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CASE LAW ROUND-UP 2011

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INTRODUCTION

2011 has certainly seen a number of interesting cases in the world of employment law. Courts and tribunals have covered an expansive range of topics in their analysis of cases and below are some highlights giving a brief insight into what is included in this review.

In one local case almost £25,000 was paid out to a Cookstown based employee following a claim for age discrimination (*Stirrup v Summers Day Cleaners*).

In *Jackson v Liverpool City Council* [2011] EWCA a decision of the High Court was overturned by the Court of Appeal. The case dealt with a claim by an employee for damages due a reference which stated "...there were some issues identified by his team manager in respect of recording and record keeping. This was addressed by a supervision and would have led on to a formal improvement plan to assist Mark to make improvements in this area. Mark left the Council before this process was instigated". The employee then remained unemployed for about a year. It was ultimately held by the Court of Appeal that it was not unfair to include a cautionary remark on a reference, especially as it did say that the issues had not been investigated. Should there have been a refusal to provide a reference, it is likely that adverse inferences would have been drawn.

Bungay & Paul v Saini & Ors [2011] UKEAT considers the principle of agency. It was held on appeal that two of the directors of an employer had been key movers in acts of religious discrimination against employees. It will be interesting to see in future how much further this principle will be extended by the courts.

Finally, *Jacqueline Karim v Laura Ashley (1977/10)*, a Northern Ireland case, shows that employers must exercise care when making changes to hours or working conditions so as not to prejudice a particular section of their workforce. The employees of the respondent employer were notified of the proposal of a new working rota involving more flexible working between all hours in which the store was open. The new arrangement prejudiced a sizeable proportion of the female workforce and was held by the Tribunal to be a fundamental change in the terms and conditions of the contract of employment. The new rota was held to be simply a cost cutting measure and that there was insufficient evidence to show that the aim behind these measures was "legitimate and necessary". There were other means of cutting costs which were not considered and it was held that the new rota was not a proportionate action. The claimant employee was awarded a total of £9,927.67.

We hope that you find the case summaries in this edition useful and the guiding principles helpful. Please do not hesitate to contact a member of our Employment Law and Pensions team should you require any further advice or assistance on employment law and how it relates to you or to your organisation.

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CONTRACTS OF EMPLOYMENT

Morgan v Network Europe Group Ltd (2011) EAT

Contracts of Employment; implied term; variation; construction of term

Employers may, under certain circumstances, lay-off workers with no more than a statutory guarantee payment. But can they vary terms to include lay-off or will any subsequent deductions be unlawful?

On 29th November 2005, Mr Morgan, a storekeeper within Network Europe Group Ltd, signed a statement of terms and conditions of employment and agreed to be bound by the conditions set out. He also confirmed receipt of the company handbook but neither the statement of terms and conditions nor the handbook made any provision for payment during lay-off.

On 20th March 2008, Mr Morgan was issued with a new handbook for which he signed. This new handbook contained a provision providing for lay-off without pay, other than the statutory guarantee payment. The Respondent continued below that at the same time he was issued with a new statement of terms and conditions. The Claimant denied receiving that document. Although he had been advised to read the handbook, the Claimant had not done so. The new statement stated that:

“...I have read, understood and am willing to abide by the terms and conditions laid down in the Employee Handbook...”.

The original employment judge ruled in favour of the employer. The EAT (a lone judge ruled on this case) disagreed and commented that, “the Claimant signing a document stating that he received the handbook – bundle page 49 – is a different matter from signing the rubric at the end of a new statement of terms and conditions”.

The EAT also stated that although the claimant was not affected until he was laid off on 27th February 2009 (almost a year after he received the new handbook), he had not consented to the change (which had no immediate impact) and that the deductions were unlawful, amounting to some three months’ wages. This case shows the importance of ensuring explicit employee agreement regarding changes to terms and conditions.

<http://bit.ly/fnCUaN>

Garratt v Mirror Group Newspapers Ltd [2011] EWCA

Contracts of employment; implied terms; enhanced redundancy

This case involved an appeal against a decision that the claimant was not entitled to an “enhanced redundancy payment” as he had not signed a compromise agreement.

Over a long period of time, the respondent company made redundant a number of its employees. Prior to the redundancy, they were given a package over and above the rate of statutory redundancy pay with the understanding that this would be accepted as full and final settlement. The claimant was informed that he was being made redundant and sought to appeal against the decision. He refused to sign a compromise agreement in these circumstances but sought the full redundancy package the company was offering on the basis that he was contractually entitled to it in any event. The company informed him that the package was available only to those who had signed the compromise agreement. The company offered only notice and statutory pay but the claimant refused and pursued a claim for breach of contract.

The case proceeded to the Court of Appeal, which considered whether the term was “reasonable, certain and notorious.” The Court also referred to the case of Albion Automotive Limited v Walker which held that the relevant factors to be taken into account when considering whether a policy had acquired contractual status included whether the policy was drawn to the attention of employees,

whether it was followed without exception for a substantial period, the number of occasions on which it was followed and whether payments were made automatically.

The appeal was dismissed, the Court stating that "whether the likely prospects of success in whatever other proceedings he might have contemplated were sufficiently high to render the additional redundancy payment an unattractive substitute." The claimant was at liberty to pursue a claim against the company but in this situation there would be no enhanced payment. It was for the claimant to decide the most attractive option.

<http://bit.ly/gbEAXn>

Driver v Air India Ltd [2011] EWCA

Contracts of employment; overtime and other allowances

The claimant was employed as a catering manager from Frankfurt to Heathrow by Air India Ltd, with his employment initially governed by the terms of a contract of employment (the first contract). The first contract stated that the employee would be required, from time to time, to work overtime on a rostered and ad hoc basis in addition to his basic hours of work. He was initially paid for both overtime and shift work however with the passage of time, these payments ceased. The employee responded by writing a series of grievance letters to the employer and an internal investigation was carried out. This resulted in a decision by the employer (the first decision) that the employee was entitled, inter alia, to applicable overtime, applicable shift allowance and telephone allowance. Despite this decision, his claims remained unpaid.

A new contract of employment (the second contract) was subsequently entered into between the employer and employee which allowed the employee to continue working beyond the employer's statutory retirement age. When the employee's employment eventually came to an end (for reasons unrelated to the current proceedings), the employee issued proceedings against the employer claiming various sums in respect of overtime, shift allowances, car allowance and telephone allowances under the first and/or second contract. The employer argued that the contract had been varied upon transfer to the second contract (and subsequently thereafter) and so the initial contract was no longer valid.

In the High Court, the judge rejected the employee's claim for sums under either contract. The employee appealed and the appeal was heard in part. The Court addressed the issues as follows:-

1. In the circumstances, the contract had given the employee, even in the absence of any guidelines from the employer, a contractual right to be paid for overtime where overtime was 'required'. The first contract had plainly contemplated that overtime, being hours beyond the basic hours of 37.5 hours per week, was 'required...on a rostered and ad hoc basis', and would be remunerated. The employee would therefore be entitled to be properly compensated for his overtime.
2. On the evidence, the first contract, but not the second contract which had not mentioned shift payments, had required payment of a shift allowance. The combination of the previous payment of the shift allowance, together with the absence of any explanation for the unexpected cessation of such payments, had placed an evidential burden on the employer which it had failed to discharge. With regard the claim for a car allowance, the judge had been mistaken in thinking that the employee had had to prove the extent of his usage. The employee had been entitled to his allowance and the first decision had operated retrospectively. However, the second contract had reverted to a mileage allowance and there had been no claim under that contract. The employee had also been entitled to his telephone expenses under the first but not the second contract.

<http://bit.ly/oGhJxQ>

Autoclenz Ltd v Belcher and ors [2011] UKSC

Contracts of Employment; employment status; actual agreement

In this case 20 valeters sought holiday pay and back pay from their employer (a car-cleaning service provider to motor retailers and auctioneers) for the national minimum wage. The Claimants submitted that they were workers within the meaning of the National Minimum Wage Regulations 1999 (NMWR) and of the Working Time Regulations 1998 (WTR) and that as a result, they were entitled to be paid in accordance with the NMWR and to receive statutory paid leave under the WTR.

Proceedings were first issued in the Employment Tribunal by the Claimants, with the question of whether the Claimants fell within the definition of 'workers' determined as a preliminary issue. The ET held that the Claimants were 'workers' on the basis that they were employed under contracts of employment within limb (a) of Regulation 2(1) of the NWMR and that they were in any event working pursuant to contracts within limb (b) of that Regulation. The employer appealed to the Employment Appeal Tribunal and the EAT held that the claimants were not within limb (a) but that they were within limb (b). Both sides appealed to the Court of Appeal. The Court of Appeal restored the judgment of the ET, holding that the Claimants were within both (a) and (b). The employer was then granted permission to appeal to the Supreme Court.

In 2007 the employer had produced a new contract which the claimants had signed. In the contract the valeters were described as sub-contractors throughout and it was expressly agreed that it was the intention of the parties that the sub-contractors were not and should not become employees of employer. The contract also stated that the valeters could engage suitably qualified substitutes to carry out the valeting on their behalf and that they were not obliged to provide their services and the company did not undertake to provide work on any particular occasion.

If the relevant contract was, as a matter of law, solely contained in that documentation, it was considered that it would be impossible to bring the case within limb (a) of the definition of "worker" and very difficult to bring it within limb (b). The appeal therefore involved consideration of whether and in what circumstances the Tribunal could disregard terms which were included in a written agreement between the parties and instead, base its decision on a finding that the documents did not reflect what was actually agreed between the parties or the true intentions or expectations of the parties.

Lord Clarke, in his unanimous decision to dismiss the appeal, wrote: "So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."

Tribunals are therefore obliged to look behind contractual terms to determine employment status. Employees may be in a weaker position than the employer and may sign documents that express one thing because they do not have the power, particularly at the start of a relationship, to bargain for better terms or ones that reflect the reality of the situation, which may vary over time.

<http://bit.ly/nVImcC>

Driver v Air India Ltd [2011] EWCA Civ 986

Contracts of employment; overtime and other allowances; final quantum decision

The main Court of Appeal decision is reported above however the final quantum decision was that the claimant was awarded over £77k in overtime and other unpaid allowances.

<http://bit.ly/rexPHH>

Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC

Breach of Contract; express contractual disciplinary procedures

The reasoning in *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 A.C. 518 was a bar to a claim for damages by an employee for loss arising from the unfair manner of his dismissal in breach of an express term of his employment contract. In each case the decision appealed against was that the respondent employees could, in principle, claim such damages arising out of the manner of their dismissal. They each claimed that their dismissals had resulted from the correct disciplinary procedure not having been followed, in breach of those express terms. Rather than making claims for unfair dismissal, they sought damages for breach of contract based on loss of reputation and loss of future earnings

It followed that, if provisions about disciplinary procedure were incorporated as express terms into an employment contract, they were not ordinary contractual terms. Parliament intended those provisions to protect employees from unfair dismissal and it had specified the consequences of a failure to comply. For all the reasons given in *Johnson*, it could not have intended that the inclusion of those provisions in a contract of employment would also give rise to a common law claim for damages, *Johnson* applied

The unfair dismissal legislation precluded a claim for damages for breach of contract in relation to the manner of a dismissal, whether formulated as a claim for breach of an implied or an express term.

The crux of the case is that you it was held in line with the *Johnson* case that you cannot put a bigger burden of damages on the employer within the contract than that which would be available by going to the Employment tribunal.

To allow a separate route for claims would circumvent the intentions of parliament. Nonetheless, the appeals by the employer bodies were allowed and, without falling into the *Eastwood* exception (which these cases were considered not to), or having an express right to claim damages within the contract, there is no right to damages for the manner of the dismissal other than via the unfair dismissal legislation.

<http://bit.ly/umd3X5>

DEFINITION OF EMPLOYEE

Moore v The President of the Methodist Conference [2010] EAT

Jurisdictional points; worker, employee or neither

The claimant was ordained a Methodist minister and in 2006 was appointed Superintendent Minister on the Redruth Circuit for a five-year term. She was subject to annual appraisals and the possibility of disciplinary action and received a salary, holiday pay, a manse and was entitled to sick pay. A P60 was issued at the end of each financial year and annual National Insurance contributions were taken.

The claimant resigned in 2009 and brought a claim for unfair dismissal against the Church. The Employment Tribunal initially applied *President of the Methodist Conference v Parfitt* [1984] ICR 176 in which it was held that ministers could not be employees due to the absence of intention to create legal relations between the parties. The appeal was allowed and remitted to the Employment Tribunal to decide the case on its merits. The Employment Appeals Tribunal reconciled the two decisions by saying that the lack of intention to create legal relations in 1983 did not necessarily transfer into situations twenty years later.

<http://bit.ly/i2jdsc>

Knight v BCCP Ltd [2011] UKEAT

The Claimant was a licensed private hire driver, who was engaged by the Respondent between 1 September 2008 and 14 October 2008. He was told that he would receive mileage rates for the work that he did, that he had to provide his car upon the basis that he paid the insurance as well as the running costs including petrol, maintenance bills and other expenses. The Claimant was paid by submitting an invoice based on the records of the Respondent, but had to pay his own tax and national insurance contributions and did not have any set working hours. The Employment Tribunal held that he was not an employee. The Claimant appealed.

The Employment Appeals Tribunal (EAT), using its considerable latitude to consider whether mutual obligations exist and the degree of the employer's control, dismissed the appeal because there was no mutuality of obligation as the Claimant did not have to work and the Respondent did not have to provide work for him.

<http://bit.ly/ibsYJv>

DISCRIMINATION

AGE DISCRIMINATION

Prigge v Deutsche Lufthansa AG [2011] ECJ

Age discrimination; retirement at 60

The claimant and two colleagues were employed as pilots by Lufthansa. On attaining age 60, their employment was terminated without notice in accordance with the applicable collective agreement, which was recognised by German law. This compulsory retirement provision was included in the collective agreement limiting pilots' working age to 60 in order to reduce the risk of human error. The pilots brought age discrimination claims, which failed in the first instance and were ultimately referred to the ECJ.

The ECJ concluded that prohibiting airline pilots from working after the age of 60 constitutes discrimination on grounds of age. However, while the right to act as a pilot may be limited from that age, total prohibition goes beyond that which is necessary to ensure air traffic safety.

International and German legislation provides that, between the ages of 60 and 64, an airline pilot may not continue to act as a pilot unless s/he is a member of a multi-pilot crew and the other pilots are under 60. However, that legislation prohibits pilots from acting as pilots beyond 65.

The collective agreement applicable to the crew of Deutsche Lufthansa – which is recognised by German law – prohibits pilots from acting as pilots after the age of 60. When they reached 60 years of age their employment contracts terminated automatically in accordance with the collective agreement.

The ECJ found that the age limit of 60, imposed by the social partners to be able to pilot an airplane, constitutes a disproportionate requirement in light of international and German legislation that fixed that age limit at 65. The main reason for the decision was that national and international legislation did not impose a total prohibition on pilots flying between ages 60 and 65, but merely imposed conditions. Accordingly, a complete ban was discriminatory.

<http://bit.ly/qH8Eyn>

Lycee Francais Charles de Gaulle v Delambre (2011) EAT

Age discrimination remedies; recommendations

This case involved an appeal by a large French school in London against recommendations made against it following a finding of unlawful age discrimination and victimisation against a catering employee. The following recommendations, all of which subsequently criticised by the school, were made:

- "(a) That both the Tribunal's Full Merits Hearing and Remedy Judgments be circulated to each member of the Respondent's Governing Board and to each member of the senior management team of the Respondent, to be read and digested by them, by the end of March 2010.
- (b) That the Respondent secure the services of an appropriately qualified HR professional who will conduct a review of their existing equality, disciplinary, grievance and recruitment policies and procedures and amend or redraft the same as necessary, so as to ensure compliance with United Kingdom Employment Law. This HR adviser will have had the opportunity of studying the Tribunal's Full Merits and Remedies Judgments before going about their task, which should be completed by the end of June 2010.

- (c) That the Respondent undertake a programme of formal equality and diversity training, including an recruitment and selection procedures, beginning at Board of Governors and highest management levels and cascading down through the entire organisation; this training programme to begin at the start of the academic year in September 2010 and to be completed within six months of that date."

The EAT dismissed the appeal grounds almost out of hand, considering the recommendations to be 'perfectly appropriate' and reasonable. ("... an HR professional would be able to give advice to Mr Vasseur [a senior manager] about the way in which disciplinary action for matters of minor misconduct should be conducted..." and "...equality and diversity training... does not take long; this is not an onerous obligation and it needs to start at the top and go down.") Furthermore, in their concluding statements the EAT submitted that "we see nothing wrong with the tribunal making the recommendations it did based upon the evidence which it heard and any disagreement we may have would involve us tinkering impermissibly in the proper province of the Employment Tribunal."

<http://bit.ly/iV2K51>

Fuchs v Land Hessen [2011] CJEU C-159/10

Prohibition of discrimination on grounds of age; compulsory retirement

The applicants in each of the main proceedings worked as state prosecutors until they reached the age of 65 (the age at which they should normally have retired pursuant to the law of the relevant federal state in Germany (the HBG)). The applicants each applied to continue to work for a further year, pursuant to the HBG, but their applications were rejected by the Ministry of Justice of the federal state on the grounds that it was not in the interests of the service for them to remain in post. From October 2009, the applicants were therefore no longer able to perform their duties as state prosecutors and were paid a retirement pension. The applicants lodged objections at the Ministry, which were subsequently dismissed. The applicants then brought an action against the decisions of the Ministry. The German court decided to stay proceedings and referred questions to the Court of Justice for preliminary rulings.

One of the main questions to be decided was whether Council Directive (EC) 2000/78 precluded a law such as the HBG which provided for the compulsory retirement of permanent civil servants at the age of 65, subject to the possibility that they might continue to work, if it was in the interests of the service, until the maximum age of 68.

The court ruled that Council Directive (EC) 2000/78 did not preclude a law, such as the HBG, provided that that law had the aim of:

- Creating a favourable age structure (a balance of employee ages)
- Planning staff departures
- Creating opportunities for promotion
- Preventing legal disputes with older employees over their continued fitness for service

This ruling is very significant given the recent media coverage on retirement age. Whilst default retirement age (DRA) has been abolished (subject to transitional measures), employers can in some cases maintain DRA if this is a 'proportionate means of achieving a legitimate aim'. Employers are therefore looking to case law to help clarify what constitutes justification. The court did however state that generalisations would not be adequate:

"It is clear from paragraph 51 of Age Concern England that mere generalisations indicating that a measure is likely to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of derogating from the prohibition of age discrimination and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are likely to achieve that aim."

It is important to keep in mind that the ruling in this case should be read in the context of the case ie. the German public sector. The CJEU took into consideration the fact that the civil servants would retire on full pension when reaching a decision on whether this was a 'proportionate means' of achieving the four aims above. It remains unclear whether UK and NI private sector employers could apply the CJEU's approach to justifying DRA.

<http://bit.ly/pUFIJW>

Stirrup v Ufuoma Obahor T/A Summers Dry Cleaners [2011] NIIT

Age discrimination; victimisation

The claimant worked for the respondent as a dry cleaning operative at his premises in Cookstown. Her employment commenced on 19 February 2007 and terminated on 4 June 2010. It was conceded that the respondent dismissed the claimant on what he said was grounds of gross misconduct. The claimant argued that she was unfairly dismissed and that her dismissal also constituted victimisation because she had already brought an age discrimination claim against the respondent.

The issues put before the Tribunal in this case were as follows:

1. Was the claimant unfairly dismissed?
2. Was the claimant victimised on the basis of her age contrary to the Employment Equality (Age) Regulations (Northern Ireland) 2006?
3. Were unauthorised deductions made from the claimant's wages contrary to Article 45 of the Employment Rights (Northern Ireland) Order 1996?

The Tribunal unanimously decided that the claimant was unfairly dismissed by the respondent and that the dismissal was victimisation, contrary to Regulation 4 of the Employment Equality (Age) Regulations (NI) 2006. It also found that the claimant had suffered unlawful deductions from her wages, contrary to Article 45 of the Employment Rights (NI) Order 1996. The respondent was duly ordered to pay to the claimant the sum of £13,153.80 in respect of the unfair dismissal claim, £10,000 in respect of injury to feelings for the victimisation claim, together with interest in the sum of £928.76 to the date of this decision and £65.00 in respect of the unlawful deduction from wages.

<http://bit.ly/of8h3d>

DISABILITY DISCRIMINATION

British Midland Airways Ltd v Hamed [2011] EAT

Disability Discrimination Act; reasonable adjustments – alternative employment

This case concerns the requirement to consider reasonable adjustments when offering alternative employment to a disabled employee. The claimant had suffered an injury and was unable to continue to work as a flight supervisor. She was not offered an administrative role as it was against the policy of the airline to do this. Alternatives were considered but deemed unsuitable and the claimant was dismissed on the grounds of capability.

The EAT concluded that the Employment Tribunal was right in stating that the onus was on employers to find a suitable alternative post. The respondent employer in this case had failed to consider an alternative post or reasonable adjustment to the role.

<http://bit.ly/m2oVZH>

Mid Sussex Citizens Advice Bureau & Ors [2011] EWCA

Disability discrimination; volunteers

The appellant, when starting with the Citizens' Advice Bureau under a volunteer agreement which stated that it was not legally binding and was not a contract of employment, was asked to stop attending as a volunteer as she had been absent for around 25-30% of her expected hours. However, under the agreement there was no obligation for her to attend, but only an expectation of trust. She then claimed for disability discrimination. The Court of Appeal has ruled that volunteers are not protected from acts of discrimination on grounds of disability under the DDA 1995. The ruling applies to other grounds identified in the EU Framework Directive ('occupation' does not cover volunteers, according to the EWCA).

Elias LJ identifies that the occupation argue is a major issue:

"...I suspect that Burton J is right in concluding that the concept of "occupation" was intended to refer to a class or category of jobs, and that the concept of "employed" and "self employed" was intended to refer to particular jobs...In other words, it [the Directive] is concerned with rules or practices imposed by professional or other collective bodies which can, by granting qualifications or licences of some sort, restrict the right of someone to enter into a particular job, b it described a profession or occupation..."

"This analysis is consistent with the fact that the concept of worker under EU law is not defined by reference to those with a contract; it is capable of embracing all those who perform work for another for remuneration, whether pursuant to a contract or some other relationship. There is no need for a concept of occupation to capture those employed in a particular job."

He rejects the submission from the ECHR and the appellant, stating that the draftsmen of the Directive would have dealt specifically with the position of volunteers regarding discrimination if he had intended to include them and that the term 'occupation' in the Directive concerns access to a specific sector of the job market and not the particular job which someone seeks or holds.

<http://bit.ly/gEabQc>

Breakell v Shropshire Army Cadet Force [2011] UKEAT/0372/10

Employment status; disability discrimination

The claimant was appointed a probationary adult instructor in a paid voluntary capacity and was not therefore entitled to the national minimum wage. The claimant was told he may be entitled to pay for attending training days but attending these was not compulsory, nor was informing their detachment commander if they were unable to attend. There was no obligation on the claimant at any time to work.

The claimant was eventually dismissed and claimed disability discrimination. The Employment Tribunal found that the claimant was a volunteer and therefore not an employee under section 68(1) of the Discrimination Disability Act 1995, and that it did not therefore have jurisdiction to hear his disability discrimination claim.

<http://bit.ly/eWDreH>

Tameside Hospital NHS Foundation Trust v Mylott

DDA; reasonable adjustments; early retirement

This case involved an appeal by the respondent against decisions of unfair dismissal and disability discrimination. The claimant went off sick following incident of alleged offensive behaviour by the manager and was eventually dismissed. The Employment Tribunal held that this, along with various procedural failures, constituted a breach of duty under section 4A of Disability Discrimination Act 1995. Consequently, dismissal was rendered unfair and an act of disability-related discrimination. At subsequent remedy hearing the Claimant was awarded £4,410 for unfair dismissal and £22,000 for disability discrimination, comprising £16,000 for injury to feelings and £6,000 by way of "aggravated damages", with no award for loss of earnings.

The EAT ruled that the ET was entitled to find that, if proper procedures had been followed as regards unfair dismissal, the claimant would probably not have been dismissed, and so upheld the ET decision. They found that the ET was not entitled to find that s4A gave rise to a duty on the employer of a disabled employee to facilitate an application for ill-health retirement.

On remedy, the EAT held that the ET was entitled not to award compensation for loss of earnings because the claimant had not obtained expert evidence on the impact to his mental health. The award for injury to feelings was upheld but the facts of the case did not justify an award for aggravated damages.

<http://bit.ly/fiZ7xu>

The Royal Bank of Scotland v Ashton (2010) EAT

DDA; reasonable adjustments; continuation of sick pay

The Appellant was an employee of RBS who suffered from severe migraines. Under RBS policy she was entitled to up to twelve months sick pay, but if the employee's absence level reached a certain level then disciplinary action could be taken against them for poor attendance. RBS took steps with the Appellant in line with health guidelines and she continued to receive sick pay even when her absence reached trigger levels. However, her absence continued to be high and she was eventually given a formal warning for her poor attendance, which resulted in her losing sick pay for the next 12 months.

The Appellant argued that RBS failed to make reasonable adjustments under the Disability Discrimination Act 1995 and that she was subjected to unlawful discrimination resulting from her disability.

The EAT rejected her claim, finding that there was no case for concluding a lack of reasonable adjustments when an employer fails to further extend the benefits of the sick pay scheme to a disabled employee when such benefits are already beyond that which are given to non-disabled employees when sick. Whether a “reasonable adjustment” has been made is to be judged based upon the result, not by the process which it is reached.

The EAT made much of the similar case before the Court of Appeal in O’Hanlon v Revenue and Customs Commissioners [2007] EWCA. It went on to comment;

“We would wish to flight shy of a general conclusion that where there is a sick pay scheme (and even one where there is a discretion to treat those who are disabled more generously than those who are not) there can never be a proper case where discrimination by failure to make a reasonable adjustment can be shown. However it is self evident that it must be an exceptional case with particular features which can be clearly drawn to the Tribunal’s attention which would need to be clearly identified”.

<http://bit.ly/h1Sldw>

Cordell v Foreign and Commonwealth Office [2011] UKEAT

Disability Discrimination; Reasonable adjustments

This case involved a deaf employee at the FCO who required English speaking professional lipspeakers to assist her to do her job. She had been employed in Warsaw but was refused a posting to Kazakhstan because of the problems, and in particular the cost (about £230,000 p.a.), of providing English-speaking lipspeaker support.

In this case the EAT considered whether an employer’s refusal to provide lip-speaking support to a deaf employee was unreasonable based on cost alone. The EAT provided guidance on how Tribunals might put costs considerations into context when considering reasonable adjustments for disabled employees but, ultimately held that Tribunals will have to make a judgement in each case based on what they consider right and just.

It is trite law that cost on its own cannot justify discriminatory treatment and the failure to make reasonable adjustments under the DDA but it is nevertheless a factor for consideration. The claimant argued direct discrimination and a failure to make reasonable adjustments and compared her situation to a benefit of school fees provided to parents in the FCO. In particular she argued that the FCO would have to pay commensurate sums by way of Continuity of Education Allowance to staff with a large number of school-age children (school fees).

As regards the claim of direct discrimination, the EAT held that the reason for the Appellant’s non-appointment was not her disability as such but the cost of the adjustments which it necessitated.

The EAT also found that the Tribunal had made no error of law in its decision that it was not reasonable to expect the FCO to incur the costs of providing English-speaking lipspeaker support in Kazakhstan.

<http://bit.ly/plkGCa>

RACE DISCRIMINATION

Bungay & Paul v Saini & Ors [2011] UKEAT

Race Discrimination; vicarious liability

The claimants were found to have been unfairly dismissed and to have been discriminated against by reason of religion. There was no appeal against the liability judgment. At the remedy hearing the Tribunal ruled that the 2 respondents in the original hearing, who were both directors of the employer (called the Centre), had been the prime movers behind the discriminatory acts and they were agents within the meaning of regulations 22 and 23 of the Employment Equality (Religion or Belief) Regulations 2003, thus concluding that they were vicariously liable for the acts of discrimination.

They were ordered to pay a share of the aggravated damages and injury to feelings awards. The respondents appealed, claiming primarily that the Tribunal had erred by finding them to be agents for the employer. They also said that there was no basis to make them jointly and severally liable for the damages awarded to the claimants and there were other directors who were not named as respondents to the claim who were equally responsible for the discriminatory acts. Lastly, they complained that the Tribunal was wrong to have regard to post-employment conduct, which led to the claimants being falsely accused of theft and held in police cells, when assessing the award for aggravated damages.

The EAT dismissed each ground of appeal, saying that all that had to be shown to make the respondents liable for discriminatory acts was that they were authorised to manage as part of their authority as directors. The respondents were therefore each acting as agents and were each liable jointly and severally for contribution to the damage sustained by the claimants. Aggravated damages could be awarded without restriction.

<http://bit.ly/rouvgO>

Sheffield City Council v Norouzi [2011] UKEAT

Race Discrimination; third party harassment/conduct

In this case, the EAT upheld a Tribunal's decision that the employer was liable for harassment of a social worker by a child in care on the basis that it had failed to protect the claimant from racial harassment and discrimination by that child.

The case draws some interesting parallels with other cases in this area and is reminiscent of Vaile v London Borough of Havering [2011] EWCA, which involved a teacher injured at work as a result of being attacked by a pupil with Autistic Spectrum Disorder. The teacher in that case, now suffers from agoraphobia and depression and likewise in this instance, the employee went off sick with stress and has never returned.

The employee was of Iranian origin. He was employed as a residential social worker at a home for troubled young people. One of the children at the home was regularly abusive and offensive to him on racial grounds. The employee became increasingly upset by the child's behaviour and was signed off work on medical grounds. He made claims against the employer for harassment on the basis that the employer had not done enough to protect him from the effects of the child's behaviour.

In respect of the claim of indirect discrimination, the Tribunal found that there had come a point where the employer had been on notice that more effective measures were required and they had not been taken. It found that the employer should also have put in place more effective support mechanisms for the employee. With regard to the second claim, it again found that the employer had been put on notice of the child's behaviour and had not done enough to protect the employee from that behaviour. The employer appealed against the finding that it was itself liable for the child's harassment.

The appeal was dismissed, with the EAT concluding that: 'A [the child] was in fact mocking a racial characteristic of the Claimant, namely his "foreign" accent. That being so, the fact that her underlying

motive was not to do with his race – say, to upset those in authority – is irrelevant... To mock a racial characteristic seems to us plainly analogous with overtly racial abuse.'

<http://bit.ly/r33rRz>

British Airways Plc v Mak & Ors [2011] EWCA

Territorial jurisdiction; race and sex discrimination

The facts of the case are that there were sixteen Claimants who were former cabin crew members for BA. They Claimants were from Hong Kong and served on flights between Hong Kong and Great Britain. The question for the Court of Appeal was whether they qualified as working "Partly in Great Britain"?

The CA said yes they did based upon section 8 of the Race Relations Act 1976. Section 8 states that:

- "(1) For the purposes of this Part ("the relevant purposes") employment is to be regarded as being at an establishment in Great Britain if the employee
- (a) does his work wholly or partly in Great Britain; or [immaterial parts omitted]
- (4) Where work is not done at an establishment it shall be treated for the relevant purposes as done at the establishment from which it is done or (where it is not done from any establishment) at the establishment with which it has the closest connection."

In the leading judgement, Mummery LJ said:

"There was no error of law in the ET's ruling that Ms Mak did "her work partly" in Great Britain. That is sufficient to confer on the ET jurisdiction to hear and determine her claims (and those of her fellow claimants) for race and age discrimination. The jurisdiction exists as a result of the statutory process of deeming her employment to be at an establishment in Great Britain under s.8(1); that takes priority over the deeming process under s.8(4), which does not therefore apply to Ms Mak's case."

The equality act is silent on the issue of territorial jurisdiction and it is likely that future equality claims of this nature will follow the reasoning in Lawson v Serco Ltd

<http://bit.ly/gBDgQs>

Komeng v Sandwell MBC [2011] EAT

Race Discrimination; Part-time employee; training

This case involved a part time council employee, a care assistant, who alleged that the Respondent failed to ensure that he was placed on an NVQ course level 2 in care within a reasonable time.

The claimant set out comparators and complied with the requirements to establish a case of discrimination on grounds of part time and racial status. The respondent denied the claims and argued administrative errors and the original tribunal accepted this; the claimant's application "became the victim of the respondent's sometimes disorganised and unsatisfactory training regime".

The EAT did not accept this because it could not link the tribunal's acceptance with the reality on the ground: "Tribunals should, we think, take care before accepting an explanation that the reason for less favourable treatment (if proven) lies merely in general poor administration. There is always the risk that poor administration masks real disadvantage to a particular group or a particular individual on prohibited grounds. In this case, for example, Mr Cotterill and Ms Sharp, the Claimant's named comparators, did not suffer any less favourable treatment by reason of poor administration. It is important to examine carefully why his various requests to go on the course were not addressed."

<http://bit.ly/m1f2XB>

RELIGIOUS BELIEF/POLITICAL DISCRIMINATION

Eweida and Chaplin v United Kingdom and Ladele and McFarlane v United Kingdom (2011) ECtHR

Religious Belief; Article 9 European Convention on Human Rights

The Eweida and Chaplin cases concerned the wearing of crosses by Christians in the workplace and Ladele and McFarlane concerned Christians who refused to carry out duties in relation to same-sex couples.

The European Commission largely supports the position of the employees in the first two cases and is opposed to the position of the employees in the second set. The Commission believes that in Eweida and Chaplin there has been a misreading of the Convention rights by the UK courts in relation to the wearing of religious symbols in the workplace (with too much weight placed on perceived relative disadvantage of others), whereas the (public sector) employer's legitimate aim of eliminating discrimination and advancing equality outweighed the religious objections of the employees in Ladele and McFarlane.

The Commission summarised its views in Eweida and Chaplin thus:

"Article 9 does not demand that the manifestation of a belief is a requirement of a religion. Manifestation is protected by Article 9 if it is motivated or inspired by a genuinely held belief that attains a certain level of seriousness and cogency and is not unreasonable. Manifestations that are less closely connected to requirements of a religion or belief should be carefully considered at the interference and proportionality stages.

The question whether there has been an interference with a person's Article 9 rights is not to be determined solely by reference to the choices the person has made in accepting particular employment but also by reference to the actions of the employer."

In relation to Ladele and McFarlane, the Commission's position is:

- (a) "Article 9 does not demand that the manifestation of a belief is a requirement of a religion. Manifestation is protected by Article 9 if it withstands careful scrutiny if less aligned with the requirements of the religion or belief, and is motivated or inspired by a genuinely held religion or belief that attains a certain level of seriousness and cogency and is not unreasonable.
- (b) The question whether there has been an interference with a person's Article 9 rights is not to be determined solely by reference to the choices the person has made in accepting particular employment but also by reference to the actions of the employer.
- (c) An employer's refusal to accommodate the manifestation of a discriminatory religious belief in cases where discrimination in the provision of public services results will generally be justified by reference to the legitimate aim of eliminating discrimination and advancing equality, giving due deference to the employer's decision and the United Kingdom's margin of appreciation."

<http://bit.ly/ncsNyg>

Cherfi v G4S Security Services Ltd [2011] UKEAT

Religion or Belief - Indirect Discrimination

This case concerned whether Muslim employees should be allowed time off work to attend Friday prayer meetings at a mosque and whether refusal would constitute discrimination on the grounds of religion or belief.

The respondent employer provided security services and refused to grant the claimant time off as requested. The EAT considered their response was a proportionate means of achieving a legitimate aim i.e. to safeguard the contract to provide safety and security services. Apart from financial penalties the continuation of the contract was in danger if a full complement of security staff was not on site throughout.

On the surface it appears that this decision could be used to show that cost alone could be used to justify discrimination. The employer, however, used to allow the claimant to extend his lunch on Fridays to attend the mosque until the end user enforced a requirement for a minimum staffing complement. These were major financial implications that could threaten the whole operation. The employer also offered alternatives to the claimant, for example, by offering to amend his current contract of employment to a Monday to Thursday pattern with the option to work a Saturday or Sunday. The claimant refused these offers.

<http://bit.ly/k1TXQD>

SEXUAL ORIENTATION DISCRIMINATION

Lisboa v Realpubs Ltd and others [2011] EAT

Sexual orientation discrimination

The Respondent purchased a pub, recognised as London's first gay pub, and sought to rebrand it as a gastropub. The claimant worked at the pub for just over one year before resigning.

The first claim was for unlawful direct discrimination under the Employment Equality (Sexual Orientation) Regulations 2003. The openly gay claimant argued he had been the victim of discriminatory comments directly, which was accepted and damages were paid for injury to feelings.

Secondly the Claimant brought a constructive dismissal claim. He argued on the basis of being forced to co-operate with a policy of making the pub less welcoming to gay customers. The ET rejected this as being part of a legitimate course of action of rebranding the pub to be desirable to a wider audience.

The EAT rejected the decision of the ET. They found that ET fell into error focusing on the (legitimate) commercial aims of the Respondent and not the potential discriminatory effect of the implementation of the policy. A policy requiring an employee to discriminate against certain groups of customers could be discriminatory under s3 and 4 of the 2003 regulations applying principles in *Showboat* approved by *Wethersfield v Sarg*. The EAT found there was discrimination against gay customers and thus the constructive dismissal claim succeeded. Even without the *Wethersfield* claim they would have reached the same conclusion as the discriminatory comments were a contributory factor in his resignation which is enough for a dismissal claim.

<http://bit.ly/fw7J6>

SEX DISCRIMINATION

DeBique v Ministry of Defence [2011] UKEAT

Discrimination compensation; failure to mitigate loss

The original case of October 2009 involved a female soldier in the army, from St. Vincent & the Grenadines, who was also a single parent with a young daughter. She could not have a member of her extended family (a half-sister) to stay with her in the Service Families Accommodation because she was a foreign national only entitled to stay in the UK for a short period.

The decision of the army was deemed to be discrimination on grounds of sex: "... the Army failed to make appropriate arrangements to deal with this eventuality, either by providing proper childcare provision or by taking any steps to secure a relaxation of the relevant immigration policy in the Claimant's case, to enable her sister to provide live-in childcare..."

The EAT has recently considered what the level of compensation ought to be. The Tribunal awarded the appellant £15,000 by way of compensation for injury to feelings (with interest); but declined to make any award for loss of earnings, on the basis that the appellant had failed to mitigate her loss. Specifically, it held that she had unreasonably refused an offer made to her during the period of her notice of a posting that would, as the Tribunal found, have adequately addressed her childcare difficulties. The Appellant appealed against this.

The EAT could find no fault with the Tribunal's reasoning. The appellant had enjoyed army life and had a chance to go on enjoying it and refused. By accepting an alternative she would have mitigated her loss of earnings to nil. That same refusal had properly led the Tribunal to not include in the injury to feelings award any amount for "loss of congenial employment".

<http://bit.ly/n6vkOD>

Fox v Ocean City Recruitment Ltd UKEAT/0035/11/JOJ

Sex discrimination; vicarious liability; and victimisation

The employer was a recruitment agency specialising in recruiting professional drivers for clients and the employee was employed by a company whose business transferred to the employer. The manager of the Croydon branch of the employer (the second respondent) was alleged to have made unwanted comments to the employee and was suspended for five days while investigations took place.

It was found that there was insufficient evidence to justify the second respondent's suspension, disciplinary action, or to dismiss him for sexual harassment. Whilst the second respondent was restored in his position, three members of staff, including the employee, were made redundant in March 2009. There was no attempt by the employer to comply with the statutory dismissal procedures which were then in force.

The claimant maintained that she was not made redundant because of financial considerations but because she was being victimised for having raised complaints. She presented these claims before the employment Tribunal alleging, inter alia, harassment and victimisation.

The tribunal found that the employee had been harassed by the second respondent but, that the employer had established the defence of having taken reasonable steps to prevent the harassment. It held however that the dismissal was an act of unlawful victimisation and made an award of compensation for injury to feelings in the sum of £1,500, together with 10% uplift in response to the employer's failure to comply with the statutory procedures. The employee appealed against the liability and remedy judgments.

The EAT concluded that the Tribunal had misdirected itself as to the defence of having taken reasonable steps to prevent discriminatory conduct by employees as it had relied on steps taken after the acts of discrimination, rather than before. The Tribunal had also given no reasons for awarding a 10% uplift for failure to comply with statutory procedures and had failed to give adequate reasons for awarding a sum as damages for injury to feelings. The matter was therefore remitted to the same Tribunal to reconsider the issues of the uplift and the failure to comply with statutory procedures.

<http://bit.ly/nBvTXf>

Cople & Ors v Littlewoods Plc & Ors [2011] EWCA

Sex discrimination; remedies

Where it had been established that the denial of access to an employer's pension scheme indirectly discriminated against part-time workers on the grounds of sex, this decision confirmed that the opt-out principle (employees were not entitled to a declaration of entitlement as they would 'opted-out' of the scheme even if they had been eligible to join) was entirely in accordance with EU law.

It should be noted here that within the Courts decision it did allow for a declaration of entitlement to be granted to those who would have joined it but only for the period when the scheme was closed to them.

The female part time employees appealed the decision of the employment tribunal which refused to grant them a declaration of entitlement following their denial of the access to occupational pension schemes by the employer. The employees successfully established that the denial of access indirectly discriminated against part time employees on the grounds of sex. The employer relied upon the opt-out principle.

The court had to determine 2 issues; firstly whether they should grant a declaration of entitlement to the membership of the scheme even though the part time employees would have opted out and secondly whether they should make a declaration that the part time employees should be retrospectively treated as members in open period of scheme when they were eligible but chose not to do so. The employment tribunal refused to grant a discretionary declaration of entitlement to those part time employees who would have opted out of the scheme. Declarations were granted to those part time employees who would have joined, but only in respect of the period when the scheme was closed to them.

The employees in question also argued that the opt out principle was wrong as a matter of law; that it was a breach of the implied equality clause for which a proper and effective remedy must be provided for in accordance with EU Law. Differing rules concerning full time and part time employees would clearly be against the Equality principle however the Court has found that the opt-out principle is entirely in accordance with EU law.

The equality clause had the effect of removing the barrier which prevented the claimants from having access to the scheme and was an effective remedy for that purpose. However, conferring the right of access did not oblige the claimants to join the scheme and did not confer an automatic entitlement to the benefits of membership. If the claimants would have opted-out anyway they would not have received the benefits of membership and accordingly a declaration of entitlement was not appropriate. Conversely, if they would have joined, the declaration provided a full remedy. If full-time workers chose not to exercise their right to join the scheme when they were able to do so they could not later claim the right to be allowed to join with retrospective effect. As such, that right could not be conferred on the claimants as it would create an unacceptable inequality. Equal treatment did not mean more favourable treatment. The remedy sought by the claimants would be disproportionate to their loss and would create an inequality with the full-time male workers which would be wholly contrary to the principle of non-discrimination. Domestic law prevented the breach of EU law by making the declaration of entitlement discretionary thereby ensuring that it need only be given where it was appropriate and in accordance with EU law to do so.

<http://bit.ly/u1ayUB>

Cromwell Garage Ltd v Doran [2011] UKEAT

Sexual Discrimination: Pregnancy and discrimination – burden of proof / injury to feelings

The Claimant, at the time of the tribunal, was a 28 year old mother of three. After informing her employer of her fourth pregnancy she was subjected to a number of comments about the impact on the business and was asked to attend meetings held with the respondent in an effort to persuade her to change her working hours. The Claimant was eventually dismissed shortly after returning from maternity. The Employment Tribunal found the Claimant to have been unfairly dismissed on the grounds of her maternity.

The EAT rejected the respondent's contention that the Tribunal had failed to pay sufficient attention to the problems of a small business and that the Tribunal wrongly shifted the burden of proof to the employer. The EAT also rejected the contention that the remedy awarded for injury to feelings of £12,000 was manifestly excessive. With regard to the remedy the EAT referred to Da'bell which established that such decisions are for the Employment Tribunal.

His Honour Judge McMullen QC, comments that the assertion by the respondent's solicitor that generally speaking, women who are on maternity leave do not return to work, is not the impression held by those present at the EAT hearing. The impression of the lay members present would indicate that more and more women in the relevant age group are employed and are taking advantage of their right to come back after maternity leave has expired.

<http://bit.ly/kZCA5C>

Eversheds Legal Services Ltd v De Belin [2011] UKEAT

Pregnancy and discrimination; redundancy criteria

This case involved a male claimant and female comparator (who was absent on maternity leave) in a redundancy selection pool. The claimant was given a low actual score and the female claimant was given the maximum score because of her absence at the measurement date. The claimant was selected for redundancy but had the female comparator not been given the maximum score, she would have been selected. The Tribunal held that the scoring method constituted unlawful sex discrimination. The appeal was dismissed on the following grounds:

1. As regards sex discrimination, more favourable treatment of the comparator in order to compensate her for a disadvantage consequent on her absence on maternity leave would not constitute unlawful sex discrimination, if but only if the treatment was no more favourable than was reasonably necessary for that purpose – article 2.7 of the Equal Treatment Directive and section 2 (2) of the Sex Discrimination Act 1975 considered; but
2. It was not reasonably necessary to accord the comparator a notional score on the lock up criterion because there were more proportionate means available of ensuring that she did not lose out in the redundancy exercise because of her maternity absence.
3. As regards unfair dismissal, it was not reasonable in the circumstances for the employer to rely on its own failure to identify more proportionate means of protecting the comparator's position.
4. The Tribunal had wrongly refused to consider evidence that if the Claimant had not been dismissed he would have been at risk of dismissal in a further redundancy exercise in less than a year's time – King v Eaton, Thornett v Scope and Software 2000 considered – Tribunals not to decline to undertake Polkey exercise merely because it involves "speculation."

<http://bit.ly/hhFbET>

Association Belge des Consommateurs Test-Achats ASBLLL (2011) ECJ

Sex discrimination; insurance premiums

The European Court of Justice held that Art 5(2) Directive 2004/113 is invalid with effect from 21 December 2012.

The preamble to the equal treatment directive says:

- “(18) The use of actuarial factors related to sex is widespread in the provision of insurance and other related financial services. In order to ensure equal treatment between men and women, the use of sex as an actuarial factor should not result in differences in individuals’ premiums and benefits. To avoid a sudden readjustment of the market, the implementation of this rule should apply only to new contracts concluded after the date of transposition of this Directive.
- (19) Certain categories of risks may vary between the sexes. In some cases, sex is one but not necessarily the only determining factor in the assessment of risks insured. For contracts insuring those types of risks, Member States may decide to permit exemptions from the rule of unisex premiums and benefits, as long as they can ensure that underlying actuarial and statistical data on which the calculations are based, are reliable, regularly up-dated and available to the public. Exemptions are allowed only where national legislation has not already applied the unisex rule. Five years after transposition of this Directive, Member States should re-examine the justification for these exemptions, taking into account the most recent actuarial and statistical data and a report by the Commission three years after the date of transposition of this Directive.”

Article 5 of Directive 2004/113, which is entitled ‘Actuarial factors’, provides:

1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals’ premiums and benefits.
2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.

The ECJ has now ruled that Article 5(2) of Directive 2004/113 is invalid with effect from 21 December 2012.

Presumably this means that insurance companies could lower premiums and possibly payouts in respect of annuities, retirement savings and accident cover for men down to that for women. However, it would be wiser to expect an increase for insurance and pension premiums for both men and women but an increase in pension payments for women.

<http://bit.ly/eP2hBH>

Clyde & Co LLP & Anor v Winkelhof [2011] EWHC

Contracting out of statute; arbitration agreements; sex discrimination

The defendant was a partner in a firm of solicitors who began work for the first claimant after a buy-out in 2008 of the firm she originally worked for.

The defendant was expelled from the partnership of the firm on 13 January 2011 and complained to an employment tribunal of sex discrimination/pregnancy discrimination contrary to the Equality Act 2010. She also brought a whistleblowing claim under the ERA 1996.

The firm applied to the High Court for a mandatory injunction to compel the defendant to apply for, or consent to, a stay of her employment tribunal claims, pending compliance with the dispute resolution procedure in clause 41 of the membership agreement.

The High Court dismissed an application for a mandatory injunction to compel a former partner to apply for, or consent to, a stay of her employment tribunal claims, pending compliance with the dispute resolution procedure in a partnership agreement. The court held that the dispute resolution clause, which provided for the final determination of any dispute by arbitration, was void insofar as it purported to limit the former partner's rights to continue her whistleblowing and sex discrimination employment tribunal claims. The High Court also noted that it had no power to stay tribunal proceedings.

<http://bit.ly/gPUTBn>

DISMISSAL & GRIEVANCE PROCEDURES

Lambert v Vicomte Bernard de Romanet Ltd [2011] UKEAT/0501/10/SM

In this case the claimant was dismissed after 16 month's absence. During this time there was no communication with his employer apart from a sick certificate for three months and an expenses claim. The claimant claimed unfair dismissal and discrimination under the Disability Discrimination Act 1995 (DDA).

The Employment Tribunal held that dismissal was automatically unfair under section 98A(1) of the Employment Rights Act 1996. The Respondent had not engaged with the statutory dismissal and disciplinary procedure and dismissal was admitted. The Tribunal also found that the dismissal on grounds of capability were substantively unfair but that the claimant was not entitled to a compensatory award for lost earnings.

The claimant's appeal was dismissed, the EAT holding that he had contributed to his dismissal to the level of one hundred per-cent by failing to reply to his employer's enquiries about his health.

<http://bit.ly/fZmZbz>

Bond v Dunster Properties Ltd & Ors [2011] EWCA

Delay in issue of Decisions; Human Rights Act 1998

In this appeal, Court of Appeal made observations regarding late delivery of judgments and case management issues, including the value of preliminary issues hearings.

The underlying dispute involved a property development by father and son. There was a disagreement as to the basis on which they had entered into various agreements and the matter came before the trial judge, who made an order to try a number of preliminary issues. However, because of various late disclosures and an underestimate in the time estimate given for the trial of the preliminary issues, the trial originally fixed for April 2007 was not heard until over a year later. The judge did not hand down his judgment until some 22 months after the trial (in which he found in favour of the son), without any apology or explanation for the delay. The father sought to appeal the judgment on the basis that the judge's findings of fact should be set aside on the basis on the lengthy delay.

The Court of Appeal noted that a judgment must be delivered within a reasonable time in accordance with Article 6 of the European Convention on Human Rights, depending on the circumstances of the case. Findings of fact are not, however, automatically to be set aside because a judgment is seriously delayed.

Having carefully considered the facts, and emphasising that the delay was "lamentable and unacceptable", nevertheless the Court decided that the delay in giving judgment did not render it so unsafe as to justify a retrial.

The Master of the Rolls noted that where a hearing is adjourned part-heard, the trial judge and court should do their best to ensure the gap until the hearing resumes is kept to a minimum. A serious delay in giving judgment, particularly where the delay is not explained and no apology made, is a denial of justice. It leaves the parties in a state of uncertainty, undermines confidence in the reliability of the delayed judgment, and the judiciary generally, and may lead to the appellate court entertaining and sometimes allowing an appeal it would not otherwise have done.

<http://bit.ly/hf5XWB>

Bonhoeffer, R (on the application of) v General Medical Council [2011] EWHC

Dismissal procedures; right to a fair hearing; hearsay evidence

The High Court has ruled that the GMC's decision to allow hearsay evidence in a Fitness to Practise Panel (FTPP) hearing against a doctor was a breach of the doctor's right to a fair hearing under Article 6 of the European Convention on Human Rights.

The case involved an allegation of child abuse in Kenya against the doctor. Criminal charges were dropped because only one witness supported the allegations but the GMC felt the allegations were so serious that the complaints had to be investigated. They believed that the transcript of the police interview with the witness should be permitted as evidence at the disciplinary panel hearing, although the witness was not called because of fears of repercussions back in Kenya.

The defendant argued that the gravity of the allegations is a factor arguing in favour of admissibility of the hearsay evidence. In the leading judgment, of Mr Justice Stadlen stated:

"... that submission is misconceived. It is of course self-evidently correct that the greater is the gravity of allegations, the greater is the risk to the public if there is no or no effective investigation by a professional body such as the FTPP into them. However, that factor on its own does not in my view diminish the weight which must be attached to the procedural safeguards to which a person accused of such allegations is entitled both at common law and under Article 6. To the contrary, the authorities to which I have referred suggest the reverse to be the case. The more serious the allegation, the greater the importance of ensuring that the accused doctor is afforded fair and proper procedural safeguards. There is no public interest in a wrong result.

For these reasons in my judgment the FTPP's conclusion that it was fair to admit the hearsay evidence of Witness A and its decision to admit it was irrational and constituted a breach of the Claimant's Article 6(1) right to a fair hearing and cannot stand. The decision must accordingly be quashed."

<http://bit.ly/l8kb9z>

EQUAL PAY

Baxter v Titan Aviation Ltd [2011] UKEAT

National Minimum Wage; sleepovers

The claimant in this case was a casual driver for a holiday firm which provided the service of picking up clients going on holiday and driving them to the airport. He supplied his respondent employer with the days on which he could work and was free to accept or decline any job offered. The hours he worked varied considerably and he complained to the respondent that on a pro-rata basis he was being paid less than the respondent's full time employees. He lost various claims under fixed term regulations because he was not employed under the same type of contract as the 'comparable' full time employee.

The claimant began claims in the Employment Tribunal soon after this, complaining of discrimination contrary to regulation 5(1)(a) of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the PTWR), victimisation shown by the lower level of work handed to him since the first claim, discrimination contrary to regulation 6 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the FTER) and a claim that he was not properly paid for so-called lay-over periods.

The claim under the FTER was dismissed on the basis that the claimant was not an employee and the other claims were also dismissed.

The PTWR claim was dismissed because the claimant had used a full time employee as his comparator; however, as the claimant was not an employee and the comparator was, both people were employed under different contracts and accordingly the comparator could not be comparable.

The victimisation claim was dismissed because, on the evidence, the Tribunal were unable to detect any pattern evidencing a situation in which the claimant had been singled out or targeted for particular treatment namely a reduction in work.

The last claim was dismissed on the grounds that the time spent by the claimant after he arrived at his destination was not working time and therefore did not count when calculating his hourly pay. The claimant appealed.

The EAT dismissed all the grounds of appeal. The PTWR claim was rightly dismissed because the comparable full time employee on whom the claim relied was an employee and accordingly worked under a different type of contract within the meaning of regulation 2 of the PTWR. The Tribunal was also entitled on the evidence to dismiss the victimisation claim. As regards the NMWR claim, even if the claimant could be deemed to have been working under regulation 15(1), the case would fall within the exception under regulation 15(1A), which says:

"In relation to a worker who by arrangement sleeps at or near a place of work and is provided with suitable facilities for sleeping time during the hours he is permitted to use those facilities for the purpose of sleeping should only be treated as being time work when the worker is awake for the purpose of working."

<http://bit.ly/qtf9Ve>

Minter v Kingston Upon Hull City Council [2011] EWCA

Equal Pay; settlements - income or capital?

This case involved two Council employees who received settlement payments via an ACAS conciliated settlement agreement. They had been part of a number of claims and their union had advised on the actions throughout.

The claimants were in receipt of benefits and declared them to the relevant authorities. In turn, the relevant authorities recalculated their benefits for the period concerned and sent bills for overpaid benefits. Should the payments constitute "income", then they must be brought into account and a repayment made of some of the benefits received. If they are "capital", this will not apply.

The Court of Appeal has decided that:

"The true characteristic of the payment... was that it was an on account payment for what was due to her by way of lost wages which had not been paid in the amount which should have been paid under the Equal Pay Act, the equality clause and similar statutory provisions. On its true characteristic, it was clearly compensation for past income."

This is an important case for representatives involved in the settlement of equal pay (and presumably other income-related) claims because it seems to counter the previously accepted position that most settlement payments were simply an amount to remove a claim, rather than essentially underpayments of wages.

<http://bit.ly/qjQiNK>

Agard v Westminster Kingsway College [2011] EWCA

Redundancy Payment; calculation for term time workers

The appeal concerns the sum of £234.29, being the difference between a redundancy payment based on a 40 week (term time) year of weeks spent at work (no holidays were permitted during term time) or a 45 week year, where the 40 weeks of term time is added to the 5 weeks of holiday pay given in excess of term time.

The claimant worked during term time only, her contract stating that her average working week would be 20 hours per week and 40 weeks per year. She could take holidays only at the year end or out of term. Her statutory 5 weeks paid holiday were therefore extra to the 40 weeks she was actually paid for being at work and she was regarded as unemployed for the rest of the year. Her redundancy pay was based on her weekly pay being calculated as 'gross pay divided by 45', which was a lower figure than if her gross pay had been divided by 40. The claimant argued that the gross figure should be divided by 40 but the Tribunal ruled in favour of the denominator being 45.

The Court of Appeal has confirmed that the Tribunal (and the EAT) were correct to rule that weekly pay should be based on an average over 45 weeks. Right to appeal was denied and the appellant was warned about the risks of costs over an appeal on such a small amount, had leave been granted.

<http://bit.ly/n22VSm>

Skills Development Scotland Co Ltd v Buchanan & Anor [2011] EAT

Equal Pay Act: Material factor defence and justification

This case concerned two equal pay complaints where two female claimants sought to use a male employee, Mr Sweeney, as a comparator in an equal pay claim. All employees were customer service managers and all had come to work for the respondent employer via TUPE transfers. None of the employees had worked in the same transferred organisation and as a result, their starting salaries with the respondent employer all varied, with Mr Sweeney's being around £10-12K higher. Furthermore, Mr Sweeney's contract of employment that transferred with him, also provided that he was entitled to pay increases on 1 January 2003 and on 1 August 2003 (which he received) and that "On the expiry of 2003, your salary will be reviewed on an annual basis as per normal arrangements applying from April 2004." Over subsequent years all the employees received routine "across the board" pay increases and the respondent employer never exercised its right to freeze employees' pay if it is considered they were being overpaid. This meant that the pay gap between the claimants and Mr Sweeney consistently remained around £10 - 12K.

The respondent employer used the TUPE regulations as the basis of their defence however the Employment Tribunal rejected these claims on the basis that the employer should have taken action to freeze the comparator's pay.

On appeal, the EAT upheld the employer's arguments on the basis that the original reason for the disparity in the salaries was TUPE and that this continued to be the reason years later. 'It was absurd to suggest that the awarding of an "across the board" 1% pay increase meant that the cause of and reason for the differential pay ceased to be TUPE. It was evident that the disparity in pay could be traced directly back to the effect of TUPE and there had been no supervening factor to break that chain of causation.' Furthermore, the fact that the employer might have frozen the comparator's salary to reduce differentials over time was held not to be important; 'The ability, under the PRP scheme, to freeze the pay of an employee who was being overpaid... is, we consider, neither here nor there, given the finding in fact that it was not the practice of Scottish Enterprise to freeze salaries.' The reason for the differences in salary therefore remained gender neutral, notwithstanding the passage of time and as such, the claimants' claims were dismissed.

<http://bit.ly/qGm0zr>

Asif v Elmbridge BC [2011] EAT

Redundancy and Equal Pay

The Claimant's case of unfair selection based primarily on the failure of the Respondent to retain her when another employee in the group was leaving is reasonably arguable. Appeal allowed on this ground.

Her case that the Respondent did not have a genuine material factor defence to her equal pay claim was dismissed. The employer had a reasonable genuine material factor defence not related to the sex of the claimant. That being the performance of the male comparator was consistently better.

The Claimant argued that she had been unfairly selected for redundancy as a result of the failure of the Respondent to consider alternative employment for her when a post became available within her work group. She also argued that the Respondent did not have a genuine material factor defence to her equal pay claim.

The Claimant was employed by the Respondent in a capacity which was the subject of a reorganisation. The Claimant had a job description and there was a new job description. The new job description was said by the Respondent to be a very different job. The Claimant contended that she was in a team of four, the new team was of three, she could do the job which was envisaged in the new team and she should have been slotted in. At the time, Mrs White had given notice, before the redundancies took effect, that she was going to leave and the Claimant said "I can do her job. Why

make me redundant when Mrs White is already going?" She also pointed out that within the Respondent's redundancy policy a person who does not have sufficient experience for a vacant post should be offered the job on a trial basis for up to three months, and that the Claimant should have been considered for that and it was unfair not to.

<http://bit.ly/t42N6i>

City of Edinburgh Council v Wilkinson & Ors [2011] ScotCS

Equal Pay; Equal Value; Meaning of 'Establishment' and common terms and conditions

Employment appeal Tribunals decision was unsuccessfully appealed by a local authority. The original decision found in favour of 52 female employees on a preliminary plea lodged by the authority in response to the female employees' claim for equal pay.

This case involved a claim from 52 female workers in a variety of council jobs comparing themselves for equal value purposes to manual workers in the council.

The female employees held posts which were known in government employment terms as administrative, professional, technical and clerical whilst male employees jobs held were formally known as manual jobs. The females contended that their job was of equal standing to that of the males and the argument came down to whether or not under the definition contained in legislation it was perceivable for there to be a differentiation.

Circumstances in which EAT, upholding cross appeal, found that Employment Tribunal had erred in failing to hold that Claimants (female non-manual workers) and their comparators (Male manual Workers) were employed at the same establishment. Otherwise, employers' appeal dismissed, EAT holding that ET was correct to hold that Claimants and their comparators were employed on common terms and conditions, namely the "Red Book" notwithstanding that job evaluation studies not completed and, accordingly, employees not yet on new pay and grading arrangements provided for in the Red Book.

<http://bit.ly/u5aHxk>

Birmingham City Council v Abdulla & Ors [2011] EWCA

Equal Pay; Civil Courts; Time Limits

The Court of Appeal confirmed that equal pay claims, which would have been out of time under the six month time limit in an employment tribunal, may proceed as breach of contract claims in the High Court. Mummery LJ, in the leading judgement, found that employees should not generally be required to explain why they preferred one forum to another, even if the employment tribunal would appear to be more convenient.

The Court of Appeal rejected the reasoning in *Ashby and others v Birmingham City Council* (2011) EWHC, which also allowed claims too late for tribunal to proceed in the High Court but did so with certain conditions attached.

<http://bit.ly/u19cpP>

Abdulla & Ors v Birmingham City Council [2010]

Equal Pay; Time Limits

The Claimants were bringing equal pay claims against the Defendant. The Claimants however were not in a position to bring their claims before the Employment Tribunal given that 6 months had elapsed since their contracts had been terminated by the Defendant.

The High Court ruled that equal pay claims may be heard in the civil courts (with a six-year time limit) notwithstanding that the six-month time limit for tribunal claims has expired. The Deputy Judge stated the following commenting on the Section 2 (3) of the Equal Pay Act 1970 "... Parliament has merely conferred an option for claimants to pursue their claim before an Employment Tribunal and it would be wrong for the Court to turn that option into an obligation by preventing those claimants from pursuing a claim before the Courts after the time period for presentation of a complaint to an Employment Tribunal has expired..."

<http://bit.ly/fQO8im>

Williams and Ors v British Airways plc [2011] AG's Opinion

Holiday Pay - Average earnings

This case concerns certain aspects of the organisation of working time and Clause 3 of the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation but can also be applied to employees outside this industry.

At its heart it involves what employees should be paid when on holiday, for example, basic pay, normal pay or an average. In the case of an average payment the case looks at how this should be calculated if it is appropriate.

The Court concluded that normal payments must be included and reference periods for averaging pay must be typical of normal working hours:

"... holiday pay must, in principle, be determined in such a way as to correspond to the worker's normal remuneration. In any event, an allowance granted as holiday pay will not satisfy the requirements of EU law if it is determined at a level which is just sufficient to ensure that there is no serious risk that the worker will not take his annual leave.

"In a situation such as that in the main proceedings, in which the level of remuneration varies, a worker is entitled to holiday pay corresponding to his average earnings. The calculation of that average remuneration must be based on a sufficiently representative reference period.

"The calculation of that average remuneration must take into account both supplements usually due to the worker as part of his remuneration and any restrictions in respect of annual or other limits on the extent to which, or the time during which, the worker can engage in a particular activity rewarded by the grant of a supplement."

<http://bit.ly/lhWkMx>

North & Others v Dumfries & Galloway Council & Another [2011] ScotCS

Equal Pay: Comparators "in the same employment"

The appellants were women employed by the council working in support roles within schools. They made a claim for equal pay, selecting as their male comparators grounds men, road workers, and refuse drivers etc. who were employed by the Council but did not work in schools. These workers were entitled to certain bonuses which the appellants were not. For the claims to be valid, the comparators had to be "in the same employment" as the appellants.

The conclusion of the judge at the previous EAT hearing was:

"I conclude, in these circumstances, that where a woman seeks to use a male comparator that is not employed at her establishment, she requires to show a real possibility of him being employed there in the job he carries out at the other establishment or in a broadly similar job".

The Court of Session has declared this to be an incorrect application of the hypothetical test set out by Lord Slynn in *British Coal Corporation v Smith* 1996 ICR 515. Therefore the Claimants could use the groundsmen etc as comparators. However, they lost the case because they could not show that 'common terms and conditions' would apply to their male comparators, were they to ever have been employed at the appellants schools – too many variations to the men's terms and conditions would be required for that to occur.

<http://bit.ly/gQLBUz>

Irvine v South Lanarkshire Council [2011] Scot IC

Freedom of Information Act; pay details

Mr Irvine (the Claimant) made a number of requests to South Lanarkshire Council (the Council) for the number of persons placed on specific spinal column points within the pay structure. The Council responded to each request by stating that it considered the requested information to be personal data and exempt in terms of section 38(1)(b) of Freedom of Information (Scotland) Act 2002 (FOISA). A review was carried out, which upheld the original response. The Claimant eventually applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Council had failed to deal with the Claimant's request for information in accordance with Part 1 of FOISA. He concluded that disclosure of the withheld information would not contravene the data protection principles and therefore that the Council had incorrectly applied the exemption from disclosure in section 38(1)(b) of FOISA. The Council was therefore required to provide Mr Irvine with the information he requested.

<http://bit.ly/gZuNBu>

Ashby and others v Birmingham City Council [2011] EWHC

Equal pay; civil courts; time limits

The claimants were home carers employed by the council until between July 2003 and January 2006 and brought claims that the equality clause implied by section 2 of the Equal Pay Act 1970, as amended by the Equality Act 2010, operated to vary their contracts of employment to give them an entitlement to bonuses and higher rates of basic pay paid to male comparators. They claimed damages for breach of contract for the shortfall between their pay and that of their comparators for the six years up to the ending of their employment.

The claimants began proceedings in the County Court as the limitation period for the Employment Tribunal had come to an end. The Council applied for the claims to be struck out on the basis that the County Court action was started solely for the reason that time had run out for an action in the Employment Tribunal.

Under section 2(1) of the 1970 Act such claims could be brought in an employment tribunal but since they were for breach of contract they could also be brought in High Court or the county court.

The judge struck out the claim under section 2(3) of the 1970 Act, as amended, holding that it was "a claim, viewed objectively, which would be determined conveniently by an employment tribunal and not by a county court". The claimants appealed.

On appeal it was held that striking out an action under section 2(3) was a two-stage process:

1. The Court had to decide whether the claim could be more conveniently disposed of separately by an employment tribunal and
2. If it concluded that the claim could be more conveniently disposed of in this way, it would decide whether to exercise discretion to strike out the claim.

The fact that the only claim in court proceedings was for equal pay was a factor which could be taken into account in determining the two questions posed by section 2(3).

The Court found that practical justice required the reason for not commencing employment tribunal proceedings to be taken into account. The inability of the claimants to commence proceedings before an employment tribunal could be a factor affecting the suitability of the Employment Tribunal as a means for settling a claim for equal pay or the ability of the judge to use his discretion to strike out a claim.

The judge decided that “viewed objectively” the claims would be determined conveniently by an employment tribunal but the only “objective” factors referred to in his judgment were general features of the determination of equal pay claims in employment tribunals.

The appeal would be allowed on the basis that the judge failed to consider whether the particular claims before him could more appropriately be disposed of before an employment tribunal. As the defendant was contending the only reason that proceedings were brought in the county court, the judge had an obligation to make findings as to the reason that proceedings were not issued in the Employment Tribunal.

<http://bit.ly/gZn3Fc>

Birmingham City Council v Akhtar & Others [2011] EWCA

Equal Pay Act; other establishments

The EAT has concluded that employees employed by the Council in non-teaching roles in community schools are entitled to compare themselves with employees in other Council establishments. The school governors however have the power to require the Council to engage employees in schools otherwise than on recommended terms. The Council is deemed to be the 'single source' for terms and conditions of non-teaching employees within the Council, wherever they are based. In this case, catering staff and cleaners in schools could compare themselves for equal pay purposes with Council employees involved in any area of work.

<http://bit.ly/k0Kkm6>

TRADE UNIONS

The National Union of Rail, Maritime & Transport Workers v Serco Limited t/a Serco Docklands and ASLEF v London & Birmingham Railway Limited t/a London Mainland (2011) EWCA

Strikes; Balloting; Interim Injunctions

The decision concerned two decisions to grant interim injunctions to prevent the respective trade unions from taking industrial action. The cases raise different issues regarding balloting provisions contained in the GB equivalent to the Trade Union and Labour Relations (NI) Order 1995.

In the ASLEF case, the facts are that terms and conditions of train drivers varied and there was no agreement on harmonization. Negotiations broke down and the union balloted for strike action. Ballot papers were sent out on 17 November and the ballot closed on 6th December 2010. On 9th December 2010, London Midland received the strike notice from ASLEF. The notice informed the company that the strike had been called for 23rd December 2010. The planned industrial action involved train drivers not clocking on for shifts that day. On 21st December an interim injunction was granted. ASLEF appealed.

In the RMT appeal, an interim injunction was similarly granted and it prevented a strike which was due to take place at the London Docklands Railway on 21st and 22nd January 2011.

The judgment helpfully sets out the legal context of strike action and goes on to look at the purpose of an interim injunction. It examines the complex balloting provisions, deals with accidental ballot errors, disclosure of information and notice compliance. In essence, it appears that this judgment will assist unions as they charter a course though the statutory requirements. As a consequence, it may also make it more difficult to obtain interim injunctions.

<http://bit.ly/fkpO4Z>

TRIBUNAL PROCEDURES

R (on the application of G) (Respondent) v The Governors of X School (Appellant) [2011] UKSC

ECHR: Article 6 - Right to a Fair Hearing; Right to Legal Representation at Disciplinary Hearings

The claimant was employed as a teaching assistant at a primary school. Allegations were made against him that he had kissed and had sexual contact with a 15-year-old boy, who was undergoing a short period of work experience at the school. The claimant was suspended and internal disciplinary proceedings were brought against him.

The claimant asked to be allowed legal representation at the hearing before the disciplinary committee of the school's governors. The request was refused and the claimant was told that he was only entitled to be accompanied by a work colleague or union representative. The disciplinary committee found the allegations established and the claimant was duly dismissed.

The claimant then brought proceedings for judicial review of the school's decision not to allow him to have legal representation at the disciplinary hearing relying on his right to a fair hearing under Article 6(1) of the European Convention for the Protection of Human Rights. He was successful in the Administrative Court and in the Court of Appeal however, the school then appealed to the Supreme Court.

The Supreme Court ruled by majority that the claimant did not have an Article 6 right to legal representation on the basis that the school was obliged to refer the matter to the Independent Safeguarding Authority. The ISA is an independent body which is distinct from the school's decision-making process. It is entitled to carry on whatever investigations it so wishes and its decisions are not dependent on the employer's decision or findings. It was therefore the decision of the ISA, and not the employer, which ultimately determined whether the claimant should be put on the children's barred list and as a result, the decision of the Court of Appeal was reversed.

It appears from this ruling, that where there is no independent process available to an employee, Article 6 would be engaged and the employee would be entitled to legal representation at an internal disciplinary hearing involving potential career threatening repercussions. A large proportion of professions do however have a professional body independent of the employer that will make decisions on such matters. The right to legal representation therefore seems to be unavailable, for now, for the majority.

<http://bit.ly/ITgAGl>

Home Office v Tariq [2011] UKSC

Tribunal procedures; closed material procedure

This case involved an appeal concerning the permissibility and compatibility of a "closed material procedure" with European Union law and Human Rights Convention rights. This procedure permits an Applicant and his representatives to be excluded from certain aspects of employment tribunal proceedings on the grounds of national security. A special advocate is then enlisted to represent the Applicant's interests, so far as possible, in relation to the aspects closed to him and his representatives.

The Appellant, the brother of a man charged and arrested for alleged terrorism offences, was suspended from his immigration officer post while consideration was given to the withdrawal of his security clearance. When his security clearance was subsequently withdrawn, the Appellant complained that the decision involved direct or indirect discrimination on the grounds of race and/or religion. The Home Office refuted this claim, submitting that there was no such discrimination and that all decisions were taken for the purposes of safeguarding national security. They also submitted that the order for a closed material procedure made by the Employment Tribunal was made justifiably and for the same protective purposes.

The Appellant's challenge to the Employment Tribunal's order for a closed material procedure was dismissed by both the Employment Appeal Tribunal and then subsequently the Court of Appeal. It was however declared that Article 6 of the European Convention on Human Rights "requires [an Appellant] to be provided with the allegations being made against him in sufficient detail to enable him to give instructions to his legal team so that those allegations can be challenged effectively" (a requirement described in the course of the case as "gisting"), even if this put the Home Office "in the invidious position of having to make difficult decisions about disclosure and whether or how a claim is to be defended". It was against this conclusion that the Home Office appealed to the Supreme Court and the Appellant cross-appealed against the conclusion that a closed material procedure was permissible.

The Court held that the Home Office's appeal should be allowed, primarily on the ground that the case concerned a decision taken in the context of security vetting. The cross-appeal by the Appellant was dismissed.

Through this decision, the Supreme Court has therefore confirmed that a closed material procedure may be used in tribunals where matters of national security are at stake and that in these instances, even the gist of certain parts of evidence are not required to be given.

<http://bit.ly/pTmfqJ>

Reed In Partnership LTD v Fraine [2011] UKEAT

Jurisdictional Points: Extension of time: reasonably practicable

The EAT accepted the respondent's appeal against extension of time allowed to submit a claim for unfair dismissal. The EAT has disagreed with the Employment Tribunal, which found that it was not reasonably practicable to present the claim within time on the basis of the Claimant's ignorance.

The claimant in this case was employed as a personal advisor for job seekers until his summary dismissal for alleged misconduct on 20 April 2009. He presented Form ET1 to the Tribunal on 20 July 2009 which was (one day outside the primary limitation period). The claimant submitted that he assumed, without enquiry, that the period commenced the day after his summary dismissal. Judge Clark considered the approach of Lady Smith in *Sodexo*, paragraph 25, in reaching his conclusion:

"Was this Claimant reasonably ignorant of the start date for the three month limitation period?" no. He knew of his right to bring a claim, he knew of the three month time limit, he was not misled by the Respondent nor any other agency or advisor as to the correct start date. He made no inquiries at all through solicitors, the CAB or the Employment Tribunal website; he simply proceeded on a false assumption for which he had no basis."

"In these circumstances I shall set aside the Judge's decision and dismiss the complaints of unfair dismissal and wrongful dismissal."

In relation to submission of the claim within time limits, the EAT was able to establish that the claimant had not sought professional advice on the matter and was therefore not misinformed or reliant on negligent advice.

<http://bit.ly/kMu7P6>

TUPE

OTG LTD v Barke, Luke and Department of Business Enterprise and Regulatory Reform (2010) EAT

TUPE; insolvency proceedings

This is authority for the proposition that an administration can never qualify as “insolvency proceedings with a view to the liquidation of the assets of the company” within TUPE, Regulation 8(7).

Oxford Tool and Gauge Ltd (Oldco) went into administration on 27th June 2008. On the same day, under a pre-pack arrangement, the entirety of the business was sold as a going concern, but leaving the debts behind to a company called OTG Ltd.

The two claimants, Barke and Luke were employees of Oldco who were dismissed at or around the time of transfer. They brought claims for redundancy payments, pay in lieu of notice and unpaid holidays. The Tribunal determined that OTG Ltd was liable for the sums claimed and it was ordered to pay £10,336.50 to Barke and £8184.82 to Luke. It held on the facts of the case that the administration proceedings had not been instituted with a view to the liquidation of Oldco's assets. Accordingly Regulation 8(7) did not apply and Regulation 4 did. OTG Ltd appealed.

The EAT effectively dismissed the appeal in the Barke case and indicated that OTG remained liable for the full amount awarded by the Tribunal. It was OTG who had dismissed him. The EAT allowed the appeal in the case of Luke. She was dismissed prior to the transfer and the original liability for the obligations rested with Oldco and were covered by the Secretary of State's Guarantee obligations.

Accordingly, any employees who are employed by the transferor immediately before the transfer will have their contracts transferred under TUPE. The situation is different for employees who have already been dismissed by the transferor or administrator by the time of the transfer (unless there is an attempt to circumvent TUPE). The employee will have to make a claim to the Insolvency Fund for any redundancy payment or wages that remain unpaid.

<http://bit.ly/gOi7Bx>

First Scottish Searching Services Ltd v McDine & Anor [2011] EAT

This case concerned the fairness of dismissals by reason of redundancy after a TUPE transfer. The Respondent firm (which carried on the business of property title searching) acquired the business for two other searchers (Douglas & Co and SPH). The acquisition involved a TUPE transfer and the claimants (who were previously employed by SPH) transferred to the employment of the Respondent.

The dismissal of the claimant was held to be unfair by the Employment Tribunal and that there was a risk of unfairness posed in the absence of moderating the performance of the two different sets of employees, one having previously been in the employment of the transferee Respondent and then other having been previously employed by one of the two transferor companies.

The Employment Appeal Tribunal (EAT) held that there was no evidence of the risk causing inconsistencies or unfairness. Accordingly, the appeal was dismissed on the basis that it was not open to the Tribunal to conclude that the dismissal of the Claimants was unfair by reason of the risk identified by them.

<http://bit.ly/gYFDEX>

UNFAIR DISMISSAL

Zulhayir v JJ Food Services Ltd [2011] EAT

Dismissal/Resignation; effective date of termination

This case concerned a claimant employee who worked as a delivery driver and sustained a serious accident at work in June 2005. The claimant provided his respondent employer with medical certificates confirming his unfitness to work and received statutory sick pay until he stopped providing these certificates. The claimant then lodged a personal injury claim against the respondent. The claimant had moved house but failed to inform the respondent of the change in address. The respondent sent a letter by recorded delivery to the claimant dated 28 June 2006 stating that the claimant had left the job on 22 July 2005 and requiring him to confirm that he no longer wished to work for the respondent.

The claimant did not see the letter until May 2009 and only then when attached to a letter sent by the respondent's solicitors in the personal injury claim. He then lodged tribunal proceedings, complaining of unfair dismissal, disability discrimination and unpaid holiday pay.

The judge at the pre-hearing review struck out the claimant's claim, invoking the concept of implied termination of a contract of employment by the claimant and also on the basis that the claims were out of time.

The appeal was allowed by the EAT and it was held that the employment judge had been mistaken in reaching the conclusion that the contract of employment had been impliedly terminated by the claimant. There had been no attempt by the respondent to communicate with the claimant through his solicitors and the letter dated 28 June 2006 would not amount to the respondent's acceptance of any offer of resignation. There had been therefore no attempt by either party to terminate the employment until the letter from the respondent's solicitors in the personal injury proceedings on 20 May 2009. The complaints of unfair dismissal and breach of contract were therefore in time and the matter would proceed to a full merits hearing.

<http://bit.ly/qQokFU>

Halliday v Laurent Perrier (UK) Ltd [2011] UKEAT

Unfair Dismissal; SOSR; Dyslexia

The claimant worked as a salesman and part of his job was to produce daily contact reports as well as weekly and monthly reports, and submit his expense claims. All the documents were expected to be lodged promptly while events were fresh in the minds of the writer. The documentation was regarded as 'the currency' of the respondent's business, the 'lifeblood' of the sales organisation. The claimant made no request for support or assistance and his manager did not consider any action was necessary in relation to the claimant's disability.

Notwithstanding a warning for failing to adhere to strict procedures, the claimant was promoted. The failings continued and another warning was given with the claimant being required to resolve past administrative and expenses issues. Meetings were held and measure taken to attempt to assist the claimant to produce the reports. The claimant said that he was too unwell to file reports along with other issues such as IT and car problems. He was eventually dismissed for gross misconduct.

The internal appeal failed and the claimant claimed disability discrimination at the Tribunal on the basis that a minute of a meeting between managers demonstrated that the respondent had already decided that the claimant should be dismissed before formal disciplinary proceedings started. The Tribunal found that the claimant's dismissal was for wilful failure to communicate and not because of his disability. The disciplinary process was held to be proper and was only initiated after all else had failed. The requirement to submit reports of work activity did not place the claimant at a substantial disadvantage and therefore the claim in relation to reasonable adjustments was rejected. The

Tribunal also rejected the claim that the minutes of the management meeting indicated that the claimant's dismissal was decided on upon that day, or shortly thereafter.

The reports were eventually submitted but were not complete and after a disciplinary hearing the claimant was told he was on "notice of the risk of dismissal" some six months before his eventual dismissal. The claimant then claimed he was being bullied by his manager and should be given more time to prepare reports. The disciplinary process was suspended during the grievance.

The claimant was held to have been fairly dismissed. The tribunal and the EAT concluded that the dismissal was fair and not related to dyslexia. To a large extent this was because, in the early part of the process he did not refer to his disability:

The EAT dismissed the appeal. The decision of the Tribunal was held not to be perverse and was supported by evidence properly accepted by the Tribunal. They were entitled to find that the respondent was justified in concluding that the claimant's repeated failure to produce the reports was not due to his dyslexia, and reject the excuses about IT failures and sabotage of the computer. The Tribunal and the EAT concluded that the dismissal was fair and not related to dyslexia. To a large extent this was because, in the early part of the process, he did not refer to his disability.

<http://bit.ly/pGRz02>

Guiden v Accommodation & Building Systems Limited, T/A Maccorm [2011] IREAT

Unfair Dismissal; Constructive Dismissal

This case involved a claimant who fitted and erected Porto cabins and who had his van removed by the respondent. He then sought to be made redundant. When asked the reason for the removal of the van, the employer stated, "because that is my business" and argued that the claimant was simply looking for a reason to leave the job.

The Irish Employment Appeals Tribunal found in favour of the claimant, stating that, "Rightly or wrongly the claimant formed the impression that his company van was being taken from him. The claimant, on foot of this understanding, which in his view made the job impossible, sought to be made redundant."

The EAT found that the respondent should have offered the claimant a cooling off period (as would be expected by UK tribunals in 'heat of the moment' resignations). The EAT did not set out how it worked out the award of €8k but it was lower than it might have been because the employee did not mitigate his loss by looking for alternative employment.

<http://bit.ly/pwQQws>

Slade & Others v TNT (UK) Ltd [2011] UKEAT

Unfair dismissal; buy-out and re-engagement

The respondent in this case needed to cut costs and one of the ways of achieving this was to discontinue bonuses paid to the employees. The trade union opposed the changes and a ballot was held. Those refusing the buy-out were then offered re-engagement but did not receive an offer of buy-out payment for the bonus. The staff took the new jobs but under protest and reserved the right to claim for unfair dismissal. The respondent settled the prospective unfair dismissal claims for all but 183 of the employees, by means of a payment which was greater than the 'buyout' payment which had been offered in negotiations with the trade union. The 183 employees pursued their claims for unfair dismissal.

The Tribunal in the first instance held that it was a wholly reasonable response on the part of the respondent to terminate the employee's contract and offer re-engagement. It also ruled that the claimants were not entitled to the settlement payment because they had not agreed to compromise

their potential unfair dismissal claims in return for an offered sum of money unlike the majority of employees. Finally, they ruled that the fact that the re-engagement without the bonus operated more harshly on 2 of the claimants, because they did not have the benefit of consolidation of part of the bonus into basic pay, did not render the dismissal unfair. The claimants appealed.

The EAT agreed with the Tribunal regarding the first issue, saying that the dismissals were fair but on the second issue it commented that on the second issue, there was no obligation on the respondent to include the settlement payment in the terms of the re-engagement.

The EAT also commented that, "Where an employer has sought to change terms of employment and has made an offer to "buy out" certain existing terms, but warning that refusal will result in dismissal with an offer of re-engagement on the proposed new terms, the ET did not err in concluding that the employer did not act unfairly where the terms of offered re-employment did not include the terms of the "buy out" as part of the new terms."

<http://bit.ly/qPILCO>

King v Royal Bank of Canada Europe Ltd [2011] UKEAT

Unfair dismissal; Reinstatement/re-engagement

The claimant worked as a team and transaction manager in the respondent's capital markets global infrastructure finance department. In July 2008, the claimant questioned whether a performance appraisal upon her had been countersigned by her manager and why no objectives for the current year had been set by him. The claimant was then called to a meeting without knowing the purpose in advance, and was told that there were concerns about her work and that her role no longer existed. She was put on garden leave with immediate effect. The claimant asked for a letter telling her the reason for dismissal but all she was given was a draft compromise agreement. She was given no right of appeal and brought claims of unfair dismissal and sex discrimination.

The Tribunal upheld the claim of unfair dismissal but stated that the reason for this was redundancy and had nothing to do with discrimination. The claimant was offered two month's pay by way of compensation but appealed to the EAT.

The EAT upheld the appeal in part, ruling that the Tribunal had failed to apply s112 of the ERA 1996 and in particular had failed to consider re-engagement.

The EAT stated: "In its approach to compensation, in effect considering only vacancies at the time of the Claimant's peremptory dismissal and not vacancies over the period during which the Respondent ought to have carried out fair procedures, including consultation about alternative employment."

The Tribunal also failed to resolve a key dispute concerning what was said at the meeting. The claimant maintained that if the real reason for dismissal had been redundancy, she would have been informed that the project in which she was involved was going to be abolished.

<http://bit.ly/nYxvJl>

Wardle v Credit Agricole Corporate and Investment Bank [2011] EWCA

Compensation; unfair dismissal, victimisation and statutory uplift

This case concerns issues surrounding the calculation of unfair dismissal compensation by the Employment Tribunal.

The claimant was Global Head of Exotic Interest Rate Derivatives Risk Management with Caylor. He was found to have been unfairly dismissed, with the dismissal being an act of victimisation. He also lost out on promotion and a subsequent pay rise. Liability was not challenged and the case therefore concerned what to do about the statutory uplift; statutory uplift still applies in Northern Ireland under

the dismissal procedures and a potential 50% uplift applies to breaches of the LRA code in relation to jurisdictional grievances. This case involved high figures with the earning in the region of £100+k plus a 70% bonus.

In relation to the uplift, Elias LJ commented:

"In my opinion an increase to the maximum of 50% should be very rare indeed. It should be given only in the most egregious of cases. An example given by Lady Smith in the McKindless case which would at any event get close to the maximum is where there is a clear finding that the employer is determined to dismiss the employee whatever the merits and has deliberately and cynically ignored the procedures in case they get in the way of his being able to do so. However, the mere fact that the employer has ignored the procedures altogether would not in my view justify an increase to the maximum, although it would often justify some increase beyond 10%." (para 26)

"Once the tribunal has fixed on the appropriate uplift by focusing on the nature and gravity of the breach, but only then, it should consider how much this involves in money terms." (para 27)

The judgment noted that in particular, it was wrong for the Employment Tribunal to award career-long losses for discriminatory dismissals where, as in this case, the Tribunal believed that the employee would find employment with equivalent remuneration after an estimated period of time.

The Court of Appeal has now issued a supplementary judgement and has settled on an uplift of 15% for failure to follow grievance procedures.

<http://bit.ly/nNGm39>

Job Centre Plus (DWP) v Graham [2011] EAT

Unfair Dismissal; Reasonableness

A long-standing civil servant used her position in the Job Centre to help a friend of a friend of her daughter's get a job. The young man whom she helped was 19, came from an abusive background and had difficulty surviving on benefits. The claimant was subsequently reported to management via anonymous letters for providing this assistance.

The DWP has a clear policy in relation to standards of behaviour which states that staff must not use their positions to help friends, family or acquaintances. 'Acquaintances' are defined as: "An acquaintance is someone whose personal circumstances become known to an employee of the Department outside work." Pending the disciplinary hearing into the alleged breach of the DWP's standards, the claimant was not suspended, but instead transferred to another office. The disciplinary hearing found that the claimant's behaviour constituted gross misconduct and she was subsequently dismissed.

Although the original Tribunal held the claimant's dismissal was outside the band of reasonableness, the EAT went on to reverse this finding of unfair dismissal on the grounds that the Tribunal had substituted its own view for that of the employer. The EAT concluded that 'the principle of perceived equal treatment of customers is self evidently justified' and also submitted that they 'cannot see how [the transfer of the claimant to another office pending her disciplinary hearing, as opposed to being suspended] bears on the fairness of the subsequent dismissal.'

<http://bit.ly/pbnL7c>

Duncombe & Ors v Secretary of State for Children, Schools and Families [2011] UKSC 36

Territorial Jurisdiction; unfair dismissal

The Supreme Court gave its ruling in relation to fixed term contracts in April however it has now issued its decision in respect of the employees' cross-appeal in relation to Serco issues on unfair dismissal.

The case involved teachers (the employees) who were employed to teach in a European School in Germany by the Department for Children, Schools and Families. The European Schools were established by the EC and member states for the education of the children of staff working in EC institutions. The Schools are governed by the Schools Convention and Staff Regulations which set out the terms on which staff are employed, one of which being that employment at a European School is limited to nine years (the Nine Year Rule). The Supreme Court decided that what the employees were really complaining about was the nine year rule maximum limit on employment, rather than the application of three temporary periods and thus rejected their claims. As stated above, judgment was reserved in the cross-appeal of the teachers.

Under ordinary circumstances the employees would have been excluded under Serco from protection against unfair dismissal because they were not only based abroad, but also, they never worked in the UK and appeared to have little connection with the UK. The right for employees to be covered by the Employment Rights Act (or Order in NI) is exceptional however, "the principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law." The Supreme Court therefore held that the overseas teachers were entitled to protection from unfair dismissal on the grounds that:-

- The employer in this instance, namely the UK government, "... is the closest connection with Great Britain that any employer can have, for it cannot be based anywhere else."
- The teachers "...were employed under contracts governed by English law"
- The teachers "...were employed in international enclaves, having no particular connection with the countries in which they happened to be situated..."
- Finally, "... it would be anomalous if a teacher who happened to be employed by the British Government to work in the European School in England were to enjoy different protection from the teachers who happened to be employed to work in the same sort of school in other countries..."

For these reasons, the cross-appeal of the teachers was allowed and the case was returned to the Tribunal.

<http://bit.ly/rgQahK>

Fereday v South Staffordshire NHS Primary Care Trust [2011] UKEAT/0513/10/ZT

Unfair Dismissal; constructive dismissal

The EAT has upheld a Tribunal's decision that delaying resignation by six weeks following repudiation of a contract is a form of 'affirmation' and therefore the claimant is no longer entitled to claim constructive dismissal.

The claimant worked as Head of Shared Financial Services from 1975 to March 2009. The Claimant began a period of sick leave, from which she never returned in December 2007, for work related stress. The claimant had made a number of formal grievances to the respondent between 2007 and 2009, culminating in a final stage appeal in February 2009 concerning the respondents undermining of her management position, removing her from a management circulation list in suspicious circumstances and removing her access to a computer system without prior discussion. The claimant eventually sent a formal letter of resignation to the respondent on 24 March 2009 with effect from 29 March 2009.

The employee brought a claim for breach of contract and unfair dismissal. The Employment Tribunal upheld two of the alleged fundamental breaches of contract but found that the employee had affirmed her contract of employment following the commission of those breaches, in two respects, namely: (i) by failing to act promptly in bringing her claim; and (ii) by actively arguing that the contractual provisions relating to the discretionary extension of sick pay should be applied in her favour and complaining about a change in her job title in August 2008. Accordingly, the claim was dismissed and the employee appealed.

The EAT did not dispute that the Tribunal was entitled to find that the respondent was in fundamental breach of contract (breaching the relationship of trust and confidence) and so the case turned on whether, following receipt of the final stage grievance response on 13 February 2009, the claimant had 'affirmed' her contract by delaying her resignation by six weeks to 24 March 2009, even though she was out on sick leave.

The honourable Mr Justice Silber pointed to the explanation given by Browne-Wilkinson J in the Crook case: "Mere delay by itself does not constitute affirmation of the contract, but if it is prolonged it may be evidence of an implied affirmation. Thus if the innocent party call on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract, since his conduct is only consistent with the continued existence of the contract."

In the instant case, the EAT ruled that the tribunal had been quite entitled to interpret the prolonged delay of nearly six weeks as an implied affirmation, bearing in mind that the employee had been expecting or requiring the employers to perform their part of the contract employment by paying her sick pay. In essence, the employee had done nothing during that period to show that she was not bound by the existing contract. The appeal was therefore dismissed.

Finally, Lord Denning MR in *Western excavating* famously said: "the employee must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

<http://bit.ly/oLtVua>

General Mills (Berwick) Ltd v Glowacki [2011] UK Employment Appeals Tribunal

Unfair Dismissal; Reasonableness of dismissal

An employment tribunal's finding that an employee had been unfairly dismissed on the basis of disparate treatment between employees could not be upheld where the tribunal itself had established a reason why he had been treated differently.

The employer, General Mills (Berwick) Ltd appealed against a decision that it had unfairly dismissed the employee. Glowacki had been employed as an electrician and was dismissed for gross misconduct after seriously infringing health and safety procedures while repairing a machine. The tribunal did in fact find that there was a legitimate reason for dismissal but it was another employee's lack of dismissal that was considered for the question of disparity of treatment. This employee was also guilty of gross misconduct but was injured in the incident and was therefore off for 7 months and was unable to attend for a disciplinary process but was later dismissed for incapability. The tribunal at this instance found that the two employee's cases were factually indistinguishable and there was therefore unfair dismissal but that decision was overturned by the EAT.

The issue for the Employment Appeal Tribunal was whether the tribunal had lawfully determined on the evidence available that General Mills (Berwick) Ltd had failed to show a reasonable justification for the difference in treatment between the two employees.

It found that the tribunal had not taken into account the reason given by the employer for the anomaly, namely that, in the original case, employee had been very seriously injured. So serious was that injury that he was unable to take part in a disciplinary process and so was dismissed on capability

grounds. But for the injury, the employer's evidence was that there would have been a summary dismissal for misconduct.

It was entirely inconsistent for the tribunal to hold that the difference had been unexplained, or was not sufficiently explained, by M. The dismissal could not be described as unfair on the basis of disparate treatment and there was no other basis upon which unfair dismissal could be established therefore it was a fair dismissal.

<http://bit.ly/uuAfnY>

The President of the Methodist Conference v Preston (formerly Moore) 2011 UKCA

Employment status, constructive unfair dismissal

The Court of Appeal have upheld the previous ruling by the EAT that Haley Preston (formerly Moore) was, in her role as a Methodist Minister, an employee of the Methodist Church (Haley Anne Preston v President of the Methodist Conference).

The Employment Appeal Tribunal had not erred in ruling that, following Percy v Church of Scotland Board of National Mission [2005] UKHL 73, [2006] 2 A.C. 28, it was not bound to follow President of the Methodist Conference v Parfitt [1984] Q.B. 368, and in holding that despite the religious and spiritual nature of their services, a contractual arrangement could arise between a minister of religion and the church.

M had been appointed as a minister to a group of congregations known as a circuit for a five-year term. She received regular remuneration, including entitlement to sick pay; was given accommodation; required to engage in an appraisal process; subject to at least a degree of supervision from the church and was liable to a disciplinary procedure. Although she did not have to work set hours, there was a clear concept of working time when she was at the disposal of the church and holiday, when she was not. M resigned before the end of her term and commenced proceedings alleging unfair constructive dismissal. Her claim raised a preliminary issue, namely whether she was an employee of the church within the meaning of the Employment Rights Act 1996 s.230. Firstly the Employment Tribunal had found in line with the Parfitt Case but on Appeal had found in line with the Percy case. This appeal by the Church found in line with the Employment Appeals Committee and in line with the Percy Case, therefore the appeal was dismissed.

The decision means that the claim for constructive unfair dismissal may now be heard in the employment tribunal however, The Methodist Church is seeking leave to appeal to the Supreme Court.

<http://bit.ly/t1K4Ba>

Shoesmith, R (on the application of) v OFSTED & Ors [2011] EWCA

Judicial Review; dismissal

The claimant was Director of Children's Services for the London Borough of Haringey at the time of the death of Baby Peter. The then Secretary of State for Children and Families, Ed Balls, pressurised the Council into dismissing her. The Court of Appeal allowed the claimant's applications for judicial review action against the former Secretary of State for Children, Schools and Families and Haringey to succeed. Her claim against Ofsted was, however, rejected.

The Court of Appeal has said that the process of removing Ms Shoesmith was unlawful and they criticised in the summary and final observations the manner in which she was 'scapegoated': "Those involved in areas such as social work and healthcare are particularly vulnerable to such treatment [a public sacrifice to deflect press and public obloquy]".

<http://bit.ly/m2WXLD>

John Lewis Partnership v Charman [2011] UKEAT

Jurisdictional points; extension of time; reasonably practicable

The EAT has agreed with an employment tribunal judge that it was not reasonably practicable for a Claimant to present unfair dismissal claim because he was awaiting the outcome of an internal appeal and was "reasonably" ignorant of time limits and delayed claiming.

The claimant in this case was 20 years of age and depended on his father for advice, who told him to await the outcome of his internal appeal before claiming under unfair dismissal. The EAT distinguished this from cases where a trade union or other 'skilled adviser' was involved.

In relation to the submission of the claim within a reasonable period after the end of the three month period, the claimant had been on holiday and asked his father to lodge proceedings, which was done within a few days of the claimant finding out about the unsuccessful internal appeal.

<http://bit.ly/koVUtq>

Wardle v Credit Agricole Corporate and Investment Bank [2011] EWCA

Compensation; unfair dismissal; victimisation and statutory uplift

This case concerns issues surrounding the calculation of unfair dismissal compensation by the Employment Tribunal.

The claimant was Global Head of Exotic Interest Rate Derivatives Risk Management with Caylor. He was found to have been unfairly dismissed, the dismissal being an act of victimisation. He also lost out on promotion (and a subsequent pay rise). Liability was not challenged and the case concerns what to do about the statutory uplift, which still applies in Northern Ireland under the dismissal procedures and a potential 50% uplift applies to breaches of the LRA code in relation to jurisdictional grievances. The figures involved in this case are high (the claimant earned £100+k and a 70% bonus).

In relation to the uplift, Elias LJ commented:

"In my opinion an increase to the maximum of 50% should be very rare indeed. It should be given only in the most egregious of cases. An example given by Lady Smith in the McKindless case which would at any event get close to the maximum is where there is a clear finding that the employer is determined to dismiss the employee whatever the merits and has deliberately and cynically ignored the procedures in case they get in the way of his being able to do so. However, the mere fact that the employer has ignored the procedures altogether would not in my view justify an increase to the maximum, although it would often justify some increase beyond 10%." (para 26)

"Once the tribunal has fixed on the appropriate uplift by focusing on the nature and gravity of the breach, but only then, it should consider how much this involves in money terms." (para 27)

The judgment noted that in particular, it was wrong for the Employment Tribunal to award career-long losses for discriminatory dismissals where, as in this case, the Tribunal believed that the employee would find employment with equivalent remuneration after an estimated period of time.

<http://bit.ly/kR3wFC>

Karumuth v NHS Trust North Middlesex University Hospital [2011] EAT

Immigration status; Unfair Dismissal

This case concerns unfair dismissal in the context of the immigration rules and right to work. The claimant had been employed by the respondent Trust from 2001 but her status regarding her right to work in the UK was uncertain, an appeal having been pending for a long period of time and a definitive answer had not been forthcoming from the UK Border Agency.

The claimant was dismissed by the Trust on the basis that it had a genuine belief that it might be acting unlawfully by continuing to employ the claimant. It was eventually held by the EAT that the claimant had been dismissed unfairly on procedural grounds but that the employer had established a fair reason for dismissal.

<http://bit.ly/eLpoey>

DB Schenker Rail (UK) Ltd v Doolan [2011] EAT

Unfair dismissal; fitness for work; Burchell tests

The claimant in this case was an Operations Manager, a post which was specified as being "safety critical" and involved various general management duties. He went off sick with stress/depression which he attributed to his workload. He was appointed to the post of Production Manager, which had more responsibilities and was a "key safety post". After four months in the post the Claimant felt that the stress condition from which he had suffered earlier was returning and that his workload was "getting on top of him".

The original Tribunal found the dismissal unfair and ordered reinstatement and compensation. The Tribunal reached its conclusions largely on the basis that, after lengthy correspondence between doctors and many meetings, the claimant was willing to transfer to another Production Manager post, which, he felt, involved less stress.

The EAT overturned that decision and remitted the case to freshly constituted Employment Tribunal for a rehearing to decide whether the dismissal was fair on grounds of capability. It was found that there was evidence that doing the job of Production Manager could make the claimant sick: "The point is not, as the Tribunal put it, whether he could carry out the role, but whether or not he could do so without it making him ill again."

Interestingly, the EAT also said the standard of evidence required in a capability/ill-health dismissal was that set out under BHS v Burchell, perhaps the best known and most referred to conduct case. In this case, substitute belief in misconduct for belief that the employee was incapable of doing the job without causing himself harm based on a reasonable amount of evidence gleaned from a reasonable investigation. The EAT concluded by stating the following:

"First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

<http://bit.ly/mfll9l>

Dabson v David Cover & Sons Ltd [2011] EAT

Unfair dismissal; redundancy selection

The claimant was employed as the transport manager for a family-owned transport business. The business announced that redundancies were necessary. As part of the redundancy exercise, another

employee, T, with whom the claimant had had some past tensions, obtained the highest scores in the competition for transport manager and was called upon to mark the scores for the post of transport administrator (the claimant being a candidate).

The claimant failed to obtain the post and claimed that the past friction between him and the employee marking the scores meant that he was treated unfairly in the marking process. Three months later, when he became aware that his old post had been advertised, the claimant commenced proceedings against the employer for unfair dismissal.

The Employment Tribunal ("ET") dismissed the claim, having found that there was no evidence that T had deliberately under-scored the claimant out of an improper motive and that the decision to dismiss him was within the reasonable range of responses from a reasonable employer. The claimant appealed, the issue in question being whether the employer had acted fairly within the meaning of s98(4) of the Employment Rights Act 1996.

It was settled law that the EAT had to respect the factual findings of the ET and should not strain to identify an error merely because it was unhappy with any factual conclusions. There had clearly been evidence that justified the ET in coming to the conclusion that the selection process had been fair and the EAT could not therefore interfere with that finding.

<http://bit.ly/kvXlbk>

University of Warwick v Gray [2010] EAT

Unfair dismissal; reasonableness; warnings on file

On August 5th 2008 the Claimant, a swimming pool lifeguard, had been given a warning over his sickness record. It stated that, "If you commit a further related act of misconduct at this time then this warning will be used as evidence in any future disciplinary hearing," but that it would be considered spent after one year.

Two months later he wrongly entered the sports centre with colleagues after a student's pyjama party and was dismissed. His colleagues were not dismissed. Evidence was given that the Claimant was drunk and acted aggressively to security guards who were in attendance.

The EAT overruled the ET's decision in finding there was no discrimination. The Claimant was not in the same position as the other employees as he was two months into a one year warning indicating that further misconduct may result in dismissal and he had been the sole aggressor towards the security guard.

<http://bit.ly/gi45Tb>

Sanders v Kingston Transport Ltd (t/a Sussex Skips) [2011] UKEAT

Unfair dismissal; Polkey

The claimant had been employed by the respondent company as an HGV driver and during the period of employment was involved in various accidents and incidents. A meeting was called by the company to address these incidents, during which the claimant attempted to strike one of the directors, leading to his dismissal. The claimant denied that this had taken place. The Employment Tribunal preferred the claimant's version of events but the respondent stated that the claimant would have been dismissed anyway regardless of this incident.

The EAT concluded that it was within the remit of the Employment Tribunal to decide what reduction in compensation would be required on the basis of the Polkey principle; that is, where there is held to be procedural impropriety, the extent to which the compensation can be reduced on the basis of the likelihood that the dismissal would have gone ahead anyway.

The case was returned to the Employment Tribunal for consideration on this point.

<http://bit.ly/jM98pN>

DLA Piper UK Management Services Ltd v Codyre UKEAT/0323/10/RN

Unfair dismissal; contributory fault

This case involved a wave of redundancies. There were six secretaries in the department in which the Claimant worked. Two were to lose their jobs within that department. Each of the six secretaries was scored on a selection matrix containing four criteria: work performance, skills and competencies, disciplinary record and attendance record. On the first round of scoring the Claimant came bottom with a total of 55 points. Second bottom was an employee we shall describe as LW with 58. The next above her scored 60 points. Following consultation, both were dismissed. The Claimant appealed unsuccessfully against her dismissal internally. Dismissal took effect on 9 April and she complained to the Tribunal on 3 July 2009.

The finding of unfair dismissal by reason of redundancy was upheld. The issue of procedural unfairness was remitted to the Employment Tribunal for reconsideration, together with Employment Tribunal determination of mitigation of loss issue.

<http://bit.ly/dT1ghg>

Brennan v Health Professions Council [2011] EWHC

Professional misconduct; appropriate sanctions

Most readers will be aware of the fake blood injury incident in the 2009 match between Harlequins RFC and Leinster in the Heineken Cup. This case involved the physiotherapist who gave the player the fake blood capsule. The facts were that Harlequins RFC staged a fake blood injury in order to bring another player onto the field. Mr Brennan, the appellant, was struck off by his professional council as being unfit to practice. But was he a danger to anyone? Was cheating and lying a bar to work as a physiotherapist, as opposed to the alternative that the sporting authorities might have imposed, that he be banned from rugby? Had the committee reached a balanced decision and was the sanction proportionate?

The appellant admitted giving Tom Williams the blood capsule which he bit into at a point in the match where it was likely that he had been injured, in order that Nick Evans could come back onto the field. In fact, he admitted helping to fake previous blood injuries but during an investigation gave a false account of the events and produced false statements. But he showed remorse and admitted all but one of the charges, which was found proved.

A striking off order was made before the Competence and Conduct Committee of the Health Professions Council and the appellant appealed to the High Court. The imposition of sanctions is guided by the Health Professional's Council's Indicative Sanctuary Policy. It states:

"Fitness to practice proceedings is not intended to be punitive. The Panel's task is to determine whether, on the basis of the evidence before it, the registrant's fitness to practise is impaired. In effect, the task is to consider a registrant's past acts, determine whether the registrant's fitness to provide professional services is below accepted standards and to consider whether he or she may pose a risk to those who may need or use his or her service in the future..."

Readers may remember that the female doctor, Dr Chapman, who cut the players mouth to try to cover up the fact that there was no real injury was not struck off. In relation to that, Mr Justice Ouseley made the following remarks:

"However distinguishable in the detail Dr Chapman's position might be, the public perception correctly would be that she had not been sanctioned at all, despite her unprofessional act in cutting a patient

and then her dishonesty in lying about it. I am not clear as to whether her depression was thought to have affected her ability to tell truth from lies, or to reach a judgment that she should not lie, or whether she realised that she was too ill to practise and nonetheless still practised medicine or whether she was unaware that anything was amiss with her health when she cut Mr Williams and then lied to the ERC.”

The comparative treatment of Dr Chapman was one of the factors that had to be considered in relation to proportionality regarding the sanction against the appellant. Mr Justice Ouseley could have reached a decision on sanction, “but to do so in this case would involve usurping the function of the Committee to appraise the evidence and to evaluate its significance....”

The decision was quashed and remitted to the Committee with the direction that it reach a reasoned decision on sanction.

<http://bit.ly/gNgTxL>

Orr v Milton Keynes Council [2011] EWCA

Unfair dismissal; “attribution of knowledge”

Mr Orr, a part-time youth worker, black and of Jamaican origin, was dismissed for two acts of gross misconduct in breach of the instructions of his manager. The appellant had discussed a sexual assault which had recently taken place with some young people at a community centre. The applicant then became rude towards his manager. The Employment Tribunal found that, the first time round, there had been discrimination and that the dismissal was fair as both allegations amounted to gross misconduct. The decision to dismiss was taken by someone in the Council who was unaware that the second outburst towards the claimant’s manager had been caused by (the tribunal found) racial comments made towards Mr Orr by his manager. Could the employer be held responsible (and the dismissal be unfair) for a decision taken in ignorance of facts that were known to others within the organisation, including the manager and the investigating officer?

By a majority decision, the Court of Appeal has decided that the employer cannot be held responsible and the dismissal was fair, given the facts known to the decision-maker at the time.

The outcome of the Council’s decision was compromised somewhat by the claimant’s limited involvement in the disciplinary process. If he had been at the original hearing and had taken an active part in proceedings, the information known to the decision-maker might have been different. In a lengthy court decision, full of analysis of the main case law and references to the relevant sections of the Employment Rights Act, the three Appeal Court judges set out their reasoning behind their opinions. Perhaps the most telling comment of the majority came from Moore-Black LJ who stated that:

“It follows that when it is determining the fairness of a dismissal the tribunal is concerned only with the conduct of the employer and must exclude consideration of information that was not reasonably available to him at the time of the dismissal...”.

The Court of Appeal therefore dismissed the appellant’s appeal against a finding of gross misconduct.

<http://bit.ly/ghJwWR>

Bowater v Northwest London Hospitals Trust [2011] EWCA

Unfair dismissal; lewd remarks

Many readers will remember the EAT decision from March 2010 where a female nurse was dismissed for gross misconduct after making a lewd comment whilst trying to restrain a semi-naked male patient who was having a fit. This was found to be in breach of her Nursing Code of Practice and as the comment was made in public, she failed to uphold the professional reputation of the profession.

However, the original tribunal had concluded that the employee in this case had been unfairly dismissed as there was no proper restraint policy in place and the comment was made at the end of a stressful shift; she was leaving the hospital when she went to the aid of her colleagues who were seeking to restrain and pacify a patient who was having an epileptic fit. The appropriate test was deemed to be, "Would the NHS have found this comment humorous?", as to most people the comment would have been construed in this way. It was however found that the employee had in some way contributed to the dismissal (25% according to the majority of the ET), but this decision was overturned by the EAT who stated that the ET had substituted its own view for that of a reasonable employer.

The EAT has not however been criticised by the Court of Appeal which has overturned the EAT's decision. It was found that the tribunal was perfectly within its rights to find that the dismissal was beyond the band of reasonableness as the incident was not seen by the patient's family, nor remembered by the patient and it was clear that the employee had no intentions other than to help – the comment was made in a jocular fashion and was not meant to offend.

<http://bit.ly/gSMF62>

Fuller v London Borough of Brent [2011] EWCA Civ 267

Unfair dismissal; Equity and the substantial merits of the case

The claimant, who was school Bursar, was dismissed for gross misconduct following involvement in an incident concerning the staff restraint of a child, in which she made allegations against a teacher. She had previously been warned by the Head Teacher against becoming involved in such issues. The Employment Tribunal criticised the investigation carried out and said that no reasonable employer would have dismissed an employee for a one-off incident. The Employment Appeals Tribunal overturned this decision, saying that the Employment Tribunal had substituted its own judgment.

Mummery LJ went on to set out the following general observations in the management of the case:

a) when the ET asks a correct question about the reasonableness of the investigation, it is better for the ET to give a specific answer to it in addition to its discussion of the facts, law and argument on the question. It should not be left to the parties, or the EAT or this court to have to work out the answer for themselves as this can encourage overly optimistic appeals.

b) an employee undergoing disciplinary action, and faced with a possible threat of dismissal, should ideally participate in the process as this would not help the claimant in the ET

c) employees with cause for concern about the way in which fellow employees perform their duties should seek to raise the matter through the correct channels rather intervene directly in situations outside their direct experience or area of responsibility.

<http://bit.ly/g0YW5c>

Peninsula Business Services Ltd v Rees and others [2011] EAT

Unfair dismissal; redundancy selection; step 2 meeting

This case concerned the extent of the information required to be provided to employees for a Step 2 meeting under the statutory dismissal procedures to be compliant with legislative requirements. The employees in this case were made redundant and wished to know how they scored in the redundancy matrix.

The EAT ruled that the dismissals were unfair, stating that the claimants did not know their score at a time when they could properly respond and were unable to dispute the score unless they knew how they were being assessed.

The EAT concluded by saying "We accept the submission of all Claimants before us that the unfairness in this case was that they did not know their score at a time when they could respond properly to it. They did not know the outcome of the inquiries they made until after the appeal. They could not argue the scores unless they knew how Mrs English [the overall manager] had assessed them. Mr Rees asked the simple question, "Redundancy is personal: why me?" In order to answer that, he had to know what the score was and what the scoring process was. During the course of the interview, which was said to be the step 2 meeting, scores were made but the Claimants were not told what they were. Indeed, at the meeting with Mrs English, she did not score the Claimants under criterion 5, nor was that issue discussed with the Claimants. The scores were not exigible until the Claimants were told they were selected for redundancy. Again, as Mr Rees graphically puts it, "We were out of the door". He relies upon *Alexander v Brigden Enterprises Limited* [2006] IRLR 422] to say that he would have to be shown the score in order to discuss it articulately, and thus step 2 was not completed."

<http://bit.ly/hDv2bD>

Argos Ltd v Campo Dos Reis (2011) EAT

Unfair dismissal; reasonable investigation

The claimant in this case was suspended for alleged gross misconduct, pending an investigation by the respondent into an allegation that he had used inappropriate and threatening language to an Area Manager, by allegedly sending an abusive email to the Area Manager. The email was sent from a computer outside the store room – numerous people had access to this computer and so could have sent the message. The claimant however claimed that he had never had any dealings with the recipient and had not been trained in the software which was used to send the email. After an investigation, the employee was dismissed.

The original tribunal found in favour of the claimant and the EAT made reference to the tests, and their order as set out in *British Home Stores Limited v Burchell* [1978] IRLR 379. The ET however concluded that a reasonable employer would have carried out a further investigation. After looking at the standard of the investigation, the Tribunal concluded that it was likely that the approach of the investigation was to assume that the claimant was guilty and that the others involved were innocent. The Tribunal concluded however that it was implausible for the claimant to have had a motive for sending the email and although he did know how to use Formbuilder, he had not actually used it.

The Tribunal found (and the EAT concurred) that the employer had fallen into the trap of believing the claimant to be guilty and of investigation to prove that. Even though the motives of other suspects to abuse the manager existed and they had knowledge of the system, the other suspects were not investigated in the same way or to the same extent. A reasonable employer could not have concluded that dismissal was the correct decision as the dismissal could not be said to be within the band of reasonableness.

<http://bit.ly/gr5gDz>

Vision Security Group LTF t/a VSG v L Goodyear

Unfair dismissal; Polkey Principles

The Claimant, a security team leader alleged he was unfairly and wrongfully dismissed. The Tribunal upheld both of his claims. The Tribunal rejected the argument that there should be a reduction in compensation based upon the Polkey Principles. The respondent appealed on this point alone.

The facts of the case are that the Claimant asked two individuals to leave the premises. They had abused the officers, and at least one had been banned previously. The Claimant grabbed one by the arm and admitted to a defensive punch. He was dismissed for gross misconduct as it was considered that he had taken him out of sight of a camera in order to have a fight with him. On appeal the dismissal was upheld but it was on the basis of using excessive force.

The Tribunal found that every stage of the procedure used fell outside the approach a reasonable employer should have taken. The Tribunal stated “With regard to the “Polkey principles” the investigatory and disciplinary process was so flawed that it could not be said that the Claimant’s dismissal was inevitable or likely to any extent, had a fair and reasonable process and procedure had been applied. The Tribunal was satisfied, therefore that the “Polkey principles” had no application to the Claimant’s dismissal”.

The EAT stated “Polkey applies where there has been a finding of unfair dismissal so as to reduce the compensation on the ground that the dismissal would have occurred in any event... This is a case where it is said that, had a proper procedure been carried out, the dismissal of the claimant would have occurred about this time or within two months, because it would have been carried out fairly. With respect we cannot see this as simply procedural failure.” Accordingly, the EAT concluded that Polkey does not arise and the appeal was dismissed.

<http://bit.ly/fJ3FhE>

VICARIOUS LIABILITY

Co-operative Group (CWS) Ltd v Pritchard [2011] EWCA

Assault at work; vicarious liability; damages

This case concerned an assault at work. The Claimant, after being refused a day of leave by her manager, attended the store and shouted verbal abuse at the manager. The manager then physically removed her from the premises, both parties being injured in the process. The Claimant fell into depression after this incident and never returned to work. The Claimant sued under the tort of assault and battery. The Defence denied that the Claimant had been assaulted and alleged contributory negligence.

Damages of £142,760.77 were awarded at the initial trial. On Appeal, The Court of Appeal, Civil Division decided that there is no defence of contributory negligence in the case of an intentional tort such as assault and battery. It was further stated that the Claimant would not have reached the required standard even had such a ground existed.

<http://bit.ly/gOo08z>

Mahood v Irish Centre Housing Ltd [2011] EAT

Vicarious Liability

This case involved an appeal concerning whether an employer is vicariously liable for the acts of an agency worker. It was held on appeal that an employer is only liable for the discriminatory acts committed by an agency worker who became part of its workforce if either he became its employee or if he acted as the employer's agent in the sense that when doing a discriminatory act he was exercising authority conferred by the employer.

The EAT said "We remit this matter to the same Employment Tribunal to consider, on the basis of the evidence that was before it, whether Mr Toubkin was acting as an agent of the Respondent with the Respondent's authority in relation to such misconduct as may be proved towards the Claimant, as explained in authorities such as *Victor-Davis and Lana*; i.e. whether Mr Toubkin might have been acting as the Respondent's agent in the sense that when doing a discriminatory act he was exercising authority conferred by the Respondent."

If the Employment Tribunal eventually holds that the agency worker was an employee, the respondents will have to show that they took "such steps as were reasonably practicable to prevent the employee from doing that act or from doing in the course of his employment acts of that description. The Respondent must have acted, of course, before the matters complained of with a view to preventing such matters occurring."

<http://bit.ly/hRWg8l>

WORKING TIME

Hughes v The Corps of Commissionaires Management Ltd [2011] EWCA

Working Time Regulations (WTR); On-call and rest breaks

The claimant worked as a security guard at a single-manned site and often was not able to take uninterrupted rest breaks. His job duties required him to be continuously available to supervise and monitor access to the site. He was provided with a kitchen area where breaks could be taken but he had to remain on call during these periods. He was permitted to leave a message on the reception desk where the monitoring and security equipment was placed saying that he was on his break and leaving a contact number. This meant, however, that his break might be interrupted by visitors to the site. If his break was interrupted then he was permitted to start it again.

The claimant claimed that the respondent was in breach of paragraph 24 of the Working Time Regulations (WTR). The Tribunal came to the conclusion that, on the facts, the respondent had afforded the claimant with appropriate protection in order to safeguard his health and safety.

This Court of Appeal's rejected the claimant's arguments that there had been a break of the WTR. Neither did the Court accept the need for a risk assessment before arrangements could be deemed appropriate.

The Court concluded that the rest actually afforded to the claimant amounted to an 'equivalent period of compensatory rest'. He was, in principle, allowed a 20 minute break, he was compensated for the fact that he could not know in advance whether he would be interrupted and for the risk of actual interruption by being allowed to choose when to have his break and, if interruption did occur, to start his break again. Those facts, according to the EAT and the Court, amply satisfied the requirements of equivalence and compensation.

<http://bit.ly/qI0ReL>

Williams and Others v British Airways plc [2011] ECJ

Working Time Regulations; Holiday Pay Calculation

This case concerned the definition of "paid annual leave." Pilots and other employees at BA receive various allowances depending on seniority and other matters but holiday pay is paid at basic rate without any other supplements or allowances. This is deemed unlawful by the European Court of Justice, which has referred the matter back to the Supreme Court to decide specifics in this case. It was held that:

"an airline pilot is entitled, during his annual leave, not only to the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot."

For those receiving only a basic salary then a week's pay is a simple thing to calculate. For others who receive bonuses, shift payments, responsibility allowances and other extra payments, it may not be so simple. The ECJ made the following points by way of elucidation (paras 20-25):

"As the Advocate General states in point 90 of her Opinion, it follows from the foregoing that remuneration paid in respect of annual leave must, in principle, be determined in such a way as to correspond to the normal remuneration received by the worker. It also follows that an allowance, the amount of which is just sufficient to ensure that there is no serious risk that the worker will not take his leave, will not satisfy the requirements of EU law."

However, where the remuneration received by the worker is composed of several components, the determination of that normal remuneration and, consequently, of the amount to which that worker is entitled during his annual leave requires a specific analysis. Such is the case with regard to the remuneration of an airline pilot as a member of the flight crew of an airline, that remuneration being composed of a fixed annual sum and of variable supplementary payments which are linked to the time spent flying and to the time spent away from base.

In that regard, although the structure of the ordinary remuneration of a worker is determined, as such, by the provisions and practice governed by the law of the Member States, that structure cannot affect the worker's right, referred to in paragraph 19 of the present judgment, to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment.

Accordingly, any inconvenient aspect which is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided which is included in the calculation of the worker's total remuneration, such as, in the case of airline pilots, the time spent flying, must necessarily be taken into account for the purposes of the amount to which the worker is entitled during his annual leave.

By contrast, the components of the worker's total remuneration which are intended exclusively to cover occasional or ancillary costs arising at the time of performance of the tasks which the worker is required to carry out under his contract of employment, such as costs connected with the time that pilots have to spend away from base, need not be taken into account in the calculation of the payment to be made during annual leave."

<http://bit.ly/lhWkMx>

Kuehne & Nagel Drinks Logistics Limited v Deakin and others [2011] EAT

Unlawful deductions from wages; Working Time; pay for hours worked or hours scheduled?

This case relates to the construction of an agreement (known as Supply Chain North 2) negotiated between an employer's association and various trade unions. The collective agreement, which determined the terms and conditions of draymen making drinks deliveries, provided that time for breaks should be calculated by reference to planned hours rather than hours actually worked.

Under the agreement, the drivers were given routes and route times for deliveries. They were scheduled for a certain number of hours and, where times were expected in excess of 6 hours, mandatory unpaid breaks, equivalent to those required under the Working Time Regulations, were imposed. Anomalies did however arise where someone scheduled to work just under 6 hours received more pay than someone scheduled to work just over 6 hours who had a 30 minute break deducted from their paid hours.

It was held in the first instance that the contractual provision should be interpreted purposively and that the Respondent should have measured the actual time worked and, only required a 45 minute break when the total number of hours, excluding break periods, exceeded nine hours.

The EAT however upheld the appeal concluding that a literal meaning of the agreement should be followed. The employees were therefore only entitled to be paid according to the terms of their agreement and for the hours they had agreed should be treated as having been worked. There were therefore no deductions because the employees were paid for hours they were required to work, regardless of breaks, whether taken or not.

<http://bit.ly/pQAS2t>

Wray v JW Lees & Co (Brewers) Ltd [2011] EAT

NMW; Working Time Regulations; sleeping at premises

This case involved a temporary pub manager who was often contractually required to sleep on the premises. She brought a claim to the employment tribunal stating that, inter alia, the time she spent sleeping on the premises ought to be included in assessing whether she had been paid the national minimum wage. The Tribunal, approaching the issue by reference to the definition of "working time" in the Working Time Regulations 1998, held that they should not. The employee appealed to the Employment Appeal Tribunal.

The EAT dismissed the appeal but said the Tribunal had been wrong to refer to the Working Time Regulations 1998. Instead, the issue should have been determined exclusively by reference to the relevant provisions of the National Minimum Wage Regulations 1999.

Furthermore, on the facts it was clear that the claimant was not working during the periods in question as the requirement that she sleep on the premises did not require her to do any work during that period. The EAT found that "she was not in a position analogous to that of a night-watchman or a night-sleeper in a residential care home who has a responsibility throughout the night for those present in the home... She had no responsibilities of any kind."

The EAT also considered prior case law which indicated that even if the employee fell within the terms of reg. 15 (1) or 16 (1) of the National Minimum Wage Regulations on the basis that she was required to sleep at the premises in order to be available for work, the case fell within the exception provided by reg. 15 (1A) or 16 (1A) (*Burrow Down Support Services Ltd v Rossiter* [2008] ICR 1172 and *South Manchester Abbeyfield v Hopkins* [2011] ICR 254).

<http://bit.ly/oXp1VQ>

Fraser v Southwest London St George's Mental Health Trust [2011] EAT

Working Time Regulations; accrued holiday entitlement during sickness

This case is with regards to an employees ability to claim statutory holiday pay whilst off on sick leave. In this case the claimant was seeking to claim 8 weeks' statutory holiday pay which was accrued over the two years prior to dismissal and when the claimant was off on long term sickness. The Employment Appeals Tribunal has rules regarding the claimant's entitlement to claim monies in such circumstances. An employee who had been on long-term sick leave would only be entitled to statutory holiday pay under the Working Time Regulations 1998 reg.16 where she had actually taken leave in respect of which she sought to be paid by giving her employer notice of her intention to take annual leave under reg.15.

The case is an appeal, by a nurse who had injured her knee in the course of employment and as a result went on long term sick leave and never returned to work. Once her entitlement to sick leave had expired she received no sort of income from the Trust in question until her salary payments started again when she was certified fit enough to return to work. The Trust then stopped her salary payments when they were unable to find her work and finally dismissed her.

Original claim was that the claimant brought many claims including the claim for entitlement to non-payment of holiday pay for the gap in between the cessation of her sick pay to the recommencement of her salary payments. The claimant also raised discrimination claims but these were quickly put aside as the tribunal agreed that the claimant hadn't complied with the employment act and the tribunal therefore had no jurisdiction and dismissed the matter. The tribunal also dismissed the claim for statutory holidays on the grounds that under the Working Time Regulations 1998 reg. 15, the claimant had not taken leave during the two years as she had not given notice of her intention to do so.

Claimant appealed that the tribunal had made a mistake as, it was too late for non-compliance to be relied upon and secondly that under reg 16(1) Working Time Regulations 1998 there was no requirement to give notice and that if there was the trust was in breach of its duty to inform her of that.

The Employment Appeals Tribunal dismissed the appeal on both grounds saying that the Trust had a right to rely on non-compliance at the start of the substantive hearing notwithstanding that it had not been pleaded in the response form or at any time prior to the hearing. F's entitlement to holiday pay depended on her having given the trust proper notice under reg.15 of her intention to take annual leave, which she had not done, *Brown v Kigass Aero Components Ltd* [2002] I.C.R. 697 applied. The court noted that it might seem strange or artificial to expect an employee to give notice when they are off on sick leave but that it is strange to consider that any period of sickness would be regarded holiday ever. The giving of notice was more than a formality, because without it an employer, who was not otherwise paying an employee, or who was only paying sick pay, would not know whether or when it was obliged to make any payment and also the trust was not in breach of the implied term for not informing the claimant of her right to take annual leave while on sick leave because this entitlement is governed by general law and not contract law and there is not duty to advise under general law.

<http://bit.ly/senf3V>

KHS AG v Schulte [2011] ECJ

Working Time Directive

The ECJ held that, under the Working Time Directive, annual leave of sick workers need not accumulate indefinitely.

Mr Schulte was employed as a locksmith for KHS AG and the company which succeeded it. Under German law he was entitled to 30 days paid annual leave per year. A collective agreed provided that holiday not taken during the leave year must be taken within three months. In cases of sickness, all holiday not taken within 15 months of the end of the relevant year would be lost.

Mr Schulte suffered a heart attack in January 2002 and he received a pension on the grounds of invalidity from October 2003. On 31 August 2008 Mr Schulte's employment relationship ended. Mr Schulte brought an action for payment of allowances in lieu of paid annual leave not taken during 2006, 2007 and 2008.

The ECJ held that, under the Working Time Directive, annual leave of sick workers need not accumulate indefinitely. Carry-over periods for leave outside the normal leave year are acceptable (although employees have the option of taking sick leave during sickness absence) but the reasonableness of the 'cut off' date, after which untaken annual leave normally expires, will depend largely on whether leave at that point continues to be an effective rest period or is simply for relaxation and leisure. In effect, the longer the period the less the employee has a need for rest at the end of a sick absence and the more it becomes a relaxing bonus. In this case, the ECJ decided that the German national carry over period of 15 months was not unreasonable.

<http://bit.ly/v14GTD>

Russell and ors v Transocean International Resources Ltd and ors [2011] UKSC

Working Time Directive; annual leave and working weeks

The annual leave requirements of the Working Time Regulations 1998 reg.13 were satisfied in the case of those who worked on offshore gas and oil installations by their repeating shift patterns of two weeks' offshore work followed by two weeks' onshore rest.

This case involved oil rig workers, who generally work 26 weeks a year offshore in two week periods. In between times they spend two weeks on shore. It is time where they are predominantly free from working duties but they may be required to attend medical checks or training courses, although they

wouldn't be required to do work as such. It is during this onshore time that employers insist the workers must take their annual leave as well.

The workers' argument was that holidays should be time off from their actual working hours. The Supreme Court disagreed and has unanimously decided that the workers' annual leave can be accommodated within the onshore period i.e. there is no need for holidays to come out of the 26 weeks' spent at work.

The Directive required that a worker should have a rest break during the working day, a break between his working days, and a weekly rest period. Those periods had to be measured separately and could not overlap. Where necessary, the employer could derogate from those rest-break requirements as long as he gave the worker equivalent periods of compensatory rest.

<http://bit.ly/u92Zci>

H J Agard v Westminster Kingsway College (2010) EAT

Redundancy payment; calculation for term time workers

The claimant was a careers advisor with the college. She worked for 20 hours per week, 40 weeks per year at a college and was precluded from taking her holidays during term times. Her statutory 5 weeks paid holidays were extra to the 40 weeks she was required to work and was regarded as unemployed for the rest of the year.

Her redundancy pay had been calculated by taking her gross pay and dividing by 45. She argued it should be divided by 40 (the total number of weeks worked per year) as her holidays had to be taken at a specific time (outside of term time).

The EAT held that the period is 45 weeks as the correct calculation is made based upon the weeks in which she is paid, which includes the weeks worked and paid holidays.

<http://bit.ly/h7DO06>

MATERNITY RIGHTS

Wade and North Yorkshire Police v HMRC [2011] UKUT B1

Statutory and contractual maternity pay

The Claimant was a police officer who claimed statutory maternity pay (SMP) in respect of the pregnancies leading to the births of her two children.

The Claimant attempted to maximise the amount of money she received, in aggregate, by way of her police maternity pay and SMP. It was in the Claimants interest for the SMP to be payable at a different time from the police maternity pay and correspondingly in the employers best interests of them to be payable at the same time.

During both pregnancies she took police maternity earlier than the 11th week before the expected week of childbirth (EWC) but gave notice that she wished to claim SMP at a much later date. The Defendant authority argued that SMP was payable at the same time as the police maternity pay – from the 11th week – whilst the Claimant argued it was only payable four weeks before the EWC.

The Upper Tribunal held there is no requirement that the date at which a women states she expects her employer to become liable to pay SMP need not be the first day she envisions being off work. She was therefore entitled to SMP from the 4th week before each EWC.

<http://bit.ly/ep1kWG>

MISCELLANEOUS

Jackson v Liverpool City Council [2011] EWCA

References

The claimant was employed as a social worker by the respondent. Concerns were raised about his work after he left but these were not investigated. A year after he left the respondent received a reference request from Sefton Borough Council ("Sefton") asking a number of specific questions.

In answer to a question about his weaknesses, the reference said:

"There were some issues identified by his team manager in respect of recording and record keeping. This was addressed by a supervision and would have led on to a formal improvement plan to assist Mark to make improvements in this area. Mark left the service before this process was instigated".

The person responding on behalf of the respondent also spoke on the telephone to Sefton making it clear that the concerns had not been investigated and so she was not able to answer certain questions on the reference, "in either a positive or negative manner."

The claimant did not get the job and remained unemployed for about a year. He brought a claim against the respondent for damages in relation to the reference.

The High Court held that the respondent was in breach of its duty of care; the reference was true and accurate, but not fair. It found that it was unfair to refer to the allegations without investigating them or giving the claimant a chance to answer them. The respondent appealed.

The Court of Appeal allowed the appeal and overturned the High Court's decision. It did not agree with the High Court that the respondent could have simply refused to give a reference as this was likely to have led to adverse inferences being drawn in any event. It considered that it would have been open to Sefton to talk to Mr Jackson about it and thus satisfy itself one way or another.

The Court of Appeal considered that the requirement for a reference to be "fair" did not mean that there had to be some sort of fair procedure but that the requirement related to the implications which might be drawn from the facts included in a reference.

The Court of Appeal said the respondent could not be criticised for including a cautionary remark on the reference relating to allegations which had been made independently by four young people and one parent. Although these were not taken as true and had not been tested, the respondent had made it very clear that the allegations had not been investigated and therefore there was no way that the reference could be considered to be unfair in an overall sense.

<http://bit.ly/nYTWIO>

Ram v JD Wetherspoon PLC [2011] EAT

Compensation limits; immigration rules

The EAT in this case ruled on whether there should be a cap on compensation when a work permit is due to run out.

The claimant appellant in this case had a five-year work permit and claimed unfair dismissal in his fifth year. The tribunal capped the compensation to losses until the work permit ran out. The appeal was allowed on the basis that the appellant would before the expiry of that period have applied for indefinite leave to remain (as he had in fact since done) and that the effect of section 3C of the Immigration Act 1971 was that it would have remained lawful for him to work pending determination of that application.

The rule laid down in this case is, that in assessing compensation for unfair dismissal, a tribunal should not cap compensation at the point where a limited work permit and leave to enter the UK expires. It should take into account that the employee is likely to apply for indefinite leave to remain and the fact that, both while this process is ongoing and - potentially - after its conclusion, the employee may still be lawfully employed.

<http://bit.ly/pxXuE2>

NHS Manchester v Fecitt & Ors [2011] EWCA

Whistleblowing; vicarious liability

The claimants in this case alleged, amongst other things, that the employer was vicariously liable for the acts of victimisation perpetrated by fellow workers in the course of their employment.

The Court of Appeal has found that this cannot be the case as there is no provision in law for individual employees to be held liable for whistleblowing detriments and, therefore, employers cannot be held liable for the victimisation of a whistleblower; solely for legal acts:

"Absent any legal wrong by the employee, there is no room for the doctrine [of vicarious liability] to operate. Here, in contrast to the discrimination legislation where individuals may be personally liable for their acts of victimisation taken against those who pursue discrimination claims, there is no provision making it unlawful for workers to victimise whistleblowers. It was solely on the ground of such alleged victimisation that it was sought to make the Employer vicariously liable, and therefore the claim could not succeed."

Lord Justice Elias made further remarks in relation to the test of causation:

"In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. If Parliament had wanted the test for the standard of proof in section 47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so."

<http://bit.ly/tmUOGO>

Bird v Stoke-on-Trent PCT [2011] EAT

Redundancy; suitable alternative posts

The claimant, a physiotherapist by profession, was employed by the respondent in the role of Clinical Lead Therapy Musculoskeletal Services which involved both managerial and clinical responsibilities. She was later dismissed for redundancy but, did not receive a redundancy payment on the ground that she had unreasonably refused offers of suitable alternative posts. The claimant therefore presented a claim for a redundancy payment to the Employment Tribunal.

It was recorded during the course of the case that if the claimant had been entitled to a redundancy payment, it would not have been limited to the statutory redundancy payment, which in her case would have amounted to £7,750.00. Instead, she would also have been entitled to the contractual redundancy payment available to National Health Service staff which would have been in the region of £70,000.00.

Taking all factors into consideration, the Tribunal dismissed the claim and the claimant proceeded to issue an appeal to the EAT. On appeal the decision was overturned for the following reasons:

- (1) In determining that one of the posts was suitable for her, the tribunal was held to have failed to take into account two features of the evidence which were relevant to whether the post was suitable for her; and

- (2) In determining that the claimant had unreasonably refused the offer of that post, the tribunal was held to have substituted its own view about the reasonableness of the reasons for her refusal, rather than considering whether someone in her particular circumstances could reasonably have taken the view of the alternative post which she did.

<http://bit.ly/oqQla7>

M-Choice UK Ltd v Aalders [2011] UKEAT/0227/11

Jurisdictional Points; claim in time and effective date of termination

The employee commenced her employment with the employer company on 1 February 2010. She received a letter from the employer giving notice that her employment would be terminated on 1 February 2011. Using the date of 1 February 2011 took the employee over the threshold to be able to claim unfair dismissal and so she duly presented such a complaint against the employer on 11 January 2011.

On 21 January the employer summarily dismissed the employee. At that date, the employee did not have the requisite one year period of continuous service to pursue an unfair dismissal claim. The employee amended her ET1 to add a second complaint of unfair dismissal, namely that she had been dismissed on 21 January. The employer contended that the Tribunal had no jurisdiction to consider the claim because the employee did not have a sufficient period of continuous employment. The employment judge ruled that it had jurisdiction and that the employee had the necessary qualifying period of continuous employment for that claim. Accordingly he ordered that the claim could proceed to a full hearing. The employer appealed.

The issue for consideration was therefore what constituted the effective date of termination of employment. The Court of Appeal determined that the employee's date of dismissal was 21 January 2011 and that she therefore had insufficient service to progress a claim of unfair dismissal.

<http://bit.ly/nUaOsU>

Mattu v The University Hospitals of Coventry and Warwickshire NHS Trust [2011] EWHC 2068 (QB)

Article 6; breach of contract; and disciplinary procedures

The claimant was a long-standing consultant cardiologist appointed in 1998 who was suspended in 2002 for unrelated disciplinary grounds. Due to his ill-health however, the hearing was not held until 2007. Following the hearing, the claimant was to have six months 'reskilling' before returning to work. He refused to agree to this proposed plan and he was eventually dismissed in 2010.

He had since issued further proceedings in the ET and also an internal appeal. Central to these proceedings however, was the written agreement between the claimant and the defendant (the University Hospitals of Coventry and Warwickshire NHS Trust). The claimant argued that important procedural safeguards incorporated into the agreement were not met. More specifically, his counsel argued the following:

- a) the Trust had failed to seek the views of an independent medically qualified practitioner;
- b) the Trust had not consulted with the National Clinical Advisory Service; and
- c) the claimant's dismissal was a determination of his civil rights and the process therefore infringed his Article 6 rights.

The claim was dismissed with the court finding that the issues did not require independent medical involvement in the disciplinary process and that the Trust was entitled to proceed with the process. The court also did not consider that Article 6 of the European Convention on Human Rights had been engaged and, in any event, the overall process had met the requirements necessary under that Article.

<http://bit.ly/ouQup7>

Unite the Union v Evron Foods Ltd [2011] NIIC

Collective bargaining; determination of the bargaining unit

This Industrial Court case involved a decision about what constitutes the correct bargaining unit under the statutory trade union recognition procedures under TULRO.

Unite the Union submitted an application to the Industrial Court for recognition at Evron Foods Limited. The bargaining unit description was "Despatch Operatives, Production Operatives, Team Leaders, Store Persons" and the location was given as "Portadown Plant".

Following an unsuccessful informal hearing, a full hearing was arranged with written submissions relating to the determination of the appropriate bargaining unit given by both parties. It was then up to the Panel of the Court to decide the appropriateness of the bargaining unit by taking into account the following matters in so far as they did not conflict with the need for the unit to be compatible with effective management:-

- the views of the employer and of the union;
- existing national and local bargaining arrangements;
- the desirability of avoiding small fragmented bargaining units within an undertaking;
- the characteristics of workers falling within the proposed bargaining unit and of any other employees of the employer whom the Court considers relevant; and,
- the location of workers.

It should be noted that whilst the Panel of the Court must take the employer's views into account, it is ultimately the trade union which is in the driving force in these cases. As the Court explained:

"The Panel was also aware of the judicial review judgment of the English Court of Appeal in Regina Kwik-Fit (GB) Ltd v. Central Arbitration Committee, in which it was declared that the decision for the Panel to make is whether the proposed bargaining unit was an appropriate bargaining unit and not whether it was necessarily the more appropriate or most appropriate bargaining unit."

The Panel held that the Union's proposed bargaining unit (ie. "Despatch Operatives, Production Operatives, Team Leaders, Store Persons") was an appropriate bargaining unit and that it was not incompatible with effective management.

<http://bit.ly/nUoJl7>

Winchester and Eastleigh Healthcare NHS Trust v Walker [2011] EAT

Basic Award; Continuity of employment

The employee was employed by the NHS as a nurse from 1983, but specifically with the employer NHS Trust from 2006. Following her dismissal, the employee issued proceedings in the employment tribunal of constructive unfair dismissal and unlawful direct sex discrimination. The basic award for unfair dismissal is calculated by reference to continuity of employment and so the more the years served, the greater the award. The basic award system is governed by reference to the Employment Rights Act (Order in NI), which sets out conditions and exceptions. In relation to the NHS, the statute states:

- “(8) If a person employed in relevant employment by a health service employer is taken into relevant employment by another such employer, his period of employment at the time of the change of employer counts as a period of employment with the second employer and the change does not break the continuity of the period of employment.
- (9) For the purposes of subsection (8) employment is relevant employment if it is employment of a description -
- (a) in which persons are engaged while undergoing professional training which involves their being employed successively by a number of different health service employers, and
 - (b) which is specified in an order made by the Secretary of State.”

Taking into account the circumstances of the employee’s dismissal, the tribunal held that she was entitled to a basic award calculated on her total NHS service, namely 26 years. The employer appealed this decision.

On appeal, the EAT found that the Tribunal had fallen into error by dealing loosely with the concept of NHS service. It accepted that the employee had worked in the NHS, but concluded that far more was required than a general approach when addressing a statutory construct such as basic award and continuity of service. The Tribunal wrongly therefore did not take an analytic approach to the period of employment in the NHS and so the EAT ruled that without falling under the above exception or TUPE/statutory reorganisations, continuity of employment was broken when the employee joined the Trust in 2006:

"For certain purposes an employee is entitled to treat employment by a former employer as counting. Frequently, for example, in local government service and here in the NHS credit is given for the purposes of certain benefits, but these are expressly itemised in the contract (annual leave, sick leave, maternity and so on; and, it may be said, pensions). There is a world of difference between recognising certain benefits based on service to be continued with a new employer and injecting years into the statutory construct of continuous service. This simply cannot be done by parties to a contract, since it is a matter of statute..."

The appeal was therefore allowed and by agreement between the parties, in substitution for the figure given by the employment tribunal of a basic award, a basic award of £1,050 was given to which an uplift of £105 was applied.

In making this ruling, the EAT has reminded employers and employees that continuity of employment is a statutory right and cannot be written into a contract without the statutory rights to back it up.

<http://bit.ly/pVUPJO>

Chief Constable of West Midlands Police v Gardner [2011] EAT

DDA; reasonable adjustment and flexible working; pension loss

The Employment Appeals Tribunal decided that for an employment tribunal to be able to determine the question of reasonable adjustment they must be made fully aware of what specific aspect of the disability causes the individual a substantial disadvantage by the employer requiring them to attend the place of work rather than on occasions work from home.

It also decided that in certain situation where the reasons were cogent and credible that it was possible for a tribunal to use Ogden tables to calculate pension loss instead of the tables annexed to the Employment Tribunals guidelines.

The claimant was a part-time police officer who had sustained a knee injury. A police medical appeal board found he was permanently disabled from carrying out his normal duties but, with appropriate adjustments, could carry out an office-based role. The tribunal found that the police had not thereafter made the reasonable adjustment which the claimant had proposed of allowing him to perform some of his duties from home as part of a managed return to his contracted part-time hours. The tribunal calculated the claimants compensation for loss of pension by adopting the "substantial loss approach" identified in the booklet "Compensation for Loss of Pension Rights Employment Tribunals: Third Edition", but then, instead of using the actuarial tables attached to that booklet, proceeded by reference to the Ogden tables. The chief constable submitted that the tribunal had simply assumed that the proposed adjustment was reasonable. The claimant argued that the tribunal had not been entitled to find that a particular approach to calculating compensation was appropriate but then use aspects of another approach.

It was the tribunal's lack of explanation surrounding the disability and the reason why remote working was not feasible that led to the appeal being allowed on these grounds and it was the tribunals explaining and reasoning behind using the Ogden tables that meant that on that point appeal was dismissed.

<http://bit.ly/vNjeDM>

HM Revenue and Customs v PA Holdings Ltd [2011] EWCA

Discretionary Annual Bonuses; tax and NIC liabilities

Where it was concluded that bonus payments to employees, which were routed through an employee trust by way of dividend payments on the shares of a Jersey company, were emoluments of employment, they were taxable under Schedule E and there was no room for the application of Schedule F.

PA Holdings Ltd (PA) wished to pay their employees discretionary annual bonuses. It adopted arrangements whereby the employees who would have been paid bonuses were awarded shares and received dividends. The effect, so PA contended, is that the cash the employees received as dividend income is subject to the Schedule F (lower) rates and not to the basic or higher rates. Additionally, it contended, there is no liability to make National Insurance contributions (NICs) in respect of these payments.

HMRC was not best pleased by this practice. It contended that the dividends were in reality bonuses and liable to be taxed under Schedule E (i.e. normal tax and NIC rules apply).

The case had come before the First Tier Tribunal and Upper Tribunal, where mixed messages were received but the Tribunals had essentially come down on the side of the employer i.e. payments as shares and dividends attracted lower tax ratings.

The Court of Appeal has sided with HMRC. The Tribunals had concluded that the payments were emoluments in the hands of PA's employees but had also found that Schedule F could apply. That is wrong in law, said the Court - if payments fall under one category they cannot also fall under another:

<http://bit.ly/vnjwgx>

Staff Side of the Police Negotiating Board & Ors, R (on the application of) v Secretary of State for Work and Pensions & Anor [2011] EWHC

Pensions; RPI or CPI

The Government's decision to alter the basis upon which public service pensions were adjusted to take account of inflation from the Retail Price Index to the Consumer Price Index, and the statutory orders implementing that decision, were lawful.

The change from RPI to CPI was likely to reduce the value of benefits to pension scheme members over time. The claimants were public sector employees and bodies or trade unions representing staff belonging to a variety of public sector schemes. The Government has altered the basis upon which public service pensions are adjusted to take account of inflation. Hitherto the adjustments were made in line with the Retail Price Index ("RPI"). From April 2011 they are to be made in accordance with the Consumer Price Index ("CPI"). Some of the schemes fix pensions by reference to an employee's final salary and newer schemes fix it by reference to the average salary over the employee's career. In both cases the change affects the value of pensions in payment, and in the case of career average schemes, it also affects the way in which the career average is calculated. The question in this application is whether the decision to change the index, and the statutory orders implementing that decision, were lawfully taken and made.

The CPI had become a well-established method of assessing the relative increase in prices, and it would be remarkable if Parliament had intended to exclude from consideration any price index which attracted widespread support from professional economists. Both the CPI and the RPI were readily available to the secretary of state as possible measures which he could use to establish the increase in the general level of prices. The methodology used in calculating the CPI was entirely consistent with, and served to promote, the objective under s.150(1) of the 1992 Act to ensure that the purchasing power of pensions kept up with price inflation. If it appeared to the secretary of state that the CPI was a proper way to ensure that pensions retained their value, without pensioners receiving either too much or too little, there was no reason why he should not adopt that index.

<http://bit.ly/vjQrRn>

Casey v The General Medical Council [2011] NIQB 95

Appeal under s.40 Medical Act 1983

This was an Appeal under s.40 Medical Act 1983 where the Court set aside the decision of the General Medical Council (GMC) regarding Dr Casey's medical examination being sexually motivated. The Court decided that the fitness to practice panel had failed to pick up on serious inconsistencies' in the witness' evidence whilst finding favourable conclusions about the patient's credibility.

The patient had attended Dr Casey with flu like symptoms and a history of long term asthma. The patient accused Dr Casey of cupping her breasts inside her bra and placing a stethoscope on her nipples. She further accused Dr Casey of pulling her underwear out to expose her pubic area and placing his hand below the line of her pants. The panel found the patient to be a reliable, consistent and credible witness who did not embellish and openly admitted when she forgot specific details. The panel also determined that the nature of the examination and with the absence of any other explanation, sexual motivation was likely to be the reason for Dr Casey's actions.

Dr Casey's case was that the panel was in serious error in finding the witness to be reliable, consistent and credible witness due to inconsistencies' with her evidence. He argued that for the case to be found in favour of the patient he must have been found unreliable and incredible yet the tribunal had failed to explain why it has rejected his defence.

In a case where the finding of fact is based on the evidence received from witnesses the court can only interfere if it is regarded as plainly wrong or unreasonable. In most cases between two individuals it would be obvious whose evidence had been rejected and why. Case law makes it clear that in cases that are exceptional or not that straightforward a doctor was entitled to understand why his case had been rejected. (Southall v General Medical Council [2010] EWCA Civ 407)

The evidence given by the claimant differed greatly from the time she presented evidence to the police and finally what she relied upon at the tribunal. Her earlier evidence, as described above, sets out a few serious allegations which were unexplainably abandoned from by the time it was at the tribunal where the patient only relied upon the placing of the stethoscope upon the nipples. Such an inconsistency should have raised serious concerns and by virtue of Re D and the requirement for a heightened examination of the evidence, the panel, which should be aware of the law, should have

done so but this is not indicated in their analysis. Girvan LJ overturned their findings and criticised the panel for not considering the suitability of the witness's evidence:

"Questions which the panel should seriously have considered included

- (a) whether she was or might be a suggestible witness
- (b) whether she was a patient who was ready or liable to make exaggerated statements;
- (c) whether she was someone who could have formed a genuine but unjustified feeling of an invasion of her sexual privacy and convinced herself, contrary to the facts, that there was a factual basis to justify her subjective feeling of "creepiness"; and
- (d) whether she might have been a person who felt that having made so many allegations, she had to justify herself by standing over at least one allegation against the doctor, come what may." The tribunal should have made a careful examination of the important inconsistencies when evaluating reliability and credibility and its finding that the patient presented as a consistent, reliable and credible witness was one that no tribunal properly directing itself on the evidence could have made.

In fairness to the party whose evidence was rejected, a tribunal should explain why it preferred the evidence of the other. The evidential difficulty arising from the making of ultimately unfounded allegations (evidenced by abandonment or withdrawal) was one that the tribunal had to demonstrably appreciate and rationally deal with. The unavoidable inference from the panel's decision was that it had failed to take account of the importance and significance of the patient's inconsistencies when looked at as a whole in its entire context. Its decision therefore had to be set aside.

<http://bit.ly/vL4BLH>

Morgan v Welsh Rugby Union (2011) EAT

Unfair dismissal; redundancy selection; interviews for amalgamated post

The Claimant and a colleague were both made redundant, their jobs replaced by a single amalgamated role. They were both interviewed for the role and the colleague was successful despite not meeting aspects of the job specification. There were irregularities in the interviewing process, including allowing the successful candidate to present for longer than the allotted time and not marking the candidates against the prepared scoring system.

The EAT rejected the appeal. They commented:

"If the appointment of a new manager had been external, an employer would not have been bound by its job description or person specification. If a candidate emerged perhaps from a recruitment process, who was outstanding but who did not meet some aspect of the person specification, the employer would still have been entitled to appoint that candidate. In one sense, this may have seemed unfair to other candidates who did meet the person specification; but it would not follow that the decision by the employer was unreasonable. Indeed where the appointment is at a high level, it is in our experience not unusual for the interview process to be two way; a good candidate may suggest changes to the job description and may demonstrate that some aspect of the person specification is unnecessary..."

"When making an internal appointment, we do not think there is any rule requiring an employer to adhere to the job description or person specification. To our mind the employer was entitled to interview internal candidates even if they did not precisely meet the job description; and it was entitled to appoint a candidate who did not precisely meet the person specification".

<http://bit.ly/gKA7zn>

Everett & Another v Comoko (UK) Ltd (t/a The Metropolitan) & Others [2011] EWCA

Violence at work; Liability

The claimants were guests at a private members nightclub who were injured by other guest. They sued the company which managed the night club, alleging that it failed to take appropriate steps to protect its guests.

The appeal was dismissed. The CA considered the test for establishing a duty of care from Caparo Industries Plc v Dickman. There was sufficient proximity between the nightclub owners and patrons for a duty of care to arise in relation to the actions of third parties on the premises. The extent of the duty depends on the foreseeability of injury which is linked to the nature of the club – in this case because it was a private members club the risk was low and so sufficient steps had been taken so the claim was dismissed.

Lady Justice Smith commented:

"The common duty of care is an extremely flexible concept, adaptable to the very wide range of circumstances to which it has to be applied. It can be applied to the static condition of the premises and to activities on the premises. It can give rise to vicarious liability for the actions of an employee of the occupier who, for example, might have created a temporary tripping or slipping hazard. I think that it is appropriate (fair, just and reasonable) that it should govern the relationship between the managers of an hotel or night club and their guests in relation to the actions of third parties on the premises. I do not think it possible to define the circumstances in which there will be liability. Circumstances will vary so widely. However, I think it will be a rare night club that does not need some security arrangements which can be activated as and when the need arises. What they need to be will vary. One can think of obvious examples where liability will attach. In a night club where experience has shown that entrants quite often try to bring in offensive weapons, it may be necessary to arrange for everyone to be searched on entry. In a night club where outbreaks of violence are not uncommon, liability might well attach if a guest is injured in an outbreak of violence among guests and there is no one on hand to control the outbreak. It may be necessary for the management of some establishments to arrange for security personnel to be present at all times within areas where people congregate. On the other hand, in a respectable members-only club, where violence is virtually unheard of, no such arrangements would be necessary. The duty on management may be no higher than that staff be trained to look out for any sign of trouble and to alert security staff."

<http://bit.ly/hd19L7>

Pycroft v IC & Stroud District Council (Freedom of Information Act 2000) [2011] UKFIT

(Freedom of information requests; termination packages)

At the end of the 2008/9 financial year, Stroud District Council identified a major overspend in its Housing Revenue Account. KPMG were asked to investigate and published their report in August 2009, identifying individual and systematic failings. The report noted that the former Strategic Director "did not ensure that staff had taken ownership of managing the budgets". The Strategic Director retired in March 2009, with his terms having been agreed in March 2008.

The Appellant wrote to the council and asked what package had been offered to the Strategic Director and by whom. The council replied "The directors retirement had been dealt with by the Chief Executive and the Head of Human Resources in accordance with the council's policy and the provisions of the Gloucestershire Local Government Pension Fund administered by the County Council".

The Appellant appealed to the Tribunal arguing that the Councils response breached the Freedom of Information Act. The Tribunal disagreed and concluded disclosure would be unfair and unwarranted in view of the rights of the former Strategic Director to privacy and ordered no steps be taken.

<http://bit.ly/hJgyYg>

Chivas Brothers Ltd v Millar (2011) EAT

Ill Health Retirement; Pay in lieu of Notice

The EAT has overturned a Tribunal's decision to award a PILON payment to an employee who had accepted a mutually-agreed ill-health retirement and, having done so, enquired about notice pay:

"Further, we note that the Tribunal's decision that there had been no agreement to terminate appears to be based on the proposition that where, having reached agreement, one party "raises a matter", his doing so renders the earlier agreement ineffective. That is not correct in law. The fact that one party asks, after an agreement has been concluded, whether the other party will confer some further benefit on him can have no effect on the earlier agreement. It may, if he is fortunate, result in a further agreement; it may not. Whatever happens, though, the outcome of that party's efforts to secure "icing on the cake" makes no difference to the cake itself; it will remain baked and ready to eat."

<http://bit.ly/dOYzp5>

Gibson v The Information Commission and Craven District Council (2011) UKFTT

Freedom of information; compromise agreements

The Appellant requested, under the Freedom of Information Act 2000, a Compromise Agreement between the Council and its former Chief Executive Officer, which was entered into at the time she left employment which contained the terms of her departure. The Council concluded that s40(2) applied, "Having considered the terms of the agreement and the basis upon which it was entered into it is my conclusion that the disclosure would cause unwarranted prejudice to the rights, freedoms or legitimate interests of the former employee".

The Appellant complained to the Information Commission, whose decision was that Craven DC had dealt with the request in accordance with the FOIA.

The Appellant appealed to the First Tier Tribunal on the basis that the legitimate interest had been wrongly assessed and that certain information may not be personal data.

The following questions were dealt with by the tribunal:

1. Is the request information personal data?
2. What is the proper approach considering the first Data Protection Principle?
3. Would processing be fair?
4. Would processing be unlawful?
5. Does Condition 6(1) of Sch2 DPA apply?

"Having considered all these interests and taking into account the particular circumstances that led to the settlement, we find that the legitimate interests of members of the public outweigh the prejudice to the rights, freedoms or legitimate interests of the ex-CEO only to the extent that the information concerns the use of public funds... The appellant has argued that the public interests can only be satisfied by a disclosure of all the terms of the Compromise Agreement and not merely the amount of compensation paid... However, he did not fully explain why, and we disagree."

<http://bit.ly/dF2w9y>

Vaile v London Borough of Havering [2011] EWCA

Negligence at work; education sector

The Claimant was a teacher at a small school for children with moderate learning difficulties. She was attacked by a pupil in 2003 and sued the defendant, saying that they had not provided a safe system of work. The school was aware the pupil suffered from Autistic Spectrum Disorder ("ASD") but the Claimant was not aware of this. The school had, in fact, a separate system for teaching children with ASD but the claimant was not given adequate training in this system.

The appeal of the Claimant was allowed and the Court of Appeal agreed that the local authority had been negligent in failing to devise appropriate strategies for the pupil to prevent further assaults of the kind that had previously occurred.

<http://bit.ly/efqVMY>

Prudential Plc & Anor, R (on the application of) v Special Commissioner of income tax & Ors [2010] EWCA

Legal Professional Privilege

This was an appeal from a judgment of the High Court refusing to overturn an order of the Special Commissioner requiring Prudential to disclose advice given by PricewaterhouseCoopers (PwC) on a tax avoidance scheme. Prudential argued that PwC's advice should be protected from disclosure by Legal Professional Privilege (LPP) on the basis that advice about fiscal liabilities often providing advice about the relevant law. In a situation where lawyers and accountants are giving advice on the same issues, there was no reason for distinguishing between the two types of professional adviser.

The Court of Appeal unanimously rejected the appeal after hearing all submissions. Three main reasons for this decision were identified:

1. The Court of Appeal was bound by its own previous decision in *Wilden Pump Engineering Co v Fusfeld* [1985], in which it was held that LPP only applies to advice given by lawyers.
2. The Court noted that the status of LPP should only be amended by Parliament.
3. The Court also underlined the importance of certainty and said that drawing the line at legal professionals provided the requisite certainty. The extension to other professionals would lead to uncertainty.

The case asserts that clients' right to claim LPP in all legal advice given by lawyers should be preserved.

<http://bit.ly/fHQ6Pe>

Duncombe & Ors v Secretary of State for Children, Schools and Families [2011] UKSC

Fixed term employees; overseas employment

This appeal looked at the right of Secretary of State for Children, Schools and Families to limit the period for which teachers could be seconded to work in certain schools. The secondment was limited to a total of nine years, made up of a series of fixed term contracts. The principal question in the appeal was whether these arrangements could be objectively justified, as required by Regulation 8 of Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) (the "Regulations").

The appeal was allowed, with the Supreme Court stating that the schools were justified in employing teachers on fixed term contracts. The key complaint of the teachers was not against the successive contracts, but the overall fixed term nature of the contract. The Court said that the Directive and Framework Agreement were directed against discrimination of workers on fixed term contracts and abuse of successive short term contracts which in reality made employment temporary. The teachers were employed for nine years because the jobs could only last this long. The Secretary of State could not force schools to retain the teachers for longer as there was no alternative work for them to do.

<http://bit.ly/gSAjtw>

Puri, R (on the application of) v Bradford Teaching Hospitals NHS Foundation Trust [2011] EWHC

ECHR; Internal disciplinary hearings – independence of decision makers

This case involved internal disciplinary proceedings against a surgeon employed by the NHS. The High Court has held that Article 6 of the European Convention on Human Rights was not engaged as the outcome of the proceedings would not deprive him of the right to practise his profession. Neither the potential loss of his current job nor the damage to his reputation were sufficient to engage Article 6. The Court also held that the makeup of the appeal panel by either all or a majority of NHS staff was not a breach of Article 6 and this is not a requirement of fairness in these circumstances.

<http://bit.ly/dHnxRR>

Parmar v East Leicester Medical Practice [2011] EAT

Victimisation discrimination; immunity of witnesses

The claimant was a doctor employed by the respondent for a short period between 1 October and 12 November 2007. On 24 June 2008 he presented Form ET1 to the Employment Tribunal (“ET”), complaining of unfair dismissal and direct racial discrimination. He refined and altered the nature of his claims on 16 December 2008, abandoning the unfair dismissal complaint and raising two specific complaints; firstly, race discrimination and victimisation during the period of his employment and secondly a victimisation claim under the Race Relations Act 1976 (RRA).

Counsel for the claimant submitted to the Employment Tribunal that it was unnecessary to raise a written grievance to comply with s32 of the Employment Act 2002. This submission was rejected and the ET queried whether a valid grievance had been raised. Form ET1 had been submitted less than 28 days after the grievance relied upon had been submitted to the respondents and the claim was therefore barred by s32(3).

The EAT reviewed the relevant statutory provisions and concluded that as the respondent was unaware of the grievance (as it was post-termination), it was then caught by the modified procedure under regulation 6(3)(b)(i) of the Dispute Resolution Regulations 2004 (applicable when the employer was unaware of the grievance before the employment ceased). It was also submitted that Parliament did not intend post-termination claims to be subjected to the s32 regime since no requirement exists to raise a grievance under s32 of the 2002 Act for breach of contract. This was also rejected.

<http://bit.ly/jxazfK>

All About Rights Law Practice, R (on the application of) v Legal Services Commission [2011] EWHC

Procurement and public tendering

In this case the claimant firm downloaded and submitted all the appropriate tender documents. They received automatically generated responses indicating that they had "successfully published" their

responses. Mr Nadarajah, the firm's partner, assumed all was in order. A letter from the was later received from the Legal Services Commission ("LSC") saying that his tender had been rejected because one of the submitted mandatory forms called a Tender Information Form ("TIF") had in fact been blank.

The firm argued that it was an error at the LSC's end but came to accept after expert evidence that it was the firm's fault, the blank having been submitted rather than the completed TIF. The firm also argued that the LSC nevertheless should, after the deadline had expired, have permitted the claimant to clarify or supplement its tender by submitting the information contained in the TIF.

The judicial review failed and the position was summarised as follows:

"It is impossible, nevertheless, not to feel real sympathy for Mr Nadarajah arising out of the most unfortunate error that occurred. I am well aware that failure to obtain a legal aid contract in his sole area of practice probably will mean that, for him, legal practice as AAR ceases to be viable. But there are wider considerations to be borne in mind; and the due process of tendering, and the position of other tenderers who are entitled to expect equal and transparent treatment, has to be respected. To permit this case to succeed would, in my view, set a bad legal precedent, would be out of line with the approach indicated in other court decisions and cannot be justified on the particular facts of this case. So I must dismiss the claim."

<http://bit.ly/IBciFH>

Independent Insurance Co Ltd (in liquidation) v Aspinall and Anor [2011] EAT

Protective Awards; individual and collective

This case concerned an appeal against a ruling that the ET had the jurisdiction to make a protective award under s188-189 of Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) not only to the individual claiming the award but also to other redundant employees who had not brought a claim, or who had had their claims settled or dismissed.

The EAT has confirmed that where an individual claimant seeks a protective award under s188-189 TULRCA in GB (equivalent of A.220 of the Employment Rights (NI) Order 1996 in NI) the Employment Tribunal only has jurisdiction to make an award in his/her favour and cannot make an award that benefits other redundant employees. Claims on a collective basis must be made by trade union or other appropriately elected representatives.

<http://bit.ly/macytP>

London Borough of Hackney v Sivanandan and others [2011] EAT

Race discrimination; victimisation; damages

This case involved a joint and several award against a number of respondents (mainly a charity and a council), who had victimised a claimant in a recruitment process due to previous claims of racial discrimination. The claimant was awarded over £400k but was unhappy that the council had paid one of its employees £2k or so apportionment of the award and asked for exemplary damages to be awarded. They were not. It was held by the EAT that the actions (or inactions) did not warrant exemplary damages:

"Even if the criticisms of the Council in this regard are entirely justified, its conduct could still not possibly be regarded as of such a character to attract a claim for exemplary damages. It involved no oppressive exercise of authority against the Claimant. The Claimant had no direct interest in whether Ms. White was disciplined or not: her own rights had been fully vindicated. We can conceive that a bad-faith failure not to discipline Ms. White might be taken into account as regards aggravated damages, as indeed it was; but exemplary damages are another matter." (para 35).

In the case of joint and several damages, all respondents are liable for the whole amount. The EAT stated as follows:

"16. (1) Where the same, "indivisible", damage is done to a claimant by concurrent tortfeasors – i.e. either tortfeasors who are liable for the same act (joint tortfeasors) or tortfeasors who separately contribute to the same damage – each is liable for the whole of that damage."

Different respondents may seek proportions of damages from other respondents but, as the EAT again pointed out:

"16. (2) ...It is important to emphasise that while this kind of "apportionment", as it is often described (though that term is not used in the statute) determines the liability of concurrent tortfeasors as between themselves, it has no impact on the liability of any of them to the claimant. The claimant can recover in full against whichever tortfeasor he chooses, and that tortfeasor has the burden of recovery of any contribution from the others, and the risk that they may not be solvent."

The charity had become insolvent in this case and the council was liable for the whole amount.

<http://bit.ly/lelCTM>