• Maximum statutory redundancy pay for an individual is (currently) = £9,900, achievable only by an employee aged over 61 with 20 years continuous = service. Maximum unfair dismissal compensation is generally £72,900 (in some = cases there is no statutory limit).
• Age discrimination. Since October 2006 age limits for = entitlement to redundancy pay have been removed but the = age-related parts of the formula for calculating statutory redundancy pay have not been = removed.
• The same minimum statutory dismissal procedures must be observed = when a dismissal is by reason of redundancy as when dismissal is for any = other reason.
• An employee being dismissed by reason of redundancy is entitled to = notice.
• Special consultation rules apply if 20 or more employees are to be = dismissed at one establishment within a 90 day period and employment = tribunals can award very substantial "protective awards" if these consultation rules are not followed.

- For further information click here on Redundancy / Calculator (redundancy pay) to go to notes on our = website.

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2. Redundancy (some subtleties)

And here are 10 less basic points about redundancy dismissal to = bear in mind:

1. It is a criminal offence for an employer to fail to give = written details of calculation of a redundancy payment to a redundant = employee.
2. An employee may be able to claim the equivalent of statutory = redundancy pay from the State if his employer fails to pay it.
3. If an employee is made redundant without being told why he was = selected, it is likely that an employment tribunal would find the dismissal was = unfair dismissal for that reason alone.
4. It is a breach of the Part-time Workers (Prevention of Less = Favourable Treatment) Regulations 2000 to select employees for redundancy = by virtue of their status as part time workers, unless justifiable on objective = grounds.
5. Until October 2006 statutory redundancy pay due to an employee would be reduced or extinguished if he or she was = entitled to an occupational pension starting within the 90 weeks after the = redundancy. This is no longer so.
6. If a woman's job becomes redundant while she is on maternity leave she will be treated as automatically = unfairly dismissed if the employer had a suitable available vacancy but = failed to offer it to her. A "small employer exception" to this rule was = ended in April 2007.
7. Civil servants are not eligible for statutory redundancy pay but = their terms of service usually give them equivalent or better rights by = contract. Local Authority staff and other public sector = employees who are not civil servants are eligible for statutory redundancy pay under = normal rules.
8. In deciding whether selection of an individual for redundancy was = unfair (so that the employee concerned can claim unfair dismissal) = an employment tribunal must not substitute its own view for that of = the employer as to what was reasonable either in respect of = redundancy selection criteria or implementation of the criteria. Rather the = tribunal must consider the wider question of whether the selection = was one that a reasonable employer acting reasonably could have made.
9. Where a business is closing and 20 or more employees at one = establishment are being made redundant the employer's statutory obligation to = consult extends to consulting about reasons for the closure. Only in the = rare situation where there is to be closure but redundancies could be = avoided will consultation over the closure decision itself not be needed.

10. If an employer provides enhanced redundancy pay (ie an = amount greater than that calculated in accordance with the statutory formula) = it is unlawful age discrimination to pay all those being made redundant = an amount calculated solely by reference to length of service or to pay = them a flat amount regardless of age unless this can be objectively = justified. Instead the enhanced redundancy pay must be calculated by applying the = different multipliers which apply for different age groups where the = statutory minimum is being paid.

- For further information click here on Redundancy= to go to notes on our website.

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3. Flexible working - April 2009 changes

Since April 2003 parents and others responsible for looking after = children aged under 6 (or under 18 if the child is disabled) have had = a legal right to ensure that requests for flexible working arrangements (such as = part-time work or working from home) are taken seriously by their employers. An = important condition is that the employee must have been employed in his job for at = least 6 months to be eligible.
In April 2007 the right to request flexible working was extended to = employees with responsibility for caring for (i) spouses/ partners (ii) adult = relatives as defined and (iii) adults living at the same address as the employee.
There has been recent consultation about extending the right to all parents with = children under the age of 16. The government has now announced = that this extension is to come into effect in April 2009.
A further change in April 2009 will be removal of the obligation on = an employer (currently often not observed) to give written notice to an = employee of agreement to flexible working arrangements. The obligation to = write will NOT be removed where the employer refused a flexible working = request.

- *For further information click here on Flexible Working to go to notes on our website. =*

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4. Disability discrimination - the mystery of the blind man and his = dog

One of the perennial problems of human life is deciding who is = responsible for what. Where does the buck stop? The question = is most clearly confronted in legal disputes and is thus one which judges = and lawyers consider on a daily basis. Different circumstances = and different conditions require different answers and in laying down = guidelines the courts sometimes bring about what can best be described as a = seismic shift.
Something along these lines seems to have happened recently. A = ruling by the House of Lords at the end of June may have major repercussions, = not least in the context of employment law, in relation to responsibility for the treatment of people suffering from a disability. Depending on how = other courts apply the House of Lords decision in *Mayor and = Burgesses of the London Borough of Lewisham v Malcolm (25th June = 2008)* it may be that employers will have considerably less responsibility = towards

disabled employees than was previously the case. By way of gross over simplification of a technical issue concerning proper choice of = comparators, this is what has happened:-

In the early days of the Discrimination Act 1995 there was a question = as to whether dismissal of an employee who had been absent = from work for a considerable time because of a disability was or was not unlawful discrimination. The wording of the Act was ambiguous. It enabled the employer to argue that the reason for the dismissal was the employee's absence not his = disability and that on that basis there was no discrimination as any employee absent from = work for a considerable time would be dismissed. On the other hand the employee could argue that if it were not for his = disability he would not have been absent and that if he were treated less = favourably than other employees because of his absence this was discrimination by = reason of his disability.

This is where the blind man and his dog came in. When = Parliament was considering what became the Disability Discrimination Act 1995 the = Minister for Social Security gave an example. He said that if dogs were not = allowed in a restaurant and as a result blind people with guide dogs were not = allowed in, then when the Bill became law this would be prima facie unlawful discrimination. Taking its cue from this, the Court of = Appeal ruled in *Clark= v TDG Ltd, t-a Novacold* [1999] ICR 951 that in the "absence = from work dismissal" example above, the dismissed employee could bring a = disability discrimination claim. The employer might in some situations be = able to avoid liability on the basis that the discrimination was justified = but the onus would be on the employer to show that this was the case. The important point was that it was not open to the employer to = avoid liability by using the argument outlined above. Ever since = then the courts have interpreted the Disability Discrimination Act 1995 in = accordance with the Court of Appeal's 1999 decision - until 2008, that is.

Now, in a non-employment law case, the House of Lords has thrown = doubt on whether the *Novacold* was correctly decided. A Mr Malcolm = rented a flat from the London Borough of Lewisham. He was a secure tenant but = under the Housing Acts could lose his tenancy if he sub-let without the = Council's consent. Mr Malcolm had the right to buy his flat but when he tried to = exercise that right the Council found that he had sublet it without their = consent. The Council served him with a notice to quit. Mr Malcolm replied that he = suffered from a disability, that the reason he had sublet the flat was because = his disability prevented him living there, that the Council's action in = serving a notice to quit amounted to unlawful disability discrimination and that = it followed that he was legally entitled to exercise his right to = buy.

On the basis of the blind man and his dog example and of the *Novacold* decision, there was force in Mr Malcolm's argument. Indeed he won in the Court of Appeal. However = Lewisham appealed to the House of Lords which, *"with some hesitation"* = and *"not without misgivings",* overruled the Court of Appeal = by a majority and held that the service of the notice to quit was not disability discrimination.

Unless Parliament clarifies the law there will no = doubt be much argument in other cases before the position is clear. Argument is = likely to concentrate on two important differences between the = *Novacold* and *Lewisham* cases. Firstly, the *Lewisham* case did not concern the employment related = part of the Disability Discrimination Act - but the wording involved is = exactly the same in the employment related part. Secondly, an important = consideration in the *Lewisham* case was that when the Council served = the notice to quit it did not know that Mr Malcom was disabled whereas in the *Novacold* case the employer of course knew the employee was disabled.

In short, the full effect of the House of Lords decision in June 2008 = for employers is not yet clear. Employers may be encouraged by the decision = but should not give three cheers - one maybe and possibly two. As so = often, this is now another of those "watch this space" subjects.

- *For further information click here on Disability Discrimination / comparator to go to notes on our = website.*

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5. Disability discrimination - help for carers

In contrast to the case noted above which appears to favour = employers, another recent case (this time in the European Court) clearly favours employees.
In essence the point in dispute was "Can the working mother of a = disabled child win a disability discrimination claim if her employer refused = to give her the same flexibility as regards her working arrangements = as given to colleagues with non-disabled children - and called her 'lazy' when she = sought to take time off to care for the child"? The = European Court has said "yes, that is unlawful disability discrimination".
On the face of it, the Disability Discrimination Act 1995 gives = rights to employees who suffer from a disablity. It would need a = stretched interpretation of the Act for it to be used to give healthy = employees the right to take time off to care for a disabled person (the Flexible = Working regulations noted above are more obviously relevant in that = situation).
However as the result of the ruling by the European Court = of Justice in *Coleman= v Attridge Law & anor 2008* the British Act will either have = to be amended or be given that stretched interpretation. The ECJ has = ruled that "*Where an employer treats an employee who is not himself disabled = less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable = treatment of that employee is based on the disability of his child, whose care is = provided primarily by that employee .....*" the employer is in breach = of EC anti-discrimination law.
The case concerned a Ms Coleman who has a disabled son, born in 2002, with specialised caring requirements. She was employed by = Attridge Law, a firm of solicitors. She requested flexible working = arrangements in order to care for the boy. Attridge Law refused the request. Amongst other claims she brought before the London South employment = tribunal, Ms Coleman sued Attridge Law for disability discrimination. The = tribunal referred the question of principle to the European Court which, in July = 2008, handed down the ruling noted above.
The repercussions of the ECJ decision are likely to be considerable. Although Ms Coleman's case was concerned with = disability discrimination, the same principle presumably applies to = discrimination by reason of religion and belief, age, or sexual orientation as they are covered by the same EC anti-discrimination law. Thus it = seems that, as a result of the European Court's ruling, British law will have = to recognise that employees can bring claims against their = employers if they have been discriminated against because of association with a person of = a particular age, sex, religion, belief or sexual orientation as well as = because they are caring for a disabled person.

- *For further information click here on Coleman= v Attridge Law & anor ECJ 2008 to go to notes on our website.*

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6. Rights during additional maternity leave

Entitlement to maternity leave is 52 weeks and is available as of = right to all employed mothers.
Until recently there were potentially significant differences between = the rights of a woman during the first 26 weeks of maternity leave = ("ordinary maternity leave") and those to which she was entitled thereafter ("additional maternity leave"). Further, until recently not all = women were entitled to additional maternity leave - the requirement for = a woman to have been in continuous employment with the same = employer for (roughly) nine months before her expected week of childbirth as a = condition of entitlement was progressively removed during 2006 and early = 2007
New rules were introduced in April and July 2008 which now, = for most practical purposes, abolish the remaining differences between = ordinary and addtional maternity leave. These rules are the Sex =

Discrimination Act 1975 (Amendment) Regulations 2008 and the Matern= ity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) = Regulations 2008 .
Under the new rules, a woman's rights during additional maternity leave are upgraded to be the same as her rights during ordinary = maternity leave and only minor differences continue (for example in regard to the = notice which a woman must give if she intends to return to work early). The new = rules apply if the woman's expected week of childbirth begins on or = after 5th October 2008 and so are already operating. The overall result is that for most practical purposes the = distinction between "ordinary" and "additional" maternity leave is now of academic = interest only. Employers must make sure that their maternity leave policies are = adjusted accordingly.
For clarity, we should point out that the Statutory Maternity = Pay rules do not (yet) mirror the rules for maternity = leave. SMP is, of course, a state benefit, albeit paid by employers through the normal = payroll, funded by adjustments to their liability to pay national insurance contributions. The period for which SMP is payable was increased from 26 = to 39 weeks in April 2007 and the government is on record as hoping to = extend it to 52 weeks by 2010. If and when this is achieved the SMP period will be aligned with maternity leave. Perhaps by then the now = rather artificial distinction between ordinary and additional maternity leave = will be removed.

- *For further information click here on Additional maternity leave to go to notes on our website.*

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7. New regulations effective 1st October 2008

As a general rule, the government tries to ensure that new employment = law related regulations come into force on 6th April and 1st October in each = year. The following employment law related regulations = announced by the beginning of September come into force on **1st October 2008** *(see also notes above on "Rights during additional = maternity leave")*:-

- The National **Minimum Wage** Regulations 1999 = (Amendment) Regulations 2008, SI 2008/1894 *(go to our notes on Minimum Wage / 2008 increases)*
- The **Employers' Liability (Compulsory Insurance)** = (Amendment) Regulations 2008, SI 2008/1765 *(go to our notes on Employers' liability Insurance).*
- The **Mesothelioma** Lump Sum Payments (Claims and Reconsiderations) Regulations 2008, SI 2008/1595
- The **Mesothelioma** Lump Sum Payments (Conditions = and Amounts) Regulations 2008, SI 2008/1963
- The **Social Security** (Recovery of Benefits) (Lump = Sum Payments) Regulations 2008, SI 2008/1596
- The Occupational **Pension Schemes (Transfer = Values)** (Amendment) Regulations 2008, SI 2008/1050
- The Personal and Occupational **Pension Schemes** = (Amendment) Regulations 2008, SI 2008/1979
- The **Armed Forces** Act 2006 (Commencement No. 3) = Order 2008, SI 2008/1650
- The **Police** Authority Regulations 2008, SI 2008/630 in so far as they revoke the Police Authorities = (Selection Panel) Regulations 1994
- The **Metropolitan Police** Authority Regulations = 2008, SI 2008/631 apply in respect of appointments of members of the = Metropolitan Police Authority taking effect on or after 1st October 2008
- The **Companies Act 2006** (Commencement No. 6, = Saving and Commencement Nos. 3 and 5 (Amendment)) = Order 2008, SI 2008/674

Links to our notes on the more generally significant of the new regulations are provided above. Full text is available on the = government SI's = website. Any one who may be affected by any of the new regulations who is not = aware of their requirements should, of course, consult their advisers.

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8. 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), of recent employment law = related Acts of Parliament and employment law related Bills currently before = Parliament and notes on significant new employment law related secondary = legislation (statutory instruments, orders and regulations).

- *For further information click here on List of Cases and/or Acts of Parliament etc and/or Bills before Parliament to go to notes on our = website.*

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9. and finally .....

For an unusual slant on the law against sex = harassment at work a report in the Daily Telegraph of 30th July 2008 would be hard to beat. The article concerns a case brought by a 22-year-old female advertising = executive from St Petersburg
She is quoted as telling the Russian judge that her middle aged male = employer "always demanded that female workers signalled to him with their eyes = that they desperately wanted to be laid on the boardroom table as soon as he gave = the word. I didn't realise at first that he wasn't speaking = metaphorically". According to the article the judge ruled: "If we had no sexual = harassment we would have no children". The article says that only two women have won = sexual harassment cases in Russia since the collapse of the Soviet Union, one = in 1993 and the other in 1997. This case did not add to the number.

- *For further information click here on Sex discrimination / harassment at work to go to notes on our = website.*

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