

July 2008

# Law at work



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# Features

## Who do you think I am? Catching the dishonest applicant out

*"Hey, Alice, John Smith has applied to us for a job. You used to work with him – what's he really like? Did he honestly quadruple your profits as he claims on his CV? And pass the ketchup, please."*

Cosy chats at a barbeque might elicit some interesting gossip about a potential employee, but it's not a particularly scientific way of collecting information about job candidates. Recruitment is becoming increasingly sophisticated – yet candidates will often try to stretch the truth when applying for roles (according to Experian four out of ten people know someone who has "altered" their CV). How can you know who you are hiring?

### 1. Application Forms

Most application forms will contain a statement intended to be countersigned by a candidate in which that candidate declares that the information provided is true and accurate. However, if somebody intends to lie on a CV or application form, such a statement is unlikely to stop them. Its main value is defensive in that if it transpires after they have been hired that a candidate did lie, it can be helpful if the employer wants to terminate employment – especially if the clause expressly states that the employer reserves the right to dismiss if any information is found to be untrue or that the employee has not revealed some piece of information that might have affected the decision to recruit.

### 2. Interviews

These still form a major part of the recruitment process and will give the interviewer a feel for whether or not a candidate is suitable. The more rigorous an interview process, the harder it may be for a candidate not to trip up over their own fibs, especially if they are interviewed by a series of people – but a sophisticated liar can still get through.

### 3. References

It is common for a job offer to be conditional upon the receipt of satisfactory references. If these are followed up diligently, then they can reveal useful information. However, very often they are not checked, and if an employee has been in position for months or even years, it can be a bit late to start doing so. Another increasingly common phenomenon, is that employers are now so wary of being accused of either misleading a future employer or of unfairly damning an ex-employee, they will simply give factual references which only provide the bare minimum of detail – knowing the employee's start and termination dates plus job title does not tell the recruiting employer much more than the fact that the employee worked where he says he worked.

### 4. Pre-hire checks and outside databases

There is a proliferation of various agencies and bodies who offer background-checking services, and this is often a sensible choice either where an employer has a high staff turnover which would mean that if the HR department did the checking they would spend their days doing only that, or, alternatively, where senior staff are being hired or you are recruiting staff into sensitive roles or roles where a high degree of trustworthiness is needed. Employers regulated by the FSA, for example, have obligations to the FSA to ensure that staff are honest and competent. Agencies will use publicly available registers and resources, such as the electoral roll, county court records (to establish whether individuals have been bankrupt) and so on. They can also check things such as academic qualifications, which is an obvious area where candidates may be tempted to lie. Where very high-level staff are being recruited, some employers occasionally even resort to hiring detective agencies to find out as much as they can about an individual – although that is rare, and might be pretty off-putting for most candidates, however honest.

While it is probably something of a relief to relinquish the job of checking to an outside agency, an employer should still make it clear to candidates, at the very latest at the point of hire, that untruths told to them or the agency in the recruitment process could result in the termination of employment.

### 5. Criminal Records Bureau

In theory, the CRB offers basic, standard and enhanced checks. Basic checks will reveal things such as unspent convictions. Standard and enhanced checks provide information in the case of employees who will be working with children or vulnerable people that cannot normally be obtained for other types of candidates – the typical example being spent convictions, which most job candidates, apart from those applying for roles in specific sectors, are not required

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to reveal. Standard and enhanced checks will also check sex offender registers. In fact, basic checks are not carried out by the Criminal Records Bureau in England (a response to a telephone enquiry revealed that they can in theory but that they don't do it). However, Disclosure Scotland does do such checks and can do so for any address in the UK.

An organisation cannot apply for a CRB (or Disclosure Scotland) check without the individual knowing, as the person being checked has to make the application. An individual cannot apply for a check directly to the CRB – they have to do this via an organisation registered with the CRB. Even if the potential employer is not registered, there is a multitude of umbrella bodies who are registered and who can carry out these checks.

It is sensible to state on application forms or in any pre-hire literature or letters that individuals may be required to consent to any checks that may be deemed necessary and that they should provide any and all information required to do that promptly.

### 6. Internet

It's amazing what a quick search of the Internet can reveal – who knew that Joe Bloggs applying for a job in IT was the world-champion bog snorkeller for three years in a row? People can often be very careless about what they put on social networking sites and their private persona can be very different from the boot and suited individual presented at interview. Many employers do now check things such as Facebook as a matter of course, to see whether candidates let information slip out which might impact on the decision to recruit. Equally, the Internet may help when checking out the dodgy-sounding university referred to by the candidate; if the address is a post-box number somewhere obscure, chances are that that First Class Honours degree is not all it is cracked up to be.

It is not illegal to do this – if a person is prepared to put information on a publicly accessible website, then they surely must accept the risk that it could be read by a future employer. However, using information gleaned from the Internet comes with a health warning – it may not be accurate or complete and the person recruiting should be careful not to allow such information to reinforce or expose prejudices that they may hold. Some employers make a conscious decision not to look at the Internet for those reasons – and because they take the view that what a candidate gets up to in private, is none of the employer's business.

If you do use the Internet as part of a recruitment decision, bear in mind that pages printed off which become part of the file on that candidate may also be disclosable in litigation if a disappointed candidate pursues claims for discrimination or victimisation, for example.

### 7. Data protection

However you check up on candidates and whatever information is revealed, you are still subject to data protection obligations in relation to the storage and processing of information – and if you use agencies, you also have responsibilities in relation to the way in which that agency processes data. In particular, information regarding criminal convictions is regarded as "sensitive personal information" for the purposes of the Data Protection Act 1998 which imposes more onerous obligations on data processors in the case of such information.

The issue of data protection on its own could merit a whole article. However, when recruiting, it should be made clear to candidates what information will be collected and why, how long it will be stored and to whom it may be transferred – again, this often comes in the form of a statement at the bottom of application forms, which candidates are expected to sign, to confirm their consent to the collection and processing of such data. There should be systems in place to ensure that information provided by or about a candidate only goes to those individuals who need to know that information and that it is destroyed securely if a candidate is unsuccessful. If you use agencies in the recruitment process, either to do background checks or to process and interview candidates, they should be able to explain how they ensure compliance with their (and your) data protection obligations.

Background checking is not infallible of course, but it may help you discover the difference between the usual gloss that a candidate will put on his or her past and chronic terminological inexactitude. If application forms and other recruitment material and correspondence contain sensible caveats and conditions, you will be in a better position to deal with an employee who is found to have lied or hidden material information during the recruitment process.

*By Naomi Branston*

## Immigration: Take action NOW to prepare for sponsorship licence

### Points Based System

You may have heard from the media or us about the new Points Based System (PBS), which is likely to affect your UK business. Under PBS all UK employers wanting to employ non-EU migrants will need to apply during summer 2008 for a sponsorship licence from the UK Border Agency.

### More responsibility on management

PBS, which is being rolled out in phases throughout 2008, will put much more responsibility on your UK operation. Strict duties will include monitoring and reporting on the conduct of your overseas nationals, and checking immigration paperwork annually. Failure to comply with immigration law can lead to an on-the-spot fine of up to £10,000 per illegal worker or, in the worst cases, to a two-year prison sentence.

### Apply by August 2008

Action is required very soon. The government intends that every business that applies for a sponsorship licence will be visited by immigration officials, who will check your documents and compliance with immigration laws. Timing is crucial - from latest available data, if employers wait too long to apply, there is a real risk of a bottleneck, meaning you may not have licence approval when the Tier 2 system goes live in October 2008. We recommend that applications be submitted by mid-August 2008 at the latest.

### What to do next

To give your UK operation the best chance of obtaining a licence, it should not apply until full compliance checks have been made by your UK Human Resources/management team. It should take the following steps NOW:

- review your current employee list and HR files to ensure that all current employees are permitted to work in the UK and that you have up-to-date copies of valid immigration papers in line with legal guidance
- issue guidance to HR/managers on the mandatory document checks required - we can provide a written policy for your business
- prepare groundwork for sponsorship licences by considering which UK-based employees will fill positions of immigration responsibility and whether you need a different licence for each UK site. Taylor Wessing may be able to take an assigned Level 2 role to help you through the new PBS regime
- amend employment contracts to take account of PBS changes (e.g. an obligation on employees to reveal changes in circumstances)

We would be delighted to discuss these issues with you - once you are ready to proceed we will assist you with the licence registration process for a fixed fee per application.

Please get in touch with your usual Taylor Wessing immigration contact to progress this or email us on [ImmigrationInfo@taylorwessing.com](mailto:ImmigrationInfo@taylorwessing.com) for someone to contact you about the next steps.

*By Charlie Pring*

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# Company Dress Codes - What not to wear! - recent cases on the impact of discrimination on company dress codes and what it might mean for employers.

Once again, dress codes are in the news.

The recent 'bangle' case is the latest example of a student bringing a claim against her former school based on the fact its uniform policy has breached race, equality and human rights laws. The school's policy does not permit jewellery other than watches and ear studs, yet Sarika Watkins-Singh is a Sikh who wears a bangle – the kara – not as a piece of jewellery but as a symbol of her religious faith. It is undisputed that the kara is one of the five Ks of Sikhism, and the judge was even referred to a photograph of the England spin bowler, Monty Panesar, wearing the kara as a symbol of his faith.

Readers may recall that another pupil, Shabina Begum, went to court in 2006 claiming her rights to religious freedom had been breached because of her school's refusal to allow her to wear the jilbab. In response, the school argued that it had done its utmost to uphold her religious freedoms and that they did not object to students wearing a Hejab (headscarf) or a shalwar kameez. The court ruled in favour of the school, stating that the uniform policy had a legitimate aim which was the proper running of a multi-cultural, multi-faith, secular school. In that case supporters of the school's stance said that guidance on Islamic dress did not specifically require the jilbab to be worn. It will be interesting to see whether the court feels able to conclude the same regarding the kara.

It may be that the 'bangle' case is more like Nadia Eweida's 2006 case against British Airways, whose decision to disallow Nadia to wear a crucifix over her uniform resulted in plenty of press coverage. However, because Christianity did not oblige Nadia to wear a crucifix and it was her personal choice, the Tribunal dismissed her claim for indirect discrimination on the basis BA's policy did not put Christians at a particular disadvantage. Nevertheless, BA did have to review their policy as a result of this case.

As this and other cases show, Tribunals do not always favour the employee. In a recent case in which Taylor Wessing acted, an employee's claims for sex discrimination and unfair dismissal were dismissed. The decision reaffirmed a long-standing case on discrimination and dress codes (the *Schmidt v Austicks* case) which said that if employers had requirements for employees in their dress codes, then as long as they were even-handed in their approach and the terms required a similar general standard from both men and women, albeit there were different detailed restrictions, then in so far as a comparison is possible, the employer will be treating both sexes alike.

## The claim

The Claimant wore an earring in one ear but the dress code forbade male employees from wearing "earrings" whilst permitting females to wear them. The Claimant had been dismissed as a result of his failure to comply with the dress code, which he alleged was discriminatory.

The Claimant said that had he known of the restrictions contained in the dress code surrounding the wearing of earrings by male employees, he would not have applied for the job. He maintained that he had worn the earring throughout his employment and he had not been asked to remove it, with limited exceptions.

The Respondent's evidence was that the handbook containing the dress code policy had been given to the Claimant at the beginning of his employment and that it had also been discussed as part of his induction process. This is because the Respondent took its corporate image and branding very seriously. The Claimant conceded this point but said he had signed to say he had received the handbook, not that he had read it and that he did not agree with the rule about men not being able to wear earrings since he thought it was discriminatory. The Respondent maintained that the Claimant's earring had been mentioned by various managers on numerous occasions throughout his employment and that each time he had removed it immediately, without any argument.

## The dress code

The Respondent's dress code reflects conventional dress habits and it also makes an exception on religious or medical grounds. The Tribunal heard that not only were all employees made aware of the code, it was also enforced. One female member of staff had been sent home because she was wearing a stud in the upper part of her ear, another had been sent home to take out a tongue piercing and a third, so she could change into clothes which would hide her ankle tattoo.

### The decision

The Tribunal found that when looked at as a whole, the Respondent's dress code was not discriminatory in its provisions, but was different in certain respects as between male and female. The differences in the application of the code to men and women were primarily those dictated by conventional dress habits and it was clear that the Respondent was seeking to ensure its employees dressed smartly and conservatively. The Tribunal found that the condition with regard to men and earrings as against women with earrings was not so unreasonable to single it out from the code as a whole, or to come to the conclusion that no reasonable employer could insist upon it. Indeed, the Tribunal stated that "the reality must be whether the employer, in formulating the dress code, can reasonably hold the view that the requirements or restrictions will further the company's image". It found that in this case the Respondent was entitled to hold that view.

### What this means for employers drafting dress codes

Although upholding the *Schmidt v Austicks* case, the Tribunal did acknowledge that it was over 30 years old and that social habits do change. The Tribunal chose not to comment on whether it is now not uncommon for men to wear earrings. It might be that ideas of what is conventional business dress are subject to change in future. Where dress codes reflect the conventional views of society and the requirement of a 'conventional appearance' is applied equally to men and women, there will usually be no discrimination. It also appears that Tribunals have little desire to get involved in detailed philosophical debate about subjective standards on appearance.

Implementing a dress and appearance code is a question of what is necessary, suitable and socially acceptable in the particular workplace. It's largely down to you. If rules are to be applied, you should ensure that the rules as a whole apply the same standards to men and women, unless there is a valid reason for the rule. Differing rules or requirements (for example the requirement that men wear a tie) will not necessarily amount to sex discrimination, provided that one sex is not treated less favourably than the other: but it is still worth checking the detail of any illustrations to the policy.

Employers should say they will vary or adapt rules to accommodate employees whose cultural or religious needs might prevent them from complying with them, or to make allowances for an employee's expression of their religious or cultural beliefs.

**By Mandy Brown**

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# Case law update

## Policy to make enhanced redundancy payment kept in a collection of policies in electronic form was part of employee staff handbook

***Harlow v Artemis International Corporation Ltd [2008] EWHC 1126***

### Why care?

Disputes over the contractual nature of an enhanced redundancy policy again highlight the need for companies to be clear as to which of their policies and procedures in staff handbooks are contractual, and to carefully label them as such. This case demonstrates both the particular difficulties that can arise from inheriting employment documentation through acquisition and the necessity of keeping records, especially where ownership changes. The damages awarded in employment tribunals for breach of contract claims arising or outstanding on termination of employment are capped at £25,000, so the employee brought his claim in the High Court, where costs are usually awarded.

### The case

The employee claimed that he was entitled to an enhanced redundancy payment of about £62,000, or alternatively damages for that sum in breach of contract. His contract of employment included the provisions of Artemis' "Enhanced Redundancy Policy" published to employees, which he claimed was either an express or implied term of his contract. Artemis denied this.

Over the years during which the employee had been employed, the company had changed hands on many occasions. The relevant period of employment was from October 1983. His latest employment letter was dated 31 March 1993 that contained the principal terms of his contract of employment including the words "All other terms and conditions are as detailed in the Staff Handbook as issued to you, and subject to its most recent update." The employee signed accepting the terms on 5 April 1993. The employee used witnesses (ex employees of the company) to explain that hard copy manuals were distributed to staff from time to time and that these were then discontinued and substituted by intranet Lotus Notes, which were treated as a handbook. In its electronic form it included all the papers and procedures in an electronic folder called "HR Policies and Procedures" and included the company's redundancy policy.

The company's case was that the "staff handbook" in later years comprised only one of the folders included within the "HR Policies and Procedures" file on the electronic site, namely a document called "Our Employment Practices" which did not include the redundancy policy. None of the employee's witnesses accepted that this sole document was the staff handbook. The company's problem was that it had no direct evidence to support its case as none of its witnesses were involved in the company's affairs before 2006. They were unable to counter the direct evidence of the employee's witnesses. The judge commented, "Indeed I was surprised to read in the witness statements of all the Defendant's witnesses a statement that they had "full knowledge of the facts of this case" when quite clearly they had not". The knowledge appeared to be founded on understandings from due diligence procedures on acquisition of the company in 2006.

The High Court held that the staff handbook included the redundancy policy and also reviewed whether the redundancy policy constituted an express term of the contract. The company argued that the policy had changed unilaterally to the detriment of the employees and that in 2004 it had stipulated that enhanced redundancy payments were being made "ex gratia" rather than as a legal entitlement. The Court reviewed *Keeley v Fosroc International Ltd (2006) IRLR 961* and decided that although the staff handbook was presented as a collection of policies they could still be contractual if they were apt to be contractual terms. The redundancy policy was kept with other policies that must have had contractual effect such as sickness and holiday pay, and it contained an express statement of the manner of calculation.

The High Court held that the redundancy policy was an express term in his contract.

The Court also held that if it had not been an express term, the redundancy policy would have constituted an implied term of his contract of employment. The redundancy policy did comprise part of the staff handbook, from the start of the Lotus Notes site and probably before that. Any changes may have been posted on Lotus Notes but were not specifically and separately drawn to employees' attention. There was evidence that in 2004 the company considered

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the policy for long term employees as legally binding on the company, and applied it on about six occasions, conditional on employees signing a compromise agreement. The High Court held that this practice was custom and practice at the company, so that the policy would have been an implied term of his contract.

## What to take away

Ensure that during the legal due diligence on a company or business acquisition the buyer gains as full a picture as possible of the employment documentation. This includes checking the contractual status of the employment documents, especially if generous benefits such as enhanced redundancy payments are provided. When faced with a potential dispute, or when taking witness statements during the litigation, examine the evidence carefully – does it sound convincing? Consider settlement of the claim to avoid creating a precedent. Should there be a strategy for moving forward so that terms and conditions are changed for future redundancy situations?

The Age Regulations now in force contain a specific exemption for enhanced redundancy payments. Employers are still able to make such payments where those payments are calculated in accordance with the multipliers used to calculate statutory redundancy payments under ERA 1996 but the employer may treat a week's pay as not being subject to a maximum amount. Perhaps these Regulations could be used to claim an inherited redundancy policy is unlawful because it is discriminatory.

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## Use of comparator in disability discrimination claims

### ***Mayor and Burgesses of the London Borough of Lewisham v Malcom [2008] UKHL 43***

#### Why care?

This is a potentially helpful case to employers which may make it easier to dismiss a disabled employee with a long term illness. Of interest is the House of Lords' application in this case of the Court of Appeal judgment in *Clark v TDG Ltd (t/a Novacold Ltd) [1999] IRLR 318* as to who is the correct comparator in a disability discrimination claim. Whereas in *Novacold* it was held that where an employee who was dismissed for absence, which was related to his disability, the correct comparator was a person who was not absent and whether they would have been dismissed. There must be someone to whom "that reason" i.e. the reason for the claimant's treatment does not apply. The House of Lords has overruled this decision. The correct comparator would be employees absent from work for some similar period for a reason unconnected with physical disability. The House of Lords decided that if those others would have been dismissed as Mr Clark was, he would not have been treated less favourably than them. If they, or a significant number of the comparators would not have been dismissed, then there would have been unlawful disability discrimination.

#### The case

Mr Malcom had schizophrenia which was not known by the London Borough of Lewisham ("LBL") when it made him a secure tenant of a domestic property. Mr Malcom sublet and ceased to live in a flat let to him by LBL. This had the effect of destroying the security of tenure he had previously enjoyed and breaching the terms of his tenancy so as to give LBL a claim to possession under housing law. Mr Malcom argued that his act in unlawfully subletting the property was related to his disability and he would not have behaved in such a way if he had not been schizophrenic. He relied on sections 22 and 24 in Part III Disability Discrimination Act 1995 ("DDA"). These provisions are very similar to the duties placed on employers concerning their staff.

Was he entitled to do so? The first instance judge thought not but the Court of Appeal overturned that judgment and held that there had been a causal connection between his decision to sublet and his schizophrenia so that LBL had unlawfully discriminated against him by claiming possession of his property. LBL appealed to the House of Lords that upheld its appeal and dismissed Mr Malcom's claim under the DDA.

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The House of Lords held unanimously that a respondent couldn't be liable unless it knows (or ought reasonably to know) of the claimant's disability, and in this case LBL did not. It also considered who were the correct comparators. The majority held that the correct comparator would be a secure tenant with no mental illness who had sublet. Such a tenant would not have received any different treatment from LBL than Mr Malcom received. There was no less favourable treatment and therefore no discrimination. The House of Lords therefore overruled the Court of Appeal *Novacold* in which the comparator to Mr Malcom would have been someone who had not illegally sublet his flat.

## What to take away

The decision in *Novacold* appeared to ease the way for disabled claimants to establish disability related discrimination, putting the burden on the respondent to prove justification. If this case is applied in the context of employment related disability discrimination it should now be harder for disabled employees to show less favourable treatment and direct their attention to a failure by the employer to provide reasonable adjustments. Claimants are likely to try to distinguish this public authority housing case, where the "justification" defences were narrower, (and none were applicable on the facts) and where landlords could be faced with not being able to take action against disabled tenants who breach the terms of tenancy agreements. This may have generated some judicial sympathy with LBL. However, it would be prudent for employers to review current staff handbooks on the treatment of those on long term sickness absence, potential reasonable adjustments and consider any individuals who could now be "comparators" following this case.

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## Hot topics

### Age discrimination

*Johns v Solent SD Ltd Unreported June 12, 2008 (CA (Civ Div))* The Court of Appeal has upheld the EAT's decision to stay the claim on whether compulsory retirement at the current retirement age of 65 is unfair dismissal and age discrimination pending the outcome of *Heyday*. The CA judgment has yet to be published.

The first hearing in the claim by *Heyday* challenging UK age discrimination legislation in the ECJ took place on 2 July 2008. The case involves *Heyday*, part of *Age Concern*, disputing the UK's retirement age of 65, arguing that it is a breach of the EU's Equal Treatment Directive. However, neither the Advocate General's opinion nor the ECJ's judgment in the case is likely to be issued before the end of 2008 or early in 2009.

### Disclosure of confidential information through social networking sites

*Hayes Specialist Recruitment (Holdings) Ltd and anor v Ions and anor [2008] EWCH 745* *Hays*, the recruitment specialists, alleged in the High Court that their employee *Mark Ions* copied and retained confidential information concerning clients and contacts of *Hays* which he used after leaving the company. They claimed that he used the on-line business oriented social networking site *LinkedIn* to approach clients for his own rival agency, set up three weeks before he resigned from his employer. However, *Mr Ions* argued that *Hays* encouraged the use of this site for work purposes and that once *Hays'* contacts accepted his invitation to join his network they were no longer confidential.

The High Court ordered that the ex-employee hand over business contacts built up on his personal page of the *LinkedIn* network. The judge also ordered him to disclose all emails sent to or received by his *LinkedIn* account from *Hays'* computer network, all his documents including emails and invoices that showed any business obtained from the *LinkedIn* contacts.

The High Court previously considered ownership of contact lists in *PennWell v Publishing (UK) Limited v Isles and others [2007] EWHC 1570 (QB)*, June 2007 (reported in *Law at Work* July 2007). Here it held that where a journalist created and kept his contact list on the employer's computer system, that database or list of information belonged to the employer. This included personal contacts and business contacts which the employee had prior to joining the employer.

The case highlights the tension between employer and employee over encouraging the use of social networking sites for business contacts and whether (if at all) that information then ceases to be confidential if it is online and shared.

### Garden leave

*SG&R Valuation Service Co v Boudrais and Ors [2008] EWHC 1340 (QB)* The High Court has held that an employer will sometimes be entitled to force garden leave onto senior directors even when there is no such right in their service contract.

In this case, two directors resigned with the intention of joining a competitor. There was strong evidence of an intention to misappropriate confidential information. The employer insisted on a period of garden leave, so as to delay the date when they joined their new employer, and sought an injunction enforcing this. The employees resisted on the grounds there was no garden leave clause, they had a right to work, and that by not providing work the old employer was in breach of contract - entitling them to leave and go elsewhere.

The High Court has held that an employer will sometimes be entitled to force garden leave onto senior directors even when there is no such right in their service contract. In this case, two directors resigned with the intention of joining a competitor. There was strong evidence of an intention to misappropriate confidential information. The employer insisted on a period of garden leave, so as to delay the date when they joined their new employer, and sought an injunction enforcing this. The employees resisted on the grounds there was no garden leave clause, they had a right to work, and that by not providing work the old employer was in breach of contract - entitling them to leave and go elsewhere.

The High Court found in favour of the employer and the judge held that in the circumstances the directors had no right to be provided with work by the old employer, and so the employer could insist on a period of garden leave. The injunction was granted.

### Equality Bill – The next step forward

On 26 June the Government published “Framework for a Fairer Future – The Equality Bill”, setting out proposals for the Equality Bill, the purpose of which is to “strengthen protection, advance equality and declutter the law”. The bill will consolidate the current discrimination legislation into one Act.

The British Chambers of Commerce’s approach is that it could end up being a “bureaucratic nightmare for small businesses” whereas the TUC welcomed the Equality Bill as a “landmark piece of legislation”. It seeks to introduce a new Equality Duty on the public sector, end age discrimination, require transparency, extend the scope of positive action, and strengthen enforcement. Focusing on each objective, the Equality Bill will:

- contain a single Equality Duty for public sector employers to replace the race, disability and gender equality duties, which will also cover gender reassignment, age, sexual orientation and religion or belief. Currently there are three separate duties for public authorities;
- contain provisions to end age discrimination in the provision of goods, facilities and services. This could be costly in practice, for example to neutralise the cost for provision of benefits such as life assurance to the elderly, or controversial such as a doctor not providing treatment to an individual simply on the grounds of age.
- have a requirement of transparency, on the basis that across the UK as a whole there is a full time pay gap between men and women of 12.6%. Public sector employers will be required to publish clear information about their progress on important equality issues, improve transparency in the private sector through public sector purchasing, ban secrecy clauses which prevent people discussing their own pay and work with the Equality and Human Rights Commission and businesses to improve equality practice.
- outlaw pay secrecy clauses in employment contracts and make it unlawful to prevent employees from discussing pay. This could have implications for private employers who would need to review employment contracts and policies and procedures which currently prevent these types of comparisons in the workforce.
- extend positive action so that employers can take under-representation into account when selecting two equally qualified candidates – available for employers to use on a voluntary basis. Accordingly this may mean a white, male workforce giving preference to female or ethnic minority candidates as long as they are equally qualified for the job. Such a practice would need careful monitoring to ensure that other forms of discrimination or unfairness do not occur as a result.
- allow employment tribunals to make wider recommendations in discrimination cases, which will benefit the wider workforce and help to prevent similar types of discrimination occurring in the future. Currently tribunals can only make recommendations where an employer has been found to have discriminated against an employee, and only if they directly benefit the person who has been discriminated against. The new proposal would mean that if a female employee who had left her employer because of discrimination and subsequently won her case, the tribunal could recommend that the employer should introduce an equal opportunities policy or review its policies on pay. Failure by a company to comply with such recommendations could be taken into account in any further claims against the employer.
- potentially allow discrimination claims to be brought on combined multiple grounds such as where a black woman has been subject to harassment that might not have been suffered by a black man or a white woman.
- potentially promote representation by trade unions and the EHRC to bring representative actions on behalf of employees with similar claims.

The Equality Bill will be introduced in the next Parliamentary session so the Government plans to work with bodies such as the EHRC, public authorities, financial service sector, CBI and trades unions to further develop the ideas within the White Paper.

The Government Equalities Office has stated that it will publish a more comprehensive paper on the content of the Bill during this month. In the meantime the full text of the White Paper can be found by clicking [here](#). We will continue to report and comment on the progress of the Bill during the coming months.

# Contacts

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## Taylor Wessing employment specialists

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