

# Pensions and Employment: Employment/Employee Benefits Bulletin

SLAUGHTER AND MAY

Legal and regulatory developments in Employment/Employee Benefits

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## New law

### Union blacklisting: regulations and guidance

Regulations<sup>1</sup> that make it unlawful to compile, use, sell or supply a “prohibited list” (a list containing details of persons who are or have been members of trade unions or persons who are taking part or have taken part in trade union activities, that has been compiled with a view to being used by employers or employment agencies for the purposes of discrimination) came into force on 2nd March, 2010.

The Regulations also create new rights for workers not to be subjected to detriment or dismissal for a reason connected to a “prohibited list”.

BIS has also published guidance on the new legislation, including enforcement and the remedies for breach.

The guidance is available at [www.berr.gov.uk](http://www.berr.gov.uk).

## Cases Round-up

### BA’s “no visible jewellery” policy upheld by Court of Appeal

On 12 February 2010, in **Eweida v BA plc**, the Court of Appeal upheld the EAT’s ruling that E, a Christian employee, did not suffer indirect discrimination on the grounds of her religion or belief where BA, in line with its uniform policy which prohibited the wearing of any visible item of adornment around the neck, insisted that her cross necklace be concealed. It was accepted by both parties that there was no direct discrimination.

In order to show indirect discrimination in this case it was necessary to establish that a provision, criterion or practice was applied which put Christians at a particular disadvantage when compared with other persons. A fundamental difficulty for E in advancing this case was the evidence from a number of Christians that:

*“none, including the Claimant, considered visible display of the cross to be a requirement of the Christian faith..... there was no evidence in this case that might support any suggestion that the provision created a barrier for Christians, and ample evidence to the contrary.”*

Furthermore, no other employee in a workforce numbering 30,000 had ever made such a request or demand.

The Court also rejected E’s argument that an indirect discrimination claim could be based upon disadvantage to a single individual. There was no reason to depart from the natural meaning of the word “persons” in Regulation 3 which was that some identifiable section of a workforce, quite possibly a small one, must be shown to suffer a particular disadvantage which the claimant shares.

The Court also rejected E’s use of Article 9 of the ECHR which provides the right to freedom of religion. The Court noted the ECHR decision **Kalac v Turkey** which held:

*“Article 9 does not protect every act motivated or inspired by a religion or belief.”*

The Court also noted Lord Bingham’s comment on the ECHR decisions in **R(SB) v Governors of Denbigh High School** where he held:

*“The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted employment or a role which does not accommodate that practice or observance and there are other means open to the person to practice or observe his or her religion without undue hardship or inconvenience.”*

The Court therefore endorsed the EAT’s conclusion that:

*“in order for indirect discrimination to be established, it must be possible to make some general statements*

<sup>1</sup> The Employment Relations Act 1999 (Blacklists) Regulations 2010 (S.I. 2010/493).

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*which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate adverse impact on the group.”*

The Court also found by a majority that even if E had shown that there was a *prima facie* case of indirect discrimination, E’s claim would still have failed as the policy was a proportionate means of achieving a legitimate aim (i.e. the application of a uniform code), both during the years in which the policy operated without objection and while it was being reconsidered following E’s objection. It is understood that E intends to appeal to the Supreme Court.

**Comment 1:** Since the original complaint, BA has modified its uniform policy to allow staff to wear a faith or charity symbol with their uniform. E has subsequently returned to work and is still employed by BA.

**Comment 2:** This is one of a number of cases which have considered similar issues: a contrasting result was reached in **Watkins-Singh**<sup>2</sup> which held that a pupil suffered indirect discrimination on the grounds of religion or belief where the school, in line with its uniform policy, which prohibited pupils from wearing any jewellery other than a watch and a pair of stud earrings, refused to allow S to wear a Kara (a religious steel bangle).

In this case it was found that it was enough to show that a disadvantage would be suffered if a pupil was prohibited from wearing an item when that pupil genuinely believed for reasonable grounds that wearing

it was a matter of exceptional importance to the pupil’s racial identity or religious belief and the wearing of the item could be shown objectively to be of exceptional importance to the pupil’s religion or race. S did not have to show that the item was a requirement of her religion. These requirements were shown to the satisfaction of the Court in this case, unlike in **Eweida v BA**.

Other examples of work practice which have led to a claim of discrimination on the grounds of religion or belief include:

- > diet: in **Williams v Five Rivers Child Care Consortium Ltd**, where the employer provided meals to employees, the court held the claimant (who did not eat pork) was not at a disadvantage due to lack of choice if there was always a choice appropriate to his religion,
- > prayer breaks and holy days: in **Fugler v MacMillan-London Hairstudios Ltd** it was found that the employer’s policy of discouraging employees taking holiday on a Saturday put Jewish people at a disadvantage,
- > alcohol: in **Ahmed v Tesco Stores** it was found that it was not indirect discrimination to require a Muslim warehouse worker to carry alcohol, as supplying alcohol was a legitimate aim and requiring the claimant to carry alcohol was a proportionate means of achieving that aim.

## Harassment

The law on harassment at work has been considered in the recent cases of **Rayment v Ministry of Defence**<sup>3</sup> and **Commissioner of the Police of the Metropolis and another v Osinaike**.<sup>4</sup>

### Rayment v Ministry of Defence

The claimant was a female soldier with a profoundly deaf daughter and a history of depression that she had not disclosed to her employer. The claimant brought an action in the High Court for damages pursuant to a breach of the Protection from Harassment Act (the “1997 Act”), alleging that she had suffered psychiatric damage as a consequence of separate incidents that occurred during her employment by the defendant, the Ministry of Defence, at the Honourable Artillery Company (“HAC”).

Before examining the claimant’s allegations, the court summarised the meaning of “harassment” under the 1997 Act as requiring conduct which was “oppressive and unacceptable” as opposed to just being unattractive or unreasonable, taking into account whether the conduct would “sustain criminal liability”.

The High Court did not accept that all of the alleged incidents were conduct amounting to harassment under the 1997 Act.

<sup>2</sup> R.(on the application of Watkins-Singh) v Aberdare Girls’ High School Governors [2008] EWHC 1865 (Admin)

<sup>3</sup> [2010] EWHC 218 (QB), judgment published on 18th February, 2010.

<sup>4</sup> UKEAT/0373/09/SM, judgment handed down on 22nd February, 2010.

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For example, the Court held that, as work as the CO's driver inherently involved unpredictable and long hours which was known to the claimant when she applied for the job, requiring the claimant to work late and/or lengthy hours without having satisfactorily resolved the mechanism for time off in lieu could not amount to harassment. Similarly, a conversation between 2 other employees at which it had been indicated that the claimant was not the best qualified person for the job which she had overheard also did not amount to harassment.

Other instances which did not constitute harassment included the state of the female toilets and the refusal of the employer to provide the claimant with transport to attend a medical appointment.

Indeed, the Court recognised that the employee was "challenging", and that her colleagues were increasingly frustrated by her attitude and conduct.

However, the following conduct was considered "oppressive and unacceptable" and therefore constituted harassment:

- > the failure of the defendant to remove "pornographic and offensive" photographs of women on the walls of the Military Transport restroom which had been present for about 10 years. These had initially been taken down by the claimant but were subsequently replaced by an unknown person and not removed for a further 8 months;

- > the actions of a superior officer who informed the claimant at a meeting in May, 2004 that due to an administrative error she did not have a job and must repay a month's salary. The claimant was reinstated later the same month after contacting the Army Welfare Service, who investigated the matter and wrote a letter to the Commanding Officer ("CO") heavily criticising the superior officer's handling of the matter;
- > the issuance of a final written warning from the claimant's CO. The court held that 2 of the grounds of the warning were unfair and unjust. This was because: the complaint in the written warning about the claimant's "continued absence" referred to her correctly certified medical unfitness for normal duties; and the claimant's "apparent predilection to seek reprisal for any apparent wrong doing" amounted to no more than 2 complaints, which the court found she had a right to make; and
- > the final discharge of the claimant. This was made after the warning period had expired and while the claimant was unable to return to her duties due to ill health.

Most importantly it seems the Court considered that the last 3 points noted above were all deliberate acts designed to end the claimant's employment as the CO's driver.

**Commissioner of the Police of the Metropolis and another v Osinaike**

The tribunal after an 11.5 day hearing dismissed all but one of the claimant's claims of sex and race discrimination. The upheld complaint of racial harassment was the comment "*we believe you need to see a psychiatrist*", made by a human resources manager to the claimant, a female police officer, during an occupational health meeting to discuss the claimant's substantial problems with her colleagues and difficulties with her travel after being posted to a new police station.

On appeal, the Employment Appeals Tribunal ("EAT") considered that the statement was clearly unwanted conduct as it implied that the individual was mad and that a tribunal was entitled to find this conduct had the effect of violating the claimant's dignity. The real substance in the appeal was whether the treatment could be said be on racial grounds.

The EAT found that the tribunal had erred in law in concluding that the act of harassment was on the grounds of race discrimination so that the onus of proof that there was no racially motivated reason passed to the respondent. In particular, simply showing that conduct is unreasonable or unfair (i.e. the respondent's proposal that the claimant seek psychiatric help when there were strong welfare grounds for granting her request for a transfer to a new police station) is not, by itself, enough to trigger the transfer of proof from claimant to respondent. Therefore, the appeal was successful and the claim dismissed.

## Constructive Dismissal

On 24th February, 2010, the Court of Appeal upheld the EAT's ruling, in **Bournemouth University Higher Education Corporation v. Buckland**, ([www.slaughterandmay.com](http://www.slaughterandmay.com)) that the test of the band of reasonable responses used in the consideration of whether a dismissal is fair or unfair does not apply to the question of whether an employee has been the subject of constructive dismissal.

However, the Court of Appeal rejected the decisions of both the Tribunal and the EAT that an employer who is in repudiatory breach of an employment contract can 'cure' that breach and, if the cure comes before the employee accepts the breach and resigns, prevent the employee from so doing.

Professor Buckland held a chair of environmental archaeology at the University of Bournemouth from August, 2003. In 2006, a course run by Professor Buckland resulted in a high number of failures when exam papers were marked. The University re-marked the papers, leading to complaints from Professor Buckland about the way the re-marking was carried out; the tribunal considered that these complaints were protected disclosures. A report produced in reaction to Professor Buckland's complaints largely vindicated him. However, he resigned in February, 2007, in reaction to the conclusions of the report, saying that his employment would terminate in July, 2007.

Professor Buckland brought a claim of constructive dismissal on the ground that, by ordering the re-marking of exam papers, the University had

destroyed the relationship of trust and confidence. The Employment Tribunal found that Professor Buckland had been constructively dismissed, unfairly, and that the University's report had been insufficient to cure the breach. The EAT, accepting that Professor Buckland had been constructively dismissed, unfairly, held that the University had done enough to cure the repudiatory breach of contract, before Professor Buckland had accepted the breach. The EAT held that the Tribunal had erred in law in undertaking a subjective rather than objective assessment of whether the cure was sufficient. Professor Buckland then appealed to the Court of Appeal.

The Court of Appeal first considered what is the correct test for constructive dismissal. In determining if the employee had been constructively dismissed or not, the Court held that the test was objective. The question in this case was whether the employer had, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them. The Court of Appeal upheld the EAT's decision that the band of reasonable responses test was not relevant to whether an employee was constructively dismissed but applied only to considerations of whether a dismissal is fair or unfair.

Secondly, the Court of Appeal considered if a repudiatory breach could be cured. Applying general contractual principles the Court held that once a repudiatory breach had occurred it cannot be undone, but only compensated for. Once one party was in repudiatory breach he can do nothing further to remedy the situation

- the innocent party has the clear choice of whether to accept the breach or affirm the contract.

In this case, the Court endorsed the view of the EAT that neither by waiting until February before submitting his resignation letter nor by then working until July, did Professor Buckland affirm his contract. It was entirely reasonable for Professor Buckland to await the outcome of the enquiry that led to the report (instigated shortly after the repudiatory breach) before accepting the repudiation. It was also entirely proper for him to exercise his right to repudiate by a long period of notice in order to uphold his obligations to his students.

## Unilateral variation of employment contracts: **Bateman v. Asda Stores Limited**

On 11th February, 2010, the EAT held that Asda was entitled to rely upon a statement in its employee handbook, reserving the right to vary contractual terms, in order to introduce new pay terms, without the need to obtain affected employees' express consent. While varying a contractual term without notice or consultation might amount to breach of the implied term of mutual trust and confidence, the employees in this case had not asserted such a breach.

After consultation, most of Asda's staff voluntarily moved onto a new pay regime. The remaining staff were then transferred involuntarily to the new regime under a provision in the staff handbook allowing Asda to "review, revise, amend or replace" the contents of the handbook, some sections of which were contractual, and

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introduce new policies to “reflect the changing needs of the business”.

B and around 700 other employees claimed, among other things, that they had suffered unauthorised deductions from wages in breach of Section 13 of the Employment Rights Act as a result of being involuntarily transferred to the new pay regime.

The Tribunal found that, although, as a general rule, a variation of contract requires the consent of both parties, employers can reserve the right to vary contractual terms unilaterally, even if an employee suffers financial loss as a result (**Wandsworth London Borough Council v. D’Silva**). However, such a provision should be closely scrutinised to judge whether it enables the employer to make the change. The Tribunal noted that there may be exceptions where the employer’s variation breaches the mutual term of trust and confidence, for example where the variation was unreasonable, arbitrary or capricious, or where the employer failed to give notice of, or consult on, the change.

In the present case, it was not contended that Asda had breached the mutual term of trust and confidence as it had given several months’ warning to employees before transferring them. Although, on ordinary contractual principles, Asda would have been required to obtain employees’ consent to make fundamental changes to the employment relationship, this was not necessary where the handbook contained a clear and unambiguous power to vary contractual terms to reflect the changing needs of the business. As Asda’s desire to have only one pay structure fell within “the changing needs of the business” it was entitled to vary the contract unilaterally.

The claimants’ appeal was dismissed by the EAT, which held that the Tribunal was entitled to find that the power in the handbook was clear and unambiguous and allowed Asda both to amend the handbook and to introduce new policies without employee consent. As there was no ambiguity in the wording of the power, there was no need to invoke the “contra proferentem” rule, by which the term would have to be interpreted in the claimants’ favour.

The EAT rejected the claimants’ argument that Asda’s employees, most of whom were “not well educated or even literate”, could not have conceivably intended or expected that the effect of their contracts would be that Asda could reduce pay, holiday or hours without consent or notice.

The EAT also rejected the argument that failure to make the effect of the power clear to its staff was a breach of the mutual term of trust and confidence. The issue could not be raised before the EAT as the claimants had expressly conceded before the Tribunal that there was no issue in relation to the duty of trust and confidence. The EAT therefore dismissed the appeal.

### **Holiday during sickness: Shah v. First West Yorkshire Limited**

On 20th November, 2009, the Leeds Employment Tribunal held that an employee whose pre-arranged holiday coincided with a period of sick leave should be allowed to carry over that leave entitlement to the following holiday year.

This is the first Tribunal decision giving effect to the ECJ’s decision in **Pereda v. Madrid Movilidad** (Employment Bulletin 09/15 [www.slaughterandmay.com](http://www.slaughterandmay.com)), where the ECJ held that a worker who is incapacitated during a period of previously scheduled statutory holiday should, as far as the EU Working Time Directive is concerned, have the right to reschedule the holiday to a later date, and, if necessary, to the next leave year.

The Tribunal gave effect to the decision by reading into Regulation 13(9) of the Working Time Regulations 1998 (the provision preventing carrying over of statutory holiday) words allowing holiday to be carried over to a subsequent holiday year if it coincided with sickness absence.

## Points in practice

### Childcare vouchers: proposals for reform

HMRC has published (February, 2010) a technical note on its proposed changes to the tax and NICs exemptions for childcare vouchers. The changes will apply to individuals joining a voucher scheme from 6th April. From that date, the limit on the amount of exempt income associated with childcare vouchers for employees joining a scheme will be restricted where the employee's earnings and taxable benefits are liable to tax at the higher or additional rate. Anyone already in a scheme by 5th April, 2011 will not be affected by the changes for so long as they remain within the scheme.

Childcare voucher schemes provided through salary sacrifice arrangements will fall within the new provisions.

The technical note is at [www.hmrc.gov.uk](http://www.hmrc.gov.uk).

### Fit notes: DWP Guidance

The DWP has now published guidance on the new fit notes that replace sick notes with effect from 6th April, 2010.

The guidance is at [www.dwp.gov.uk](http://www.dwp.gov.uk).

### Tribunals' Update

On 24th February, 2010, the first annual report of the senior president of the Tribunals' Service was published. It includes trends and developments relating to employment tribunals and the EAT.

**Employment Tribunals:** The workload substantially increased over the last year with an increase in single, standalone cases of around 40% and an increase in group claims. The number of equal pay claims continues to increase but the Tribunals hope to be able to resolve outstanding local authority and NHS cases over the next 12 months following recent test case decisions.

The judicial mediation pilot scheme in 2006/07 had a success rate of over 60%. The scheme was expanded to all regions in England and Wales from 1st January, 2009, with success rates being currently over 65%.

**EAT:** The number of appeals lodged has gone down slightly. More appeals are being rejected at the "sift" stage. Of the 1,794 potential appeals received in the year to 31st March, 2009, 927 were rejected. Appeals are increasingly being heard by a judge sitting alone, without lay members.

The report is at [www.judiciary.gov.uk](http://www.judiciary.gov.uk)

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