

EU Directive. The European Court subsequently held that this = directive requires Member States to ensure that people in the position = of Ms Coleman are protected against discrimination. The London = South employment tribunal, hearing Ms Coleman's case, was in a difficult = position. It had to decide whether it could stretch the meaning of = the wording introduced in 2004 to comply with the Directive or give the = wording its natural meaning. While the wording is not exactly a = model of clarity it is at least clear that if given its natural meaning Ms = Coleman's claim would fail - and also that the British Government would be obliged = to change the wording yet again.

In the event, after considering rules established over several years = on how UK law should be interpreted in the light of EU law, the tribunal = decided it could and should interpolate additional words into the provision noted = above to make sure it complied with EU law. The tribunal agreed with Ms = Coleman's barrister that the wording could and should be read as = providing that:

"A person directly discriminates against a disabled person = or a person associated with a disabled person if, on the ground of the = disabled person's disability, he treats the disabled person or a person = associated with the disabled person less favourably than he treats or = would treat a person not having that particular disability or association = (as the case may be) whose relevant circumstances, including his = abilities, are the same as, or not materially different from, those of the = disabled person or the person associated with the disabled person".

Thus what is sometimes referred to as "associative discrimination" = has now been held to be unlawful in the UK.

Although this case was concerned only with disability = discrimination, the same principle is likely to apply to discrimination by reason of = religion and belief, age, or sexual orientation all of which are covered by the = same [Equal Treatment Framework Directive 2000/78/EC](#).

Of course there is more to it than set out in the short outline above = and any employer or employee who might be affected would be well advised to take = expert advice.

- *For further information click here on [Coleman v Attridge Law & anor 2008](#) to go to notes on our = website.*

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2. [Employment Act 2008 becomes law](#)

The Employment Act 2008 received Royal Assent on 13th November = 2008.

The main part of the Act is of enormous practical significance for = employers and employees who get into arguments with each other. It is a = further and significant stage in the quest which has been ongoing since the early = 1970's for a sensible and proportionate way of enabling employers and employees to = settle disputes, typified most recently by the 2004 dispute resolution regulations.

Since October 2004, as a precondition of an employment tribunal = having jurisdiction in any particular case, employers and employees have been = required to show that they have followed compulsory statutory dispute resolution procedures. These procedures are basically designed to help = bring about out of court settlement wherever possible. While wonderful = in theory, in practice, largely by reason of being compulsory, these procedures led to all sorts of difficulty - as Mr Justice Elias, the = president of the EAT, put it in a [recent case](#), "... even the most desiccated Chancery lawyer = conjured up by the imagination of a Charles Dickens" would be surprised at = arguments spawned by the 2004 dispute resolution rules.

The 2008 Act abolishes the well intentioned but impractical 2004 compulsory rules. Instead, from April 2009, there will be = a new semi-voluntary ACAS [Code of Practice](#), again designed to help settle disputes out of court. It will be semi-voluntary because if an employer or = employee fails to observe it and the matter goes before an employment tribunal, = the tribunal will in most cases have discretion to increase or decrease = monetary awards by up to 25%.

Not everyone will be happy with the passing of the compulsory 2004 rules. Smaller companies in particular have sometimes found it helpful to have the "tick box" system they encouraged. However if the new rules lead to greater emphasis on fairness rather than on ticking boxes and desiccated legal argument, their introduction is surely to be welcomed.

Other significant matters covered by the [Employment Act 2008](#) are:

- increasing National Minimum Wage enforcement powers (*in sections 8 to 14*);
- strengthening the Employment Agencies Act 1973 (*in sections 15 to 17*); and
- enabling trade unions to refuse membership to individuals who belong to a political party if membership of that party is contrary to the rules of the union (*in sections 18 and 19*).

It is worth noting that when originally proposed in July 2007, what is now the Employment Act 2008 was to have been called the "Employment Simplification Act". It did not take long for Ministers to realise that the only simplification they could offer was to shorten the title.

- For further information click here on [Employment Act 2008](#) to go to notes on our website.

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3. [Immigrant workers and ID cards](#)

From 27th November 2008 a Tier 2 immigrant from outside the EEC has had to have a Certificate of Sponsorship issued by an employer licensed as a "Sponsor" in order to be allowed into the UK. The new system replaces, and toughens up, the previous work permit system. It relies on the prospective immigrant having a certain number of "points" (the required number of points varies depending mainly on the "tier" group). Points are awarded to reflect, for example, the migrant's ability, experience and age and the level of need within the sector in which the migrant will be working. The complexity of the detail, and the red tape involved, mean that specialised advice will be essential save in the simplest of cases - however applications MUST be made by the sponsoring organisation not by advisers or representatives.

It may be helpful to address two basic matters: What is a tier 2 immigrant? And what is a Sponsor licence? [Tier 2 immigrants](#). In essence tier 2 consists of skilled workers from outside the EEC with the offer of a job needed to fill a gap in the UK workforce as identified by the [Migration Advisory Committee](#). The MAC publish a [summary list](#) of relevant occupations on their website plus a more [detailed report](#) published on 9 September 2008. Tier 2 also covers intra-company transfers (where the employee works for a multi-national and is to be transferred to the UK), sports people and ministers of religion.

Tier 2 workers cannot apply for permission to enter or stay in the UK without a certificate of sponsorship from an employer who has a sponsor licence (although having a certificate of sponsorship does not guarantee permission to enter or stay).

[Sponsor licences](#). To obtain a licence, a prospective sponsor must apply to the Home Office (UK Border Agency) with specified documents. Applications must be made online but a copy of the [application form](#) is available for download. There is a non-refundable application fee of £1,000 (reduced to £300 for small companies and charities). UKBA provide a helpline on 0845 010 6677 together with extensive [guidance notes](#) on their website.

Once an organisation has been granted a licence it can issue a certificate of sponsorship to an intending migrant using the online sponsorship management system. The system is password protected and access is open only to licensed sponsors. The migrant must then apply for permission to enter or stay in the United Kingdom, quoting the certificate of sponsorship number on their application form.

[ID cards](#). A couple of days earlier, separately from the "Tier 2 points based system" noted above but related to immigration control generally, a compulsory ID card system started. On 25th November 2008 the Home Office began issuing ID cards to people applying for leave to remain in the UK as a student or based on marriage. Identity card centres for foreign nationals will be open in Cardiff, Glasgow, Northern Ireland, Sheffield, Solihull and Liverpool by mid-December.

It is intended that all new foreign nationals and those = extending their stay will be required to have an ID card within three years. It is estimated that by the end of 2014/15 about 90 per cent of all foreign = nationals will have been issued with one.

- *For further information click here on [Immigration / work permits / a general note](#) and/or [Acts of Parliament etc / Identity Cards Act 2006](#) to go to notes on = our website.*

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[4. Asbestos](#)

On 21st November 2008 asbestos-related cancer victims and their = families won an [= important test case](#) in the High Court over access to compensation.

The = case began in the High Court in June 2008. Insurance companies were = denying liability to pay compensation in mesothelioma cases on the basis = that under policies taken out by employers to cover themselves against liability to = workers who become ill due to their work, liability was "triggered" by the onset = of asbestos related disease rather than by the exposure to asbestos.

The insurers thus argued that they had no liability under = policies which covered the time when employees were exposed to asbestos but which did = not cover the time when they fell ill. As the time lapse between exposure to = asbestos and developing mesothelioma can be as much as 40 years, a lot of = mesothelioma sufferers and/or their families would have lost out if the insurers had = won this argument. The insurers concerned have lost the test case - a matter of = enormous significance to them (including the former Equitas and Lloyds = syndicates), to their reinsurers and to the individuals concerned and their = families.

In more detail the test case covers situations satisfying the = following conditions:

1. an employers' liability insurance policy was provided to an = employer for a period during which the employer exposed an employee to asbestos;
 2. the employee is diagnosed as suffering from mesothelioma after the = end of the period of insurance;
 3. the employer is found to be liable to the employee in respect of = the mesothelioma; and
 4. the policy wording is expressed as providing cover in respect of = injuries "sustained", "contracted" or "occurring" (or some other similar = provision) during the period of cover provided by the policy.
- *For further information click here on [Health and Safety at work / asbestos](#) to go to notes on our website.*

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[5. Borrowed employees](#)

The general rule is that a contractor is liable for the consequences of negligent acts of its employees but not for the = negligent acts of the employees of an independent sub-contractor.

There are, however, two exceptions to this general rule. = One is that a main contractor will be liable for the negligence of an = employee of an independent sub-contractor who has become the main contractor's "borrowed employee" (in old latin legal-speak, an employee *pro hac vice* - for an occasion). The = second is that a main contractor can be liable for the negligence = of his independent sub-contractor where the activities of the sub-contractor = are ultra hazardous.

There have been two Court of Appeal cases recently which show how these rules are applied. In the most recent case (*Biffa Waste Services Ltd and anor v (1) Maschinenfabrik Ernst Hese GmbH (2) Outokumpu Wenmac = AB and ors, Court of Appeal on 12th November 2008*), a main contractor was held not liable for damage caused by a sub-contractor's employee. The sub-contractor's employee had caused a costly fire at a waste disposal plant by his negligent operation of welding equipment. In the other case (*Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd = & ors, Court of Appeal on 10th October 2005*) a main contractor was held to be 50% liable for damage caused by a sub-contractor's employee. In that case, the sub-contractor's employee had negligently set off a sprinkler system and flooded a factory.

The essential difference between the two cases was that in the "flood" case the employee concerned was to all intents and purposes integrated into the business undertaking of the main contractor. A young fitter's mate employed by a subcontractor was helping to install air conditioning in a factory. When he negligently triggered the sprinkler system he was working under the supervision of both a senior fitter employed by the main contractor as well as of a supervisor employed by the sub-contractor. In the "fire" case on the other hand, the sub-contractors were skilled welders with their own supervising foreman. There was no question of the main contractor exercising control over the manner in which they worked. The High Court held that the main contractor was liable but has been overruled by the Court of Appeal which said that "... *exceptional facts are required = for a contractor to be vicariously liable for the negligence of his = sub-contractor.*"

Of course the second exception to the general rule noted at the head of this note was irrelevant in both cases. The activities of the independent sub-contractor were not ultra hazardous in either the "fire" or the "flood" case.

- For further information click here on [Vicarious liability](#) to go to notes on our website.

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6. [Increase in tribunal award limits](#)

On 1st February in each year, there is an inflation linked increase in the statutory maximum limits on many awards made by employment tribunals. The government has recently published the increases which will take place as from 1st February 2009. Full details are in the [Employment = Rights \(Increase of Limits\) Order 2008](#), made on 24th November 2008. The increases apply where the "appropriate date", generally the date of the event which triggers the claim (*eg a dismissal*), falls on or after 1st February 2009.

The two main changes coming into effect from 1st February 2009 are:

1. an increase from £330 to £350 in the limit on a week's pay which can be taken into account when calculating statutory redundancy pay or the "basic award" component of unfair dismissal compensation and which applies to government guarantee arrangements for employees where an employer becomes insolvent.
2. an increase in the maximum "compensatory award" component of unfair dismissal compensation from £63,000 to £66,200.

The result is that the absolute maximum statutory redundancy payment increases from £9,900 to £10,500 and the absolute maximum unfair dismissal award in "ordinary" cases increases from £72,900 to £76,700. In some unfair dismissal cases, generally those where dismissal is for a reason which makes it automatically unfair, there is no statutory limit on the amount an employment tribunal can award. This is also true of discrimination cases - again there is then no statutory limit on the amount an employment tribunal can award.

The [Daily Telegraph](#) reported on 8th November that it had obtained figures showing that the amount awarded in employment tribunals "rose past £32 million last year". No doubt next year there will be a further increase.

- For further information click here on [Maximum and minimum tribunal awards / statutory = limits](#) and/or [Unfair dismissal / automatically unfair dismissals / a general note](#) to go = to notes on our website.

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7. [Redundancy \(basics\)](#)

Given the severity of the economic downturn we make no apology for = setting out below what may be obvious and well known and which repeats = information we have provided in the recent past. 10 = basic but important points to bear in mind about redundancy follow:

1. Redundancy is about the work requirements of the employer not = about the performance of any individual employee(s).
 2. The fact that an employee is dismissed by reason of = redundancy does not prevent him or her bringing a tribunal claim for unfair = dismissal.
 3. In general statutory redundancy pay is calculated in the same = way as the basic award component of unfair dismissal compensation. = Redundancy pay is set off against unfair dismissal basic award if the = dismissal is subsequently found to have been unfair (so as a general rule they = cancel each other out).
 4. A minimum of two years continuous employment is required = for a person to be entitled to statutory redundancy pay (it is one year for = unfair dismissal claims).
 5. Maximum amount of a week's pay which can be taken into account in calculating statutory redundancy pay is (currently) = £330 (*as noted above the limit will increase to £350 from 1st = February 2009*).
 6. 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 although = in some cases there is no statutory limit (*as noted above these limits = will increase from 1st February 2009 to £10,500 and £76,700 = respectively*).
 7. 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.
 8. The same dismissal procedures must be observed when a dismissal is = by reason of redundancy as when dismissal is for any other reason.
 9. An employee being dismissed by reason of redundancy is entitled to = notice.
 10. 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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8. [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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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 click here on [List of 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, Sex and the City etc

Sex and the City etc

1. Twin sisters Samira and Hanan Fariad have = agreed an out-of-court settlement with City firm Traditional Securities and = Futures after they submitted claims of unlawful discrimination. The case was = scheduled to last 55 days and centred around 200 allegations, including that = clients were taken away from them on the basis of their race, religion and sex. Newspaper reports suggest that the company offered a = settlement in order to safeguard its reputation as the sisters were = planning to claim that senior brokers used cocaine and that staff regularly took = clients to a lap-dancing club.
2. Assistant Commissioner Tarique Ghaffur has withdrawn = his well publicised proceedings against the Metropolitan Police. He has also = withdrawn his claims that Sir Ian Blair and Deputy Assistant = Commissioner Bryan acted in a racist or other discriminatory way towards him. He has = settled for an undisclosed sum. The Metropolitan Police Authority issued a = [statement](#) on 25th November 2008 and a [BBC News report](#) of the same day includes a rather fuller video report.
3. and finally, finally: the Honda FI team's announcement of = their withdrawal from motor racing combined with the government's = announcement of a "mortgage interest deferral scheme" led to this = entertaining "[Dear Mr Button](#)" article in the FT.

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prepared December 2008.

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