

"at an appropriate time". However in this case, the threatened industrial = action included not only a strike but also refusal to work overtime = (clearly at different times). As voluntary overtime is the employee's own = time, this may explain how the tribunal felt able to decide that the employer = was in breach of the provision noted above.

The case was an employment tribunal case and as such it does not = set a legal precedent which other tribunals must follow. Nevertheless it = is a salutary warning for employers to tread with caution in how they = approach their workers if threatened with industrial action by members of a trade union.

- *For further information click here on [Trade union matters / inducements relating to TU membership or = activities](#) to go to notes on our website.*

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[4. Rejecting non-EU job applicants and race discrimination](#)

The Employment Appeal Tribunal recently ruled that rejecting a non-EU = foreign job applicant simply because he or she did not have permission to = work in the UK at the time of making the application is unlawful race discrimination.

An eminent firm of solicitors in Bristol, had rejected an on-line = application for a training contract from an Indian without considering it in any = detail. This was in implementation of their policy of not considering = any application from anyone needing a work permit from the Home Office = Border Agency ("UKBA"). An employment tribunal found that there was no direct race = discrimination but that there was indirect race discrimination as the proportion of non-EEA = nationals who could comply with the work permit = requirement was smaller than the proportion of persons not in that group who could = comply with it. The tribunal ruled that this indirect discrimination was = not justified and was therefore unlawful. The = solicitors appealed to the EAT against this ruling but lost.

The EAT, in [= Osborne Clarke Services v Purohit](#) on 9th February 2009, agreed with the = original employment tribunal that:

(i) there was nothing to support the assumption that an application = for a work permit for a trainee would be unsuccessful on the basis of UKBA guidelines, not least because the solicitors had never applied for a work permit for a trainee.

(ii) = it was not for the BIA to tell employers who it would = be suitable for them to employ. It is for an employer to identify = suitable candidates and then to make the case to the BIA for a work permit = if they consider there is a case to be made.

The moral for employers is that the criteria for = deciding whether to consider a job application should be based simply on = merit. Work permit issues should not be considered until later in the selection = process.

- *For further information click here on [Racial discrimination / direct and indirect discrimination](#) to go to = notes on our website.*

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5. [Employment Tribunal statistics](#)

Figures released in March by the Tribunals Service show that the = total number of employment tribunal claims for 2007/08 was up by more than 40 per cent on the previous year. The increase was from = 132,600 claims in 2006/07 to 189,300 in 2007/2008.

Many of these included claims under more than one jurisdiction - = for example, unfair dismissal and sex discrimination - so that the absolute = total was an increase from 238,546 in 2006/07 to 296,963 in 2007/2008.

For the first time (at any rate in recent years) unfair dismissal = claims have not topped the list. Unfair dismissal was 3rd by number of = claims in 2007/2008 when there were approximately 41,000 such claims (which give = or take a bit is around the normal number).

The regular increase in the number of equal pay claims each year continued. Equal pay claims now top the list. There were = 62,706 equal pay claims in 2007/2008. The number of such claims has risen = year by year since 2003/04, from 4,412 to 8,229, to 17,268, to 44,013 and to = 62,706 in 2007/2008.

The other main change over the last five years is in the number of = Working Time related claims. Working Time related claims came second in = the list in 2007/2008 when there were 55,712 such claims. The number of Working Time related claims has varied widely up and = down since 2003/04 from 16,869 to 3,223 to 35,474, to 21,127 and to 55,712 in 2007/2008.

For those interested, a summary breakdown of claims over the = last five years is available in a Tribunal Service [press release of 19th March 2009](#) .

- For further information click = here on [Employment tribunals / annual report / current](#) to go to notes on our website.

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6. [TUPE](#)

It is well known that under the "TUPE regulations" if a company = or individual sells its business to another company or individual the employment contracts of employees working in the transferred business = are automatically transferred to the new owner. Those contracts are then = treated as if originally made between the employees and the new owner.

But what happens if in such a case an employee's contract says that = terms and conditions of employment will be in accordance with a collective = agreement as negotiated from time to time by, for example, a trade union? =

The "*as negotiated from time to time*" part is an obvious = source of difficulty. Does this mean the new employer could be stuck for ever with terms negotiated in the future by or with = the previous employer or a trade association? The EAT, in a = controversial decision ([Alem= o-Herron & Others v Parkwood Leisure Ltd](#)), has in effect said that = under British law the answer is "yes".

Apart from policy considerations there are complicated technical = legal issues involved in this decision. Not least of these is that the [EC Acquired Rights Directive](#) (which the British TUPE regulations = implement) allows for the opposite answer. The European Court has ruled that contractual amendments negotiated under a = collective agreement made more than a year post-transfer between the transferor of = a business and a trade union are not covered by the Directive. The = EAT noted this but pointed out that there is nothing to prevent British regulations being more favourable to employees than required by an = EU Directive. In the circumstances outlined above, a straightforward interpretation of the British TUPE regulations ([TUPE 2006 = reg 5](#)) clearly meant that a collective agreement = would have effect as if made by or on behalf of the transferee. This interpretation = was more favourable to employees than required by the EC Directive but did = not conflict with it.

In the = [Alemo-Herron](#) case employees were employed by the London Borough of Lewisham in = the Council's Leisure Department. The relevant services were privatised in = 2002. The employees' contracts of

employment were transferred under the TUPE = regulations, first in 2002 to a company called CCL Ltd and then in May 2004 to = Parkwood Leisure Ltd. The contracts with Lewisham provided for terms and = conditions of employment to be in accordance with collective agreements = negotiated from time to time by the National Joint Council for Local Government = Services. The effect of the EAT decision is that Parkwood has to honour revised = terms negotiated by the National Joint Council for Local Government Services, finalised in July 2004.

Clearly this is an important case. Recognising this, the EAT gave Parkwood leave to appeal to the Court of Appeal. So = watch this space - and in any situation where the TUPE regulations may come = into play, be careful and take expert advice in good time if there is any = uncertainty as to the position.

- *For further information click here on [Transfer of business or undertaking / change in terms of employment = after](#) to go to notes on our website.*

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7. [Holidays](#)

There are two points regarding annual holiday = entitlement to note in this month's newsletter.

Firstly, the minimum annual paid holiday entitlement for most = full time workers increases to 28 days from April 2009. This is 8 days more = than the absolute minimum required by the EC Working Time Directive so the 8 = extra days are not subject to EC requirements. It follows that it = will be possible, if employer and worker agree, for the 8 additional days = to be carried forward from one year to the next. Also in respect of = the 8 extra days there is no requirement to round up part days' holiday = entitlement.

Technically, the entitlement is to 5.6 weeks in the leave year April = 2009 to March 2010 and thereafter, subject to a maximum of 28 days. = Mathematicians can check but this works out at 28 days for a worker who works 5 days = per week, pro rata less for those who work less.

It should be noted that bank and public holidays count towards the 28 = days. Therefore, assuming 8 bank holidays in a year, the new = rules make no difference to the minimum amount of holiday which can be taken in cases where the employer already allowed 20 days = annual holiday plus paid bank holidays.

Secondly, there has been a recent [EAT decision](#) concerning the holiday entitlement of school teachers, = professional footballers, off-shore workers and anyone else whose = normal work routine involves substantial off duty periods. The effect of = the decision, which concerned holiday rights of workers on-off shore rigs, is to confirm that the employer can insist that = the statutory annual holiday entitlement of such persons is, in effect, = subsumed into their off-duty time. Thus school teachers, for example, = cannot normally take their statutory paid holiday entitlement during term = time unless, of course, their employer agrees to let them do so.

None of this affects the basic position under the Working Time Regulations that an employer can stipulate when a worker is to = take the holiday to which he or she is entitled provided = he gives advance notice of at least twice as long as the amount of holiday = to be taken (and vice-versa - subject to any contrary = agreement a worker can give his employer notice of intention to take holiday = which must be at least twice as long as the amount of holiday to be taken).

- *For further information click here on [Holidays / 2007 changes](#) and/or [Working Time Regulations / holidays](#) to go to notes on our website.*

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[8. Discrimination on grounds of religion or belief](#)

Discrimination against an employee on grounds of religion or belief = is unlawful under the [Employment = Equality \(Religion or Belief\) Regulations 2003](#) . An amendment = made in 2007 ensures that any philosophical belief is covered = whether or not "similar" to a religious belief.

An employment tribunal has ruled in March 2009 that belief in = the importance of the environment and climate change can amount to a = philosophical belief within the meaning of the regulations as amended. =

Tim Nicholson was head of sustainability at a large residential = property investment company, Grainger plc until he was made redundant in = July 2008. He considers that he was selected for redundancy = because of his strong belief in the importance of the environment which did not = fit neatly with his employer's commercial interests. He is claiming that = his selection for redundancy was thus in breach of the = religion and belief regulations and on that basis he is arguing that his = redundancy dismissal was unfair.

At a preliminary tribunal hearing in London Grainger plc sought to = have Mr Nicholson's attempt to use the religion and belief = regulations struck out. The employment judge refused. Therefore unless Grainger = plc appeals or settles out of court, the next stage is for the = case to go to a full tribunal hearing. It is understood this is likely to = take place in early June.

- *For further information click here on [Religious discrimination / new regulations 2003](#) to go to notes on our = website.*

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[9. New cases statutes and regulations](#)

You can find on our website summaries of all employment law **cases** reported in the most recent editions of = the IRLR and ICR Law Reports (the two leading series of law reports covering = employment law cases). You can also find on our website notes on all recent employment law = related **Acts of Parliament** and = **Bills** currently before Parliament.

- *For further information generally click here on [List of Summarised Cases](#) and/or on [Acts of Parliament etc](#) and/or on [Bills before Parliament](#) to go to notes on our = website.*

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[10. ... and finally](#)

It's never too late. Two Immigration judges, Jeremy Varcoe = and Stuart Southgate, brought an age discrimination claim against = the Ministry of Justice over being forced to retire at 70.

Although they pointed out that other immigration judges had, on reaching 70, been able to apply for one-year extensions where that was thought to be in the public interest, they have lost their case. An employment tribunal in Reading has ruled that although it was age discrimination for the Ministry of Justice to fail to renew their contracts on the grounds, the discrimination was not unlawful because their enforced retirement at age 70 was a statutory requirement. And in any event the Ministry of Justice had shown, perhaps somewhat brutally, that their services were no longer needed.

A sad Judge Varcoe is reported in [the Times](#) (26th March 2009) to have said: "*I believe that it is only right that there should be retirement ages for judges, like anyone else. However, I still believe I could have made a worthwhile contribution to the immigration jurisdiction.*"

- For further information click here on [Age discrimination / 2006 regulations / justification defence](#) to go to notes on our website.

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prepared April 2009.

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