

Our ref MP-G&C/0004
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Direct line (020) 7211 8997
Email debbie.kitcher-jones@oft.gsi.gov.uk

Dear

Health and Fitness Club Membership Contracts

The Office of Fair Trading (OFT) has recently accepted undertakings from a number of health and fitness club operators following an investigation into their membership contracts. These businesses have made changes to their contract terms and business practices to address our concerns to a large extent regarding potentially unfair standard contract terms and business practices. Our investigation followed the judgment and order obtained against Ashbourne Management Services Ltd in 2011 (further details below). It should be noted that your business is not under investigation and we have not conducted a review of your standard terms and conditions.

We are writing to draw your attention to the types of contract terms and business practices that we consider to have the potential for unfairness in the health and fitness industry. We recommend that businesses review their terms and conditions and business practices and amend them if necessary to ensure terms and business practices considered to be unfair are not being used.

The checklist available from the link below gives businesses some practical tips on what to consider when reviewing contract terms for compliance with the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs):

www.oft.gov.uk/sitepack/layouts/UTCCR/download-items/OFT1486.pdf

The Ashbourne judgment

The Ashbourne judgment (*OFT v Ashbourne Management Services Ltd & ors* [2011] EWHC 1237 (Ch)) has provided clear guidance for the health and fitness club industry to follow. The High Court interpreted and applied the UTCCRs to a series of standard form gym club contracts recommended by Ashbourne Management Services Ltd. The following

terms were found to be unfair and therefore unenforceable:

- Minimum contract terms of 12, 24 and 36 months that did not allow consumers to terminate during this period if their circumstances changed which made continued use of the gym impractical or unaffordable (i.e. due to illness, injury, relocation, redundancy);
- Minimum contract terms that exceed 12 months even where there was some provision for the consumer to terminate during this period if their circumstances changed, were also unfair because they were framed to exploit consumer's biases (such as over-optimism about usage of the services and inducement to lower membership fees);
- Terms permitting the club to terminate the contract and claim the entire balance outstanding for the remainder of the minimum term in the event of a relatively minor breach by the consumer, were penalty clauses and unfair. The example given by the Court were terms that would operate where the member was only a few days late with his or her subscription.

It was also held that the enforcement of an unfair term was an unfair practice within the meaning of the Consumer Protection from Unfair Trading Regulations 2008 ('CPRs') and therefore potentially a criminal offence.

A copy of the *Ashbourne* judgment can be accessed here:

www.baillii.org/ew/cases/EWHC/Ch/2011/1237.html

The OFT's investigation

As part of its investigation of health and fitness club contracts, the OFT has also considered other contract terms and practices that have the potential for unfairness under the UTCCRs and/or the CPRs. When reviewing terms and practices, you should also consider:

- Terms that automatically renew or continue the contract after the end of the minimum term. For example, automatically renewing the contract without the agreement of the consumer and/ or describing the membership as lasting for a fixed duration when the contract provides for the membership to continue indefinitely after the expiry of the minimum term;
- Terms that unfairly restrict the mechanisms for providing notice of cancellation or act as a barrier to consumers exercising their contractual rights. For example, not allowing consumers to give notice to cancel at their local club;

- The way in which contract terms are brought to prospective consumers' attention as part of the sales or sign-up process. For example, whether key membership features such as membership duration and cancellation provisions are transparent and explained upfront;
- Use of potentially aggressive and/ or misleading debt collection practices. For example, misleading consumers about the possible consequences of non-payment of membership arrears.

Businesses who use similar terms/ engage in similar practices considered to be unfair could face enforcement action by the OFT or our enforcement partners such as local authority Trading Standards Services.

Further details of the OFT's investigation can be found here:

www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/gym-contracts

Unfortunately, we are unable to provide individual businesses with advice on the fairness of their contract terms or business practices. However, we recognise that UTCCRs is complex for businesses and we have developed a new online resource to introduce the topic in a more accessible format. This is not a replacement for legal advice, but is intended for businesses to use as a starting point when considering UTCCRs:

www.offt.gov.uk/business-advice/unfairterms

It should be noted that the sectoral guidance for the health and fitness industry available on the above site has not been updated since 2002. It therefore does not reflect case law since that date.

We hope you find this helpful. Should you have any queries, we would be grateful if, in the first instance, you direct them to the gym contracts mailbox:

gymcontracts@oft.gsi.gov.uk.

Yours faithfully

Debbie Kitcher-Jones

Team Leader – Gym Contracts Investigation
Goods and Consumer Group