

A Busy 2010 - An Even Busier 2011

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2010 proved to be a very busy year for employment law, and with the prospect of an even busier 2011, we take a look back at legal developments and notable case law in 2010 and then look forward to 2011 to see what's in store for us.

The star of the Employment Law show last year was undoubtedly the implementation of the main employment and equality of terms provisions in the Equality Act (EA 2010) on 1 October 2010. The Act is designed to harmonise and strengthen anti-discrimination law in Great Britain and contains over 30 key changes to previous legislation which both employers and their legal advisers will have to get to grips with, particularly as the first cases under the EA 2010 start to be heard in tribunals. Not all of the EA 2010's provisions, as originally enacted, have, however, been implemented.

The Coalition Government (CG) announced that it will not be implementing S.1 which would have required public bodies to address socioeconomic inequality by imposing a duty on them to assess the impact of policies on those with a diverse range of characteristics. Nor will the CG be enacting S.78 for the moment, which allows for mandatory pay audits for large organisations in the private sector as it wants to see if a voluntary approach will bring about greater pay transparency.

One measure which initially concerned the CG will, however, come into force in April 2011, i.e. S.159, which allows for positive action in recruitment and promotion. Where there are two or more candidates of equal merit, the employer can select one with a particular protected characteristic where the employer reasonably believes that people who share that protected characteristic are disadvantaged or the numbers doing the job are disproportionately low, as long as it is a proportionate means of achieving a legitimate aim.

A measure that appears not to be on the CG's 'radar' at all at the moment is the 'dual discrimination' provisions under S.14 EA 2010, which provide that direct discrimination will occur where it results in less favourable treatment because of a combination of two protected characteristics. There is no indication as to when, or indeed, if, this measure will be introduced.

As we look to 2011, the two most significant developments look to be the abolition of the national default retirement age (DRA) of 65 and the right to equal treatment for agency workers.

The abolition of the DRA will take effect on 1 October 2011. Under the transitional arrangements, from 6 April 2011, no new notifications of retirement under the DRA can be issued by employers. When the DRA is abolished, enforced retirement at any age for 'work' purposes will be an act of age discrimination unless the employer shows it is a proportionate means of achieving a legitimate aim.

While comments from the Conservative Party in the run-up the General Election indicated that the Agency Workers Regulations, as laid before Parliament in January 2010, might not survive, they have come through unscathed as evidenced by the CG's announcement that they will come into force unamended in October 2011, giving equal treatment for certain terms and conditions with comparable permanent staff, once the agency worker has been employed for 12 weeks.

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Changes To Employment Legislation In April 2010

- The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 came into force requiring the Tribunals Service to provide to the relevant regulator a copy of the whole, or part, of any ET1 which alleges that a protected disclosure has been made.
- The Social Security (Medical Evidence) Regulations 2010 introduced a new statement of fitness to work ('fit notes') for use by GPs replacing the former 'sick note' system.
- The duty on employers to consider applications from employees with 26 weeks' service for time off for study or training to improve the employee's effectiveness in the employer's business and improve the performance of the employer's business, was introduced for those organisations with 250 or more employees.
- The Damages-Based Agreements Regulations started to apply to all 'no win, no fee' agreements signed on or after 6 April 2010, capping the maximum percentage of a client's compensation a service provider may take at 35% inclusive of VAT.
- The Employment Relations Act 1999 (Blacklists) Regulations 2010 were implemented, outlawing the use of blacklists to deny workers employment as a result of their union membership or activities.



Provisions which came into force in October 2010

- With a few exceptions, the main employment and equality of terms provisions in the Equality Act 2010 commenced. In November, however, the Government announced that it had 'scrapped' S.1 of the Act altogether, which would have introduced a socio-economic duty for certain public bodies.
- The final versions of the Equality and Human Rights Commission Codes of Practice on Employment and Equal Pay were published to accompany the Equality Act.
- The increased National Minimum Wage rates took effect as follows: (i) Standard (adult) rate = £5.93 (and extended to 21 year olds); (ii) Development rate for workers aged between 18 and 20 = £4.92; (iii) Young workers rate = £3.64.
- The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2010 extended and strengthened the law relating to agency worker placements, including requiring advertisements to specify whether the position is temporary or permanent.
- A new streamlined process commenced allowing enforcement of un-honoured settlements contained in Acas COT3s providing employees with the ability to instruct a High Court Enforcement Officer to issue proceedings on their behalf.



⤿ Note: The 'vetting and barring scheme', requiring compulsory registration for new employees and job-movers working with children and vulnerable adults, which was due to start in November 2010, was stopped by the Government in June 2010 in response to criticism that it is disproportionate, overly burdensome, and unduly infringes on civil liberties. The scheme remains under review.

Date of termination is when the employee reads dismissal letter

In **Gisda Cyf v Barratt**, the Supreme Court held that where an employee is dismissed by a letter sent to the employee at home, and the employee has neither gone away deliberately to avoid receiving the letter nor avoided opening and reading it, the effective date of termination is when the letter is read by the employee, not when it arrives in the post. To achieve certainty, summary dismissal should be communicated in person.

Range of reasonable responses test does not apply to constructive dismissal

In **Buckland v Bournemouth University Higher Education Corporation**, the Court of Appeal held that: (i) the range of reasonable responses test is not relevant to the question of whether an employer has committed a repudiatory breach of contract entitling the employee to resign and claim constructive dismissal; (ii) an employer is not able to cure the breach by the steps it subsequently takes: once a breach has occurred it is for the employee to decide whether or not to accept it.



Discrimination compensation can include "stigma" loss

In **Chagger v Abbey National plc**, the Court of Appeal held that, in a case involving a discriminatory dismissal, a dismissing employer can be liable for "stigma" compensation where other employers are unwilling to employ the dismissed employee because he brought discrimination proceedings. The Court also held that, in assessing compensation arising from a discriminatory dismissal, it is necessary for a tribunal to consider what would have occurred had there been no unlawful discrimination. If there was a chance that the dismissal would have taken place in any event, this must be factored into the calculation of loss.

Legitimate aim in age discrimination must be consistent with UK social or labour policy

In **Seldon v Clarkson Wright and Jakes and anor**, the Court of Appeal held that a rule requiring partners to retire at 65 was a proportionate means of achieving the legitimate aims of workforce planning and providing associates with promotion opportunities. In doing so, the Court gave important guidance on establishing a legitimate aim in age discrimination cases, i.e. while a legitimate aim can relate to a specific requirement of the business, the employer's actions must nevertheless be consistent with the social or labour policy of the United Kingdom.



Religious belief did not exempt registrar from civil partnership duties

In **Ladele v London Borough of Islington and anor**, the Court of Appeal held that the Council did not discriminate against Ms Ladele on the ground of religion when it threatened her with dismissal for refusing to carry out Civil Partnership ceremonies. She refused to provide these services because of her Christian belief that same-sex unions were contrary to God's law. The reason for the treatment was not her religious belief but her refusal to carry out her duties. In any event all registrars were required to carry out both marriages and civil partnerships and she was treated no differently than anyone else. Nor was there indirect discrimination. The Council had a legitimate aim, which was to provide its services in a non-discriminatory way and the means chosen was proportionate since the council should be able to require all staff to uphold their non-discriminatory objectives. Nor did the policy impinge on Ms Ladele's religious beliefs: she remained free to hold those beliefs, and free to worship as she wished.

Legal Developments in 2011

1 February 2011

- The limits on tribunal awards increase from 1 February 2011. The maximum compensatory award for unfair dismissal rises from £65,300 to £68,400; the statutory limit on a week's pay rises from £380 to £400.

April 2011

- The right to request flexible working to be extended to parents of children under 18. A consultation will be launched later in 2011 looking at how to extend the right to request flexible working to all employees.
- The abolition of the default retirement age (DRA) commences. From 6 April 2011, transitional arrangements to phase out the DRA and all associated statutory retirement procedures will begin. No new notifications of retirement under the DRA can be issued by employers. Regulations which allow an employer to give short notice of retirement of 2 weeks, will be repealed.
- The right to request training is scheduled to be extended to employees with 26 weeks' service in organisations with fewer than 250 employees but this provision is under review as part of the Government's drive to reduce red tape on business.
- Additional paternity leave and pay provisions commence allowing eligible parents of babies due on or after 3 April 2011 and eligible adoptive parents who are notified of having been matched with a child on or after that date, to transfer up to 6 months' additional paternity leave and pay to the father or co-adopter, if the child's mother or, the primary adopter, returns to work.
- From 11 April 2011 Statutory Maternity Pay, Statutory Paternity Pay and Statutory Adoption Pay will increase from £124.88 to £128.73 per week and SSP will increase from £79.15 to £81.60.
- The Bribery Act 2010 comes into force making it a criminal offence where a person associated with a commercial organisation bribes someone with the intention of obtaining or retaining business or an advantage in the conduct of business.
- The new single equality duty commences requiring specified public bodies to have due regard to three matters in exercising their functions, i.e.: (i) eliminate unlawful conduct under the Equality Act; (ii) advance equality of opportunity; and (iii) foster good relations between persons who share a 'relevant protected characteristic'.
- The revised statutory document '*Guidance on matters to be taken into account in determining questions relating to the definition of disability*' will be introduced reflecting changes to the definition of disability made in the Equality Act.
- Positive action in recruitment and selection provisions under S.159 of the Equality Act come into force allowing an employer to treat a person more favourably because of a particular protected characteristic where candidates are equally qualified, but people with that particular characteristic are disadvantaged.
- On 29 April 2011 the wedding of Prince William and Kate Middleton on 29 April 2011 will be marked by a public holiday across the UK.



October 2011

- The DRA and the statutory retirement procedures will be abolished.
- The Agency Workers Regulations will provide agency workers with the right to equal treatment in matters of pay and conditions as staff hired directly by the employer once the worker has satisfied a 12-week qualifying period.

European Court of Justice

USA v Nolan: The Court of Appeal has asked the EJC to clarify whether the collective consultation obligation in redundancy arises: (i) when the employer is proposing, but has not yet made, a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancies?; or (ii) only when that decision has actually been made and consequential redundancies are actually being proposed?

European Court of Human Rights

Eweida v British Airways Plc: The ECHR has been asked to determine whether a Christian employee suffered indirect discrimination on the ground of her religion or belief where BA, in line with its uniform policy, insisted (at that particular time) that the cross on her necklace be concealed.

Supreme Court

R (on the application of G) v X School and others: Appeal against the Court of Appeal's decision that a teaching assistant was entitled to legal representation during disciplinary proceedings for sexual misconduct with a child, as Article 6 of the European Convention on Human Rights (right to a fair trial) was engaged because of the seriousness of the charge and its likely effect in ending his career.

Chesterfield Royal Hospital NHS Foundation Trust v Edwards: Appeal against the Court of Appeal's decision that an employee could, in principle, recover damages for loss of future employment prospects when, as the result of breach of express contractual terms as to the conduct of disciplinary proceedings, findings of misconduct were made, resulting in dismissal, and those findings would not have been made had the disciplinary procedure been properly observed.

Court of Appeal

Grant v HM Land Registry: Employee's appeal against the EAT's decision that a tribunal erred in failing to consider the relevance of an employee being openly gay to the question of whether discrimination and harassment had taken place as it was potentially relevant to the alleged perpetrator's reasons for treating the claimant in a certain way and also to the reasonableness of the claimant's reaction to how he was treated.

Employment Appeal Tribunal

Eversheds LLP v de Belin: Employer's appeal against a tribunal's decision that it had discriminated against a male lawyer on grounds of his sex when, in a redundancy scoring exercise, it inflated the score of his female colleague to take account of the fact that she was on maternity leave.

Royal Cornwall Hospital Trust v Watkinson: The Trust is appealing the whistleblowing element of the tribunal judgment, in which Mr Watkinson was awarded £1.2 million. Mr Watkinson claimed that he was sacked for threatening to publish legal advice that proposals to relocate part of the Trust would be illegal without a public consultation.

