 'no'. Our standing in law negates the need for a safety net" and they did not believe Hudson Contract had insurance in place.

Response

Hudson Contract Services Ltd (Hudson) explained that they operated in the business to business sector. Their clients were businesses operating in the construction sector who engaged labour and sub-contractors to carry out their building work. Hudson contracted



with the individual building operatives and supplied the services of those operatives to their clients. By following this model, clients transferred administrative responsibilities (in particular, pay-roll), employment law and tax risk from themselves to Hudson. Hudson had been operating this business model since 2001. Hudson provided a copy of the standard contract they had with their clients.

1. Hudson did not agree with Acton Jennings that the claim implied they could never lose an employment claim. They said it was possible that in future they could lose an employment claim and in such eventuality, the indemnity would apply; that is, they would pay the fines. Notwithstanding that, Hudson said they had never lost an employment tribunal case or tax dispute. In support of this, they provided two letters. One was from their solicitors who confirmed they had been instructed on 36 employment tribunal cases by Hudson (either directly or on behalf of their clients) since 2004 and that they understood they were the only lawyers to have been instructed by Hudson in such matters. The letter confirmed the total legal costs incurred by Hudson in relation to these cases and confirmed that Hudson had successfully defended all of the cases.

The second letter was from their barrister who they instructed in relation to tax matters. The letter stated that the barrister had acted for Hudson since 2001 and believed he had been instructed in relation to all of their tax disputes. The barrister also confirmed that he was not aware of any claims having been brought by HMRC against Hudson for tax or national insurance due and unpaid. He said he believed HMRC were well aware of Hudson and their business model. The letter stated that in 2007 a claim had been brought by HMRC challenging Hudson's business model and the High Court found in favour of Hudson and upheld the business model. Hudson provided a copy of the High Court's judgment.

2. Hudson believed Acton Jennings had confused the question of whether a guarantee was asserted with the question of the extent to which a guarantor was financially in a position to make good on that guarantee. Hudson did not believe that CAP's position was that a guarantee could only be asserted in circumstances where the guarantor had taken out a contract of insurance with a third party to make good on that guarantee. They believed that it would be a major policy shift for CAP and the ASA to treat as relevant the question of the guarantor's financial ability to make good on a guarantee.

Hudson confirmed they had a guarantee and pointed to specific terms in their contract which clients were required to sign before conducting business with Hudson. They said it was also made clear to clients in their advertising what the limitations of that guarantee were. For example, clients were told in the body of the copy itself that Hudson stood behind the guarantee and that there was no contract of insurance with a third party. Furthermore, their clients saw the precise terms of the guarantee in the contract which they were required to sign before conducting business with Hudson. Hudson maintained that a very important part of the service they provided to clients was the defraying of risk and that their clients, who were construction businesses not members of the public or sole traders, were likely to take great care to satisfy themselves about the precise terms of the guarantee and Hudson's ability to stand behind it.

Hudson understood that Acton Jennings were concerned that if each of the operatives they contracted with, which Acton Jennings believed to be approximately 90,000 in total, made a claim, Hudson would not have the financial resources to pay the legal costs associated with

such claims. Hudson disputed this. They believed the prospect of having 90,000 claims against them was unrealistic; the number of operatives they contracted with at any one time was in the region of 15,000 and over the past ten years, employment tribunal claims against them had accrued at a rate of approximately five per year, all of which had failed. In any event, if 90,000 claims were made against them, the courts would organise a small number of test cases which Hudson would be well capable of funding and those cases would be likely to be resolved consistently with the previous cases in their favour.

Hudson said that even if they had insurance in place, it would not necessarily offer protection against the unlikely scenario of all 15,000 operatives lodging employment claims.

Hudson provided a letter from their bankers which confirmed their turnover for each financial year since 2008 and their minimum account balance held at any time in each financial year since 2008. They believed this showed they were in a position financially to honour their guarantee.

Assessment

1. Not Upheld

The ASA understood that the claim "100% Guarantee in Tax and Employment issues" was intended to mean Hudson would be responsible for 100% of the liabilities incurred by its clients in relation to tax and employment law disputes brought by HMRC or the freelance construction operatives. Acton Jennings, however, considered that it would be interpreted to mean that Hudson guaranteed a 100% success rate in all such employment tribunal claims and tax disputes. The letters provided by their solicitors and barrister confirmed that Hudson had, to date, a 100% success rate in such matters, although Hudson acknowledged that in future they may lose an employment tribunal claim or tax dispute, in which eventuality the indemnity would apply and they would pay any fines or compensation awarded.

We noted that later text on the website further explained the nature of the guarantee where it stated "THE HUDSON CONTRACT EMPLOYMENT GUARANTEE: if an [sic] freelance operative challenges the status of his or her contract to work on your sites through Hudson Contract, we will provide and pay for the legal team to argue the case. Should we lose, we'll pay the fines... Hudson Contract clients are protected from the expense - and stress - of Employment Tribunals...". We considered this text made clear that Hudson may not always win. We also understood that Hudson was a business to business marketer and considered that their clients would understand that the guarantee did not mean that success in legal disputes was 100% guaranteed.

The terms of the contract between Hudson and their clients stated "Clients should note: Hudson Contract Services Limited are providers of a specific service to companies in the construction industry. Hudson undertakes to contract with labour that you select. Hudson will accept responsibility for HMRC compliance matters, status enquiries, statutory sick pay, inferred employment rights etc., provided that you adhere strictly to the Hudson Method Statement when engaging Freelance Operatives under this agreement ... ". Another term of the contract made clear that Hudson would bear the risk of a court or tribunal finding that a Freelance Operative was an employee of Hudson.

We understood that since 2004 Hudson had successfully defended 36 employment tribunal cases either on their own behalf or on behalf of their clients and that in doing so they had incurred over £100,000 in legal fees.

We therefore concluded that the claim "100% Guarantee in Tax and Employment Issues" had been substantiated and was not misleading.

On this point, we investigated the claim under CAP Code (Edition 12) rules 3.1 (Misleading advertising), 3.7 (Substantiation) and 3.53 (Guarantees and after-sales service) but did not find it in breach.

2. Not Upheld

We understood that Hudson believed the likelihood of 90,000 claims being made against them in an employment tribunal was unrealistic because at any one time, they contracted with approximately 15,000 operatives, and the likelihood of them all lodging claims was remote. Furthermore, if multiple claims were brought, the tribunal would organise a small number of test cases so Hudson would not be required to defend each and every case, although if the tribunal found against them, they would be required to pay any compensation awarded to each of the Operative claimants.

We noted Hudson's argument that the absence of third party insurance did not automatically negate the validity of a guarantee and we agreed with them. We also agreed that insurance would not necessarily offer protection against the event that all of their Operatives brought employment tribunal claims. We noted the claim that the guarantee was "backed by an indemnity" was intended to mean Hudson would be responsible for 100% of the liabilities rather than referring to insurance and we considered the text "We are sometimes asked if we have an insurance policy to back our Guarantee... The answer ... is 'no'. Our standing in law negates the need for a safety net" qualified that claim rather than contradicted it.

We understood that there had been 36 employment tribunal cases brought against Hudson (acting for themselves or on behalf of their clients) since 2004 and Hudson had successfully defended each and every case. On average this amounted to approximately five cases per year. We considered that the likelihood of 90,000 cases being brought against them was therefore a remote possibility. We considered that Hudson did not need to show that they had the financial backing to honour the guarantee in a hypothetical scenario that may or may not happen.

We concluded that the claim "we are ... able to offer clients a full guarantee - backed by an indemnity" had been substantiated and was not misleading.

On this point, we investigated the claim under CAP Code (Edition 12) rules 3.1 (Misleading advertising), 3.7 (Substantiation) and 3.53 (Guarantees and after-sales service) but did not find it in breach.

Action

No further action necessary.