

[Kulkarni = v Milton Keynes Hospital NHS Foundation Trust.](#)

In August 2007, shortly after starting work for Milton Keynes = Hospital NHS Trust, Dr Kulkarni was accused of improperly touching a patient. The = patient had complained that he inappropriately examined her by placing a stethoscope = under her knickers without her permission. He was suspended with immediate = effect, on full pay, pending an investigation into the matter.

Dr Kulkarni was not allowed legal representation at the subsequent disciplinary hearing. He appealed to the High Court on the basis that = this infringed his Human Rights ([ECHR = Art 6](#), right to a fair trial). The High Court rejected his appeal, = holding that his Human Rights were adequately protected by his rights to take the matter on to the General Medical Council and/or an = employment tribunal.

Dr Kulkarni appealed to the Court of Appeal and won.

The Court of Appeal's decision was mainly based on the wording = of the NHS disciplinary procedure set out in a document called = "Department of Health Circular HC90(9)". This of course makes the case important for = all doctors and dentists. However the Court of Appeal went further = than that. It also took the view that refusal to allow Dr Kulkarni = legal representation at his disciplinary hearing could infringe his human rights. This is in line with another recent case, which was not = mentioned in the Court of Appeal judgment. In the other case the High = Court held that a school teacher had the right to representation by a lawyer = at an internal disciplinary hearing which could lead to his name being added = to the POCA list of those not allowed to work with children (*R (on app'n of = "G") v Governors of "X" School, 18th March 2009*)

The importance of these decisions is mainly in relation to public = sector employees. This is because, although the [Human Rights Act 1998](#) does not make the European Convention on Human Rights = part of UK domestic law, it does enable private citizens to enforce = convention rights against public authorities through the domestic courts.

In the present case, the Court of Appeal (Lady Smith, with whom the = other two Lords Justices agreed) said:

"With respect, I cannot agree with that view [ie = the view of the High Court as noted above that Dr Kulkarni's Human = Rights were adequately protected by his rights to take the matter on to = the General Medical Council and/or an employment tribunal]. = Certainly a doctor appearing before the GMC has full rights of representation but = the process there undertaken cannot be described as 'subsequent control by = a judicial body' of the disciplinary proceedings. First of all, the GMC = is not a judicial body. Second, it does not conduct an appeal from the = disciplinary proceedings by the employer. It decides whether the doctor's fitness = to practise is impaired. I entirely accept that consideration of that = issue would, in the case of Dr Kulkarni, include deciding whether he had = indeed touched his patient improperly as alleged in the disciplinary = proceedings. And I also accept that, if the GMC found that he had not, he should be = able to obtain employment again within the NHS. But there is no certainty that = there will be GMC proceedings. The doctor cannot instigate = them".

It is understood that there is likely to be a further = appeal to the House of Lords (or rather to the new "[Supreme Court for the United Kingdom](#)" as that will take over the = judicial functions of the House of Lords when it opens in October 2009)

- *For further information generally click here = on [Human Rights / fair trial](#) and/or [Disciplinary procedures / Right to be accompanied](#) to go to notes = on our website.*

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2. [When does the law say a fit person is disabled?](#)

Actually the law is not that daft. But in early 2009 the House of Lords ruled that the definition of a "disabled person" in the Disability Discrimination Act 1995 is wider than had previously been thought. The Act provides that a person is disabled for its purposes if = "*he has a physical or mental impairment which has a substantial and = long-term adverse effect on his ability to carry out normal day-to-day activities*". The Act also provides that if the = impairment has ceased to have such an effect "*it is to be treated as continuing to = have that effect if that effect is likely to recur*". In other words = the DDA caters for the possibility of someone who is currently = fit being able to claim protection under it - provided they previously suffered from a qualifying disability and that it is likely = to recur.

The House of Lords decision is to the effect that "likely to recur" = must be given a wide meaning. It could be argued that it means = "more probable than not" or "more than a 50/50 chance". The House of Lords has = said that would be wrong. The House of Lords has said that the proper meaning of = "likely to recur" in this context is simply "could well happen". One of = the Law Lords, Lord Rodger, pointed out that, if the background is one where a = doctor sees fit to continue to prescribe treatment, then that demonstrates that = a recurrence "could well happen" and should lead an employer to conclude that recurrence is "likely".

In the case in question (*SCA Packaging Ltd v Boyle [2009 UKHL 37]*) a Mrs Boyle was employed by SCA Packaging from 1969. She had suffered from nodes on her vocal cords which = were removed by surgery and did not recur after 1992. In 2000 her line management changed. Managers sought to take down a partition which would = expose her to more noise and so require her to talk more loudly. = That could cause a recurrence of her problem. She argued that this was a failure to = make reasonable adjustments as required by the Disability Discrimination = legislation and then, when in 2002 she was made redundant, that it was an act of = unlawful victimisation.

All parties accepted that it was possible that the problem = might recur. The question was whether it was likely to = recur. If so, she could make a claim; if not, not. As can be seen from the = above, the House of Lords decided in favour of Mrs Boyle. Baroness Hale held = that the previous use of a "*more probable than not*" test should no = longer be followed. Lord Brown considered that it was sufficeint to establish that = the condition "*could well recur*". Lord Hope disapproved of an = approach involving percentages of chance, saying that the purposes of the Act are = best served by a "*broader and less exacting test*". So whether or = not Mrs Boyle was in fact fit was not important. What mattered was that her = disability was "likely to recur". That meant she was disabled for purposes of the = Act and so the case was returned to the original tribunal (in Northern = Ireland) for hearing on its merits

- *For further information generally click here = on [Disability Discrimination / meaning of disability](#) to go to = notes on our website.*

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3. [Official review of default retirement age](#)

Before introducing anti-age discrimination rules in 2006 the = government announced that it would review in 2011 the provision = setting out a "default retirement" age of 65. As recently as May 2009 the [government confirmed](#) its intention to hold the review in = 2011.

Now, a couple of months later, the Government has issued a = consultation paper which announces a change of plan "*in the light of economic circumstances*". It has now decided to bring the review forward = to 2010 and says that it has "*started the process of engaging with = stakeholders and gathering evidence to inform the review*".

The "default retirement age" of 65 is really no such thing. More = accurately it is an exemption from the anti-age discrimination = rules introduced in 2006 to ensure that subject = to specified procedures being followed an employer can require an employee = to retire at age 65 or over without thereby being liable for unfair dismissal.

The government appears to be in two minds as to what should be done.

On the one hand its stated long term aim is to remove the exemption entirely. However the Observer newspaper reported in March 2009 that the Department for Business, Enterprise and Regulatory Reform (now BIS) wanted to retain the default retirement age and that a government source said that if it was abolished the result would be "industrial tribunal after tribunal" as employers found other excuses to get rid of older workers (the [Observer, 8th March 2009](#) "Cabinet split over right to stay in work after 65").

On the other hand it is worth noting that there are immediate cash advantages to the government in employees working beyond 65. This is because employers continue to be liable for employer National Insurance Contributions on employees over 65. What's more the employer's NIC contributions are at the same rate for employees over 65 as for other employees. Further many employees are likely to defer claiming State Pension until after they have retired. Whether for this or other reasons, the government's short term objective, subject to consultation, appears to be to increase the default retirement age from 65 to some as yet unspecified age (it may be relevant that the 2007 Pensions Act already provides for the State Pension Age to be gradually increased to 68, albeit only in the fairly distant future).

All this probably makes it more rather than less likely that bringing forward the review of the default retirement age will soon lead to a proposal to change the law, if not to abolish the default retirement age at least to increase it in the fairly near future.

In the meantime Age Concern and Help the Aged have not yet given up their well publicised but uphill struggle in the *Heyday* case to have the current age 65 "default retirement age" declared unlawful as contrary to EU age discrimination rules.

Finally it should be noted that the consultation noted above, "[Building a society for all ages](#)" (13th July 2009), considers various aspects of provision for older people and is not solely concerned with changing or removing the default retirement age. It closes on 12th October 2009.

- *For more information generally click here on [Age discrimination / 2006 regulations / retirement and/or Acts of Parliament etc / Pensions Act 2007](#) to go to notes on our website.*

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[4. Confirmation of pay and compensation changes on 1st October 2009](#)

The [National Minimum Wage Regulations 1999 \(Amendment\) Regulations 2009](#) were made on 15th July. They confirm previously announced increases in the NMW from 1st October 2009 and also amend the main regulations to ensure that tips (eg in restaurants) can no longer count towards the minimum wage as was previously sometimes possible.

The main changes are as follows:

- the adult National Minimum Wage (for those aged 22 or more) increases from £5.73 per hour to £5.80;
- for 18-21 year olds the NMW increases from £4.77 to £4.83; and
- for 16-17 year olds the NMW increases from £3.53 to £3.57.

On the same day, 15th July, regulations were made to confirm the proposal announced in the Spring 2009 Budget to increase from £350 to £380 the maximum amount of a week's pay to be taken into account when calculating statutory redundancy pay and certain employment tribunal awards (the [Work and Families \(Increase of Maximum Amount\) Order 2009](#)). This also comes into effect from 1st October 2009 and replaces the normal 1st February index linked adjustment for 2010. It reflects the fact that the RPI in September 2009 (upon which such an increase would normally be calculated) is likely to show a decrease rather than the normal increase.

For agricultural workers DEFRA has announced a new Agricultural Wages = Order, also to come into effect from 1 October 2009. The minimum = basic Grade 1 pay rate for farm workers over compulsory school age will increase by = 1.2% from £5.74 to £5.81 per hour, whilst the minimum pay rates for = Grades 2-6 will increase by 2.2%. The rates for Apprentices in Year 1 will = increase from £3.53 to £3.57 per hour and in Year 2 from £3.53 to = £3.57 for 16-18 year olds, from £4.77 to £4.83 for 19-21 year olds and from £5.73 = to £5.80 for those aged 22 and over.

The Scottish Agricultural Wages Board has also proposed minimum wage increases to come into effect for agricultural workers in = Scotland (to £5.80 per hour rising to £6.32 after the first 26 weeks = employment with the same employer).

- *For further information generally click here = on [Minimum Wage / 2008 and 2009 increases](#) and/or [Minimum Wage / agricultural workers](#) to go to notes on our website.*

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5. [Consultation and TUPE](#)

When a business (as opposed to shares) is being sold the TUPE regulations impose obligations on the seller and = purchaser to provide specified information to affected employees or their representatives. In some circumstances (technically, where any = "*measures in relation to an affected = employee*" are being taken) there must also be proper "consultation".

The regulations provide that if an employer has failed to inform or = consult as required a disaffected employee may present a complaint to an = Employment Tribunal. The tribunal can make an award of "appropriate compensation" = of up to 13 weeks' pay. Indeed unless there are mitigating factors the = award is likely to be the maximum, 13 weeks' pay, because the EAT ruled in = 2005 that, in spite of its name, the "compensation" is in fact a punitive award designed to be a deterrent and is not = compensation for loss.

The detail about who should be informed/consulted and of who can = present a claim to an employment tribunal if the employer(s) fail to comply with = their obligation is complicated. It all depends on whether employee representatives have or have not been elected and whether members of a recognised independent trade union are involved.

This was highlighted recently in an employment appeal tribunal = case. Workers on Liverpool Council housing stock were transferred from = Enterprise Liverpool Ltd to two other companies. The TUPE regulations = applies but it was not clear that the correct consultation procedures had been = followed. A group of workers sued. The employers said, in effect, "sorry = chaps - you have no standing to sue as you were all members of either UCATT or = UNITE, both of which are recognised independent trade unions and the relevant part = of the TUPE regulations (reg 15(1)(c)) provides that, on the facts of this case, any claim must be made by the trade unions not by you as individuals".

The obvious answer was to start again with the Trade Unions as claimants. However, by the time the matter came to the attention = of the Unions' solicitors it was too late. Any such claim would have been out = of time.

Time limits for making tribunal claims are generally strictly = enforced so, presumably for that reason, the Unions tried a more subtle tack. = They applied to the employment tribunal for permission to amend the = claim so as to replace the individual claimants with UCATT and = Unite. The tribunal gave that permission. The employers appealed to the EAT = but lost. The basis of the quite complicated EAT judgment was the simple = proposition that it was correct "*to take into account all the circumstances and = balance the injustice and hardship of allowing the amendment against the = injustice and hardship of refusing it*".

The important practical message lies not so much in the outcome = of the case as in the fact that it shows how even a substantial employer = can be confused as to how properly to implement the information = and

consultation rules in the TUPE regulations. It is a complex area and anyone involved in a prospective TUPE transfer should ensure that they take expert legal advice well in advance.

- For further information generally click here on [Transfer of business or undertaking / consultation / basic position](#) = to go to notes on our website.

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[6. Whistleblowers' allegations to be sent by tribunals to regulatory bodies?](#)

The Department for Business, Innovation and Skills (BIS) replaced the Department for Business, Enterprise and Regulatory Reform (BERR) in June 2009 (only two years after the BERR had replaced the DTI). One of the first actions of the BIS has been to launch a consultation on facilitating the exchange of information between employment tribunals and regulators in whistleblowing cases.

Employment Tribunals already, as a matter of course, notify Acas (the semi-official arbitration and conciliation service) of most claims so that Acas can offer its conciliation services to the parties. The new suggestion is that, subject to safeguards, tribunals should also be given power to forward to the "relevant regulator" any claims which involve whistleblowing allegations (PIDA or Public Interest Disclosure Act claims). The underlying issue, for example non-compliance with health & safety law or care home standards, could then be investigated quickly by the appropriate regulator.

In more detail [the BIS consultation](#), entitled "Employment Tribunal claims and the Public Interest Disclosure Act, July 2009", suggests that whenever a claim form is lodged with an employment tribunal discloses a PIDA allegation, the employment tribunal would have power to send a copy directly to the relevant regulator. It is suggested that this should be done if, but only if, the claimant has ticked a "yes" box on the form.

Last year, employment tribunals received around 1,700 claims involving Public Interest Disclosure Act allegations.

The consultation closes on 2nd October 2009. It says that 6th April 2010 is the intended commencement date for the new arrangements. As it includes complete draft regulations to implement the suggestion, it seems likely that that date can be met.

- For further information generally click here on [Whistleblowing / a general note](#) to go to notes on our website.

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[7. Will MPs need a criminal record check to visit schools?](#)

The government has recently circulated leaflets outlining the new "Vetting and Barring Scheme" (or VBS) designed to improve on current arrangement for helping to prevent unsuitable people working with children or vulnerable adults. Those who received the leaflets, and no doubt others, may be interested in understanding a little more of the legal background.

The VBS was introduced after the horrific Soham murders in 2002 and the report of the resulting [Richard enquiry](#). The new rules, made under the Safeguarding Vulnerable Groups Act 2006, will be fully

operational by November 2010 but an important stage in implementing them comes into effect in October 2009.

Under the new rules a newly created "Independent Safeguarding Authority" will maintain two lists of persons barred from carrying out "regulated activity", a "Children's Barred List" and an "Adult's Barred List". These two lists replace the previous 3 separately administered lists known as List 99, the Protection of Children Act List ("POCA") and the Protection of Vulnerable Adults list ("POVA").

An important stage in implementing the new rules comes into effect on 12th October 2009. From that date it is to be a criminal offence for a barred individual to seek or undertake work with vulnerable groups or for "Regulated Activity Providers" knowingly to employ such a person (the government has recently published draft regulations - the draft "[Safeguarding Vulnerable Groups Act 2006 \(Regulated Activity, Miscellaneous and Transitional Provisions and Commencement No. 5\) Order 2009](#)" - providing for the 12th October start date).

The other side of the coin is that from November 2010 all new employees and volunteers wanting to work with children and vulnerable adults will have to be registered with the VBS. It will then become illegal to employ people to do such work if they are not registered. This of course is a big step further than the rules noted above which make it illegal for a Regulated Activity Provider knowingly to employ people whose names are on the barring registers.

Registration will begin in July 2010. It will NOT replace Criminal Record Bureau ("CRB") disclosure which is different and will continue to be required as previously.

An interesting aside is that a report in the [Guardian newspaper](#) indicates that an MP, Kerry McCarthy who represents Bristol East, believes that the laws she helped pass will prevent MPs from visiting schools. Whether or not this is the case, it is true that as a matter of law CRB checks are only available to organisations and for those professions, offices, employments, work and occupations listed in the Rehabilitation of Offenders (Exceptions) Order 1975 as amended. The list does not include Members of Parliament. And presumably, because MPs are office holders rather than employees, they cannot get around this by being sponsored by an "employer". So she may have a point!

- *For further information generally click here on [Acts of Parliament etc / Safeguarding Vulnerable Groups Act 2006](#) = to go to notes on our website.*

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[8. Discrimination and job applications](#)

A devious technique has sometimes been used since discrimination law first came into effect in the 1970's. A phoney job applicant might put in multiple job applications for the same job, identical save for a potentially lucrative detail. The detail might relate, for example to race or ethnic origin, gender, disability or since 2006 to age, the first of which might be hinted at by using perhaps an African sounding name in one application and a British sounding name in another otherwise identical application. In either case, if one application leads to an invitation to an interview but others do not, the potential employer is likely to find a demand for money, or a threat of legal action for contravening anti-discrimination law, is soon on his desk.

The [Daily Mail](#) recently ran an article concerning a government operation which may result in showing whether this is a serious problem and whether employers do turn down applicants on the basis of their names. Under the heading "Anger as Government sends out 2,000 bogus job applications to unmask 'racist' companies", the Daily Mail has reported that civil servants have fabricated over 2,000 job applications, applying to each job with two or three CVs. In each case the CVs have been essentially the same but different fictitious names are given (generally one which sounds traditionally English and the other/s which sound foreign).

The British Chambers of Commerce strongly advised against the research on the grounds that it was "unethical and a complete waste of time" but the DWP defended the operation on the basis that it is "right to find out if there was an issue regarding people being discriminated against because of their ethnicity when applying for jobs." According to the Chartered Institute of Personnel and Development (CIPD) the project may be laying the groundwork for future legislation requiring nameless CVs to be used in job applications.

The DWP says that 1,000 jobs were involved. Apparently interview calls go to a mobile phone number which politely declines an interview.

- For further information generally click here on [Discrimination / a general note](#) and/or [Job advertisements](#) 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: 1399 to 2009 - good bye Law Lords; hello Judges of the Supreme Court](#)

The House of Lords became the highest Court in the land in 1399 when the House of Commons ceased to have a judicial role as part of "the High Court of Parliament".

Now 610 years later the House of Lords in its judicial role it is to be replaced by a "Supreme Court". The House of Lords Judicial Committee heard its last case on 30th July 2009. When the next law term begins on 5th October 2009, the new "Supreme Court" will be the final Court of Appeal for England & Wales, Scotland and Northern Ireland. The Supreme Court will sit in refurbished premises in Middlesex Guildhall on the other side of Parliament Square from the Houses of Parliament where the Law Lords previously delivered their judgments (technically known as "opinions").

The new arrangements are made pursuant to the [Constitutional Reform Act 2005](#). That Act provides that "the persons who immediately before [... commencement of the Act] are Lords of Appeal in Ordinary become judges of the Supreme Court". One might well therefore be forgiven for thinking that nothing is really changing except the name - indeed the [Bloomberg website](#) quotes one well-known lawyer as saying "Calling the Law Lords the Supreme Court is like using the phrase 'quantitative easing,' instead of 'printing money'".

In fact there is more to it than that. It is true that making a formal constitutional separation between the legislature and the judiciary will probably make little if any difference to the way final appeals are conducted. However there is a major change to the role of the Law Lords (or as they must henceforward

rather mundanely be called the "Judges of the Supreme Court"). They remain members of the House of Lords but are disqualified from sitting or voting while they are judges. [Constitutional Reform Act 2005 s.137](#), headed "Parliamentary Disqualification", includes a provision which prevents a Judge of the Supreme Court from sitting or voting in the House of Lords or in any Lords Committee or Joint Committee.

It probably wasn't much fun being a Law Lord in 1399. For example a William Le Scroope, who was then Lord Treasurer and Earl of Wiltes, was one of those performing that function. He was executed for political activity - a rather more serious consequence of the muddling together of the legislative and judicial parts of the constitution than that faced by the current Law Lords who, 610 years later in 2009, merely lose the right to sit and vote.

- *For further information generally click to go to [notes on the Supreme Court](#) and/or on [Judicial Work of the House of Lords](#) on the Parliament website.*

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