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## E-NEWS EMPLOYMENT

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### E-NEWS LATEST

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It's summer time and the silly season is upon us, so compiling our 'Human Zoo' feature for this edition of e-news was a piece of cake. Our favourite story is the one about German postmen being taught to psychoanalyse dogs, but take your pick...

On a slightly less flippant note, our latest 'inbrief' guide, included in this issue, covers the new right to additional paternity leave and pay. This will be available to fathers of children born from next April. In advance of that, it's well worth taking time to work out how the new regime will operate in practice and what changes to your policies may be required.

We'll probably have to wait until the autumn for the Government's employment law reform priorities to start taking proper shape, but at least there's now been confirmation that the main provisions of the Equality Act 2010 will be coming into force in October – click on the relevant heading below for further details.

Have a great summer in the meantime.

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### The Serious Stuff

#### Major employment law developments

#### Breach of contract – new avenue for dismissed employees?

The Court of Appeal has opened the way for employees potentially to bring substantial damages claims for a breach of a contractual disciplinary procedure.

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#### Equality Act 2010 confirmed for October

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#### Inflating maternity leaver's redundancy score was discriminatory

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### Paternity leave and pay inbrief

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## The Human Zoo

True stories from the world of work

### Firing them up

A staff motivation day organised by an Italian estate agency resulted in nine employees being taken to hospital after walking on hot coals.

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### Man's best Freud

German postmen are being taught canine psychology to cut down on the number of attacks by dogs.

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### Cowell's new contest

An unsuccessful *Britain's Got Talent* contestant has brought an employment tribunal claim against Simon Cowell.

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### Model recruitment policy

A key policy of a new political party for beautiful people in Romania is that only models in bikinis should be allowed to work as tourist guides.

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### Missing the cut

A Belfast man successfully appealed against the police's rejection of his job application because he did not have enough hair for a drugs test.

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### Saving Face?

Bucharest's deputy mayor has caused a stir by posting his resignation on Facebook and then leaving his job without telling anyone.

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### Legal re-dress

A German police officer has won the right to an extra week's holiday for the time it takes to get in and out of his uniform each day.

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### Over the road, chop chop!

A 77-year –old Norfolk lollipop lady had become the first woman to get a 7<sup>th</sup> dan black belt in ju-jitsu.

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### Mixed nuts

Airport staff in Arkansas who noticed a package was not labelled properly were shocked to discover a shipment of 40 to 60 human heads.

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### Avoidance tactic

Workers painting white lines on a road in Hampshire left a gap for a dead badger.

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## The Serious Stuff

### Major employment law developments

### Breach of contract – new avenue for dismissed employees?

#### **The Court of Appeal has opened the way for employees potentially to bring substantial damages claims for a breach of a contractual disciplinary procedure.**

Mr Edwards, an orthopaedic surgeon, was dismissed for professional misconduct. He brought High Court proceedings for breach of contract, alleging that the NHS Trust that employed him had failed to comply with its contractual disciplinary procedure. Amongst other things, this allowed him to have legal representation at the hearing, which he had been denied.

Mr Edwards' claim was for career-long loss, in excess of £4 million. The basis for this was that, had the Trust complied with its disciplinary procedure, the outcome would have been favourable to him and he would have remained in employment until he retired.

The High Court considered that the scope for Mr Edwards to claim damages was much more restricted, since his employment was subject to three months' notice on either side. On that basis, the damages could not exceed the income he would have earned during his notice period plus the length of time it would have taken the Trust to comply with the contractual disciplinary procedure. Mr Edwards appealed to the Court of Appeal.

The Court of Appeal focused mainly on the case of Johnson v Unisys Ltd [2001] IRLR 279, in which the House of Lords ruled that an employee cannot recover compensation for the 'manner of dismissal' by means of a breach of contract claim. Rather, the Lords said, the employee must bring an unfair dismissal claim in the Employment Tribunal, where the statutory limit on compensation (currently £65,300) would apply.

Taking a narrow view of the Johnson v Unisys principle, the Court of Appeal said that it prevented an employee from relying on the implied duty of trust and confidence to argue that an employer is contractually obliged to treat an employee fairly in relation to his dismissal. Mr Edwards' case was entirely different, since the disciplinary procedure was an **express** term of his contract.

On that analysis, the Court saw no reason why Mr Edwards should not be able to claim damages for breach of contract 'at large', with a view to putting him in the position he would have been in if the contract had been performed properly. Accordingly, he should have the opportunity to argue at the full trial of his case that he would have remained in employment if the contractual procedure had been followed.

## Implications

The Court of Appeal's analysis in this case is controversial and has attracted significant criticism. By focusing so heavily on *Johnson v Unisys*, the Court appears to have almost completely overlooked a significant body of case law establishing the proper measure of damages for breach of a contractual disciplinary procedure (e.g. *Gunton v Richmond-upon-Thames LBC* [1980] IRLR 321). These were the cases the High Court relied on in holding that Mr Edwards's damages were limited to his three-month notice period plus the time it would have taken to go through the disciplinary procedure.

If the Trust appeals to the Supreme Court, as expected, it will no doubt pursue this argument with vigour. But if the Court of Appeal's reasoning is ultimately upheld, the implications for employers grappling with allegations of professional misconduct are alarming.

Mr Edwards' losses, if his claim succeeds, will be very substantial because a finding of professional misconduct in a field where the NHS is a near-monopoly employer effectively prevents the individual from working again. If it can be established that following the contractual procedure would have resulted in Mr Edwards remaining in employment – which effectively requires a re-run of the disciplinary hearing at trial - it appears he would be entitled to claim career-long loss. One can easily see potential parallels with, for example, FSA-approved employees.

In the private sector, it is relatively uncommon for employers to have contractual disciplinary procedures in place, although these can sometimes be a relic of collectively-negotiated contractual terms and conditions. Any employers with such contractual procedures would be strongly advised to review the terms carefully before proceeding with a dismissal in this type of case. Indeed, had Mr Edwards acted more swiftly, he could have obtained an injunction to prevent the Trust from dismissing him in breach of its procedures.

Finally, employers introducing new disciplinary procedures should do their utmost to ensure they are not incorporated into the contract of employment. If there is room for doubt over this, the Court of Appeal's ruling gives employees a major incentive to argue in favour of procedures having contractual status.

*Edwards v Chesterfield Royal Hospital Trust* [2010] EWCA Civ 571, 26.5.10, unreported – [click here for the judgment](#)

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## Equality Act 2010 confirmed for October

**The Government Equalities Office (GEO) has confirmed that most provisions of the new Equality Act will come into force on 1 October 2010.**

The Equality Act 2010 mainly consolidates, harmonises and simplifies existing discrimination laws, but there are some notable innovations too ([click here](#) for our 'inbrief' guide).

Following the general election, it was expected that the Coalition Government would stick to the previous Labour administration's plan to implement the bulk of the Act in October whilst probably rethinking or shelving some of its more contentious novel measures. That expectation was thrown into doubt in June when the October implementation date was removed from the GEO website.

The GEO has now issued a press release ([click here](#)) which confirmed that the "first wave of implementation of the Equality Act will go ahead to the planned October timetable following the publication of the first commencement order in Parliament..."

The first commencement order duly appeared ([click here](#)), but it merely brings into force the

provisions in the Act enabling the Government to issue subordinate legislation and guidance and permitting the Equality & Human Rights Commission to issue codes of practice. The upshot is we are still awaiting exact details of which of the Act's substantive measures will come into force, and when.

In the meantime, based on various materials published by the GEO, the likely timetable for the Act's key employment provisions is set out below.

### **In force October 2010**

- Main provisions (including: protected characteristics; definitions of discrimination; harassment, victimisation etc; 'occupational requirement' defence; new disability discrimination provisions; enforcement & remedies)
- Positive action – general provision (section 158)
- Pre-employment health questions (section 60)
- Equal pay (provisions replacing and reforming Equal Pay Act 1970)
- Pay secrecy clauses (section 77)

### **In force April 2011**

- General public sector equality duty (sections 149 to 157)
- 'Combined' or 'dual' discrimination (section 14). (There is, however, a big question mark over whether the Coalition will opt to implement this at all.)

### **No implementation (i.e. shelved indefinitely)**

- Positive action in recruitment and promotion (section 159) – the controversial 'tie-break' provision
- Public sector socio-economic duty (sections 1 to 3)
- Gender pay gap reporting (section 78). (Labour had not been planning to implement this measure before April 2013, but the Coalition is likely to develop its own plans for equal pay audits instead.)

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## **Inflating maternity leaver's redundancy score was discriminatory**

### **A recent employment tribunal decision has highlighted the difficulty of taking decisions based on performance when an employee is on maternity leave.**

The case involved the law firm Eversheds, which decided it needed to implement redundancies in its real estate team. Associates in the team were scored against various criteria. One of these was 'lock-up' - the length of time between a piece of work being completed and the client paying for the work. This was calculated by looking at the associate's average lock-up on a specific date (31 July 2008).

Mr de Belin received a score of 0.5 points under this head while another employee, Ms Reinholz, who was on maternity leave on 31 July 2008, was automatically given a score of 2 (the highest possible score). As a result, Mr de Belin was selected for redundancy. Had Ms Reinholz not scored 2 under this head, she would have been selected instead.

Mr de Belin claimed that the redundancy selection scheme constituted direct discrimination on grounds of sex. He argued that automatically giving Ms Reinholz the maximum score artificially inflated her score and that, in the period before she went on maternity leave, her lock-up had been worse than his. He suggested various alternative methods of calculating her lock-up which he suggested would have been fairer to him, such as looking at the period before she went on maternity leave.

Eversheds' main defence was to rely on section 2(2) the Sex Discrimination Act 1975 (SDA), which states that any 'special treatment' afforded to women in connection with pregnancy and maternity leave must be ignored when assessing whether a man has suffered sex discrimination.

The employment tribunal decided that this provision should be interpreted narrowly. It meant that a man cannot bring a claim for sex discrimination based on the specific **statutory** protections enjoyed by women who are pregnant or on maternity leave - such as having priority for suitable alternative employment in a redundancy situation. However, if an employer goes beyond those statutory protections, a comparable man who has been treated less favourably will have a claim for sex discrimination. The tribunal therefore upheld Mr de Belin's claim.

## Implications

This decision may be appealed to the EAT, in which case it will be interesting to see the tribunal's narrow interpretation of section 2(2) will be upheld. Our gut feeling is that it is correct. It seems inconsistent with the spirit and purpose of the SDA generally to prevent male employees from complaining about more favourable treatment given to a woman on maternity leave.

If that is correct, employers should not automatically give a woman on maternity leave the 'benefit of the doubt' when assessing performance – whether this is for the purposes of a redundancy exercise, appraisal or bonus decision. Rather, they should consider whether there is any alternative way of making a fair assessment (for example, by reference to the woman's performance before beginning maternity leave).

However, this is not to say that **all** forms of more favourable treatment for women on maternity leave could potentially give rise to a sex discrimination claim. Where an employer simply provides an enhanced version of a statutory right – for example, company maternity pay – it is unlikely a male employee would be able to get a discrimination claim off the ground.

De Belin v Eversheds Legal Services Ltd, Leeds employment tribunal, case no.1804069/2009, 24.3.10, unreported

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## Perceived disability discrimination not unlawful (yet...)

**The EAT has ruled that an employee who is wrongly perceived to have a disability cannot claim under the Disability Discrimination Act 1995 (DDA). But this is set to change when the Equality Act 2010 comes into force.**

Mr Aitken was a police constable who had previously been diagnosed with obsessive compulsive disorder. At an office party in late 2005, he behaved aggressively and bizarrely. After investigation it was concluded, with medical advice, that he posed no danger to his colleagues or the public but sometimes he could not control his behaviour.

Mr Aitken took extensive sick leave and, again on medical advice, had no contact with the public in his role. He was retired on medical grounds in mid-2007. An employment tribunal dismissed his claims under the DDA for direct disability discrimination, disability-related discrimination and failure to make reasonable adjustments, so he appealed to the EAT.

One of Mr Aitken's main arguments was that he had been treated less favourably because of an (inaccurate) perception that he had a dangerous mental illness. Despite medical advice that he posed no danger to the public, he alleged that he had been treated as if he did. The EAT noted that the tribunal had made a clear finding that he had been treated as he had because of how his behaviour had appeared to others, rather than any stereotypes about mental illness.

In any case, the EAT concluded that he had been treated **more** favourably than a person who was not suspected of having a mental illness would have been treated: a non-disabled employee would probably have been dismissed immediately. The EAT also noted that the language of the DDA did not extend to discrimination on the basis of a perceived disability. It only covered discrimination against employees who were **actually** disabled.

Another of Mr Aitken's arguments, in relation to his claim of disability-related discrimination, was that he should be compared to someone who had not behaved at the party in the way he had done. However, the EAT said that the correct comparator was an employee who

had behaved in the same way but was not disabled. On that basis, this aspect of the claim failed.

In relation to the claim of failure to make reasonable adjustments, the EAT confirmed the tribunal's decision that the employer was entitled to take into account the need for a police officer not to appear to present a risk to the public, even if he did not in fact pose a risk.

## Implications

This decision appears quite useful for employers. It confirms that an employer is entitled to take into account not only the risk that an employee may pose but, where the job entails extensive contact with the public, the need for the employee not to appear to be a threat.

However, this should be applied with caution. The fact that, as a police officer, Mr Aitken was supposed to protect the public inevitably featured heavily in the assessment of how reasonably the employer had behaved. Whenever employers are considering dismissing an employee because he or she is medically unfit to perform the job, they need to consider the medical advice very carefully and assess what adjustments could be put in place, balancing the needs of the employee against the needs and resources of the business.

The Equality Act 2010 ([click here](#)) will expressly allow claims to be brought on the basis of perceived disability, which Mr Aitken was unable to do under the DDA. But even when the law changes, employers can reduce the risk of such claims by ensuring that clear and comprehensive medical advice is obtained before any action is taken on medical/capability grounds.

Another recent case, *J v DLA Piper* (15 June 2010, UKEAT/0263/09 – [click here](#)) has also confirmed that the current legislation does not cover claims based on perceived disability. This contrasts with the creative approach in *EBR Attridge Law LLP v Coleman (No.2)* [2010] IRLR 10 where, despite the clear drafting of the DDA, the EAT ruled that an individual could bring a claim for discrimination on the grounds of their association with a disabled person ([click here for details](#)).

*Aitken v Commissioner of Police for the Metropolis*, EAT/0226/09, 21.6.10, unreported – [click here for the judgment](#)

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## Caps on redundancy pay can be justified

**Applying a cap to payments under a redundancy scheme, so that employees close to pension age do not receive a windfall, can be justified as a proportionate means of achieving a legitimate aim, the EAT has confirmed.**

The case concerned a contractual redundancy scheme operated by Kraft. This applied a cap to ensure that redundancy payments would not exceed the amount that the employee would have earned - at their current rate of pay - had they remained in employment until the normal retirement age of 65.

Mr Hastie, a long-serving employee close to retirement, was concerned that he would receive a redundancy payment that was reduced by £13,600 by application of the cap. He brought a complaint under the Employment Equality (Age) Regulations 2006.

There was no dispute that the cap was a 'provision, criterion or practice' which disproportionately applied to employees nearing 65. Accordingly, it would constitute unlawful age discrimination unless it could be objectively justified by the company.

Kraft argued that the cap prevented employees receiving a windfall. The scheme was designed to compensate employees for loss of earnings they would have received had they remained in employment. As employees lost the legal right to continue employment at 65, the company claimed it was justifiable to impose a cap to ensure that payments did not exceed the sum that they would have earned up to that point.

The employment tribunal found in Mr Hastie's favour, but the EAT allowed Kraft's appeal. The EAT observed that the object of the scheme was to compensate employees for loss of

earnings they could legitimately expect to have received had their employment continued. On that basis, it was legitimate for the scheme to incorporate a cap with the aim of preventing excess compensation. Moreover, the way the limit was imposed in this scheme was a proportionate means of achieving that aim.

In reaching this conclusion, the EAT relied on observations in a previous EAT judgment, *Loxley v BAE Systems Land Systems (Munitions and Ordnance) Ltd* [2008] IRLR 853. That case concerned a redundancy scheme which calculated payments based on age and length of service, but which applied a tapered reduction for employees approaching retirement age. Without giving a definitive ruling on the point, the EAT stated that a tapering provision of this kind, which was designed to prevent a windfall, was likely to be justifiable.

### **Where does this leave us?**

Employers now have the reassurance of clear EAT authority that the use of a cap or tapering provisions in contractual redundancy schemes may be justified, where their aim is to prevent the employee receiving a windfall.

These cases were, however, decided in the context of a mandatory retirement regime. The law currently incorporates a 'default retirement age' (DRA) permitting employers to require members of staff to retire at age 65, which the Coalition Government has pledged to phase out. If and when that happens, the justification arguments used in these cases may no longer be valid. If employees have a legal right to continue working beyond 65, it is questionable whether the key contention - that employees should only be compensated for loss of earnings they would have received whilst remaining in employment – could be effective in supporting a cap or tapering provision.

*Kraft Foods UK Ltd v Hastie*, EAT/0024/10, 6.7.10, unreported – [click here for the judgment](#)

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## **Paternity leave and pay inbrief**

Our latest inbrief examines the new right to additional paternity leave and pay for fathers of children born from April 2011 and how the new regime will operate in practice.