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1. [Disability discrimination and fit employees](#)

It may sound odd but there are two circumstances in which an employee = who is not disabled can win a claim of disability discrimination against his or = her employer.

One is set out in the Disability Discrimination Act 1995 as passed by = Parliament. The other is, for public sector employees, set out in a = European Court of Justice case earlier this year and for private sector employees = is set out in the Act as effectively reworded by the Employment Appeal Tribunal = in late October 2009 in the light of that ECJ case.

The first circumstance is where an employee who is currently = fit previously suffered from a disability which is "likely to recur".

The 1995 Act provides in a schedule that "*Where an impairment = ceases to have a substantial adverse effect on a person's ability to carry out = normal day-to-day activities, it is to be treated as continuing to have that = effect if that effect is likely to recur*". The House of Lords added a gloss = to this in a case involving a Mrs Boyle in July 2009.

In Mrs Boyle's case the House of Lords ruled that "likely" has the = colloquial meaning of "*could well happen*" rather than meaning that the = person in question has to show a greater than 50/50 chance of the impairment = recurring. If Parliament had intended the latter interpretation it would have used the = word "probable" rather than the word "likely".

The second circumstance is where a fully fit employee is = discriminated against because he or she is caring for a disabled person.

The European Court of Justice ruled in July 2008 that an employee in = that position is protected by European law. The case concerned a Mrs Coleman = who was a legal secretary. She was the primary carer for her disabled son. = She resigned in March 2005 claiming that her employers were "guilty" of = unlawful disability discrimination - she said they had refused to allow her to = return to her existing job after coming back from maternity leave; they called her = 'lazy' when she sought to take time off to care for her son and refused to give = her the same flexibility as regards her working arrangements as colleagues with non-disabled children; they said that she was using her 'fucking child' = to manipulate her working conditions; they subjected her to disciplinary = action; and they failed to deal properly with a formal grievance she lodged = against her ill treatment.

This form of "discrimination" is often referred to as "discrimination = by association". In Mrs Coleman's case the European Court held that this = was contrary to what is known as the EU [2000 Framework Directive](#).

But that was not the end of the matter. For technical reasons, = judgments of the European Court can bind public sector employers. However they do not = directly bind employers in the private sector such as Mrs Coleman's = employers. Mrs Coleman therefore took her case back to the British employment = appeal tribunal.

This must have posed a problem for the President of the EAT, before = whom the case came on 30th October 2009. On the one hand it was quite clear that = the employment part of the Disability Discrimination Act 1995, as passed by Parliament, protected only employees who are disabled. The = wording used therefore did not protect Mrs Coleman. On the other hand it was equally = clear, given the ECJ ruling, that the wording should do so. The President of = the EAT took the bull by the horns. He ruled that new sub-sections had to be "interpolated" into the relevant parts of the Disability Discrimination = Act 1995. He set out the exact wording of new provisions which should be "interpolated" into the Act. In this

way he ensured that the effect of = the ECJ's ruling could apply to private sector employers in Britain without the = need for Parliament to amend the Act.

This was a somewhat bold move. It stretched to the limit, some might = say beyond the limit, a principle enunciated by the House of Lords in an = earlier case (the House of Lords had said that the words "as his or her wife = or husband" in the Rent Act should be read as if they had been "as = if they were his or her wife or husband" with the result that the surviving = partner of a homosexual couple could take advantage of the Rent Act - this = ensured that the Rent Act was interpreted in a way which complied with the European Convention of Human Rights).

It is, of course, possible that there may be a further appeal to the = Court of Appeal by Mrs Coleman's employers. But even if they were to appeal and = win, the law for the future will almost certainly remain as interpreted by the = EAT President. Assuming the current Equality Bill becomes law, there will be = appropriate provision there. And if that Bill fails to become law then = it must be very likely that Parliament would amend the Disability Discrimination = Act 1995 - this would be easy to do given that appropriate wording has been = drafted by the EAT President himself in his judgment!

- *For further information generally click here on = [Sumarised cases / SCA Packaging Ltd v Boyle HL 2009](#) and/or [Summa= rised cases / Coleman v Attridge Law & anor ECJ and EAT 2009](#) = to go to notes on our website.*

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[2. New right to request time for training](#)

From April 2010, employees who have worked in a large business for a = period to be specified in regulations (likely to be 26 weeks) will have a legal = right to request unpaid time away from their core duties (whether on or off = site) for training purposes . A large business in this context is one which = employs at least 250 staff. The current intention is for the right to be = extended to cover employees in businesses of all sizes in April 2011.

From a legal point of view the proposals will work in much the same = way as the provisions under which employees already have the right to request = flexible working arrangements. Thus employers will be legally obliged to = consider any such requests seriously and only to reject them if there are sound = business reasons for doing so. Employers will also be able to turn down requests = if the training suggested will not help "the employee's effectiveness = in the employer's business and the performance of the employer's business".

The basic = detail is set out in new sections introduced into the Employment Rights Act 1996 by = the [Apprenticeships, Skills, Children and Learning Act 2009](#) which received Royal Assent = on 12th November 2009. The Act extends to Scotland.

Further detail is to = be in regulations which have not yet been issued (and therefore information in = this note must be read as being subject to possible change depending on the = detail of the regulations). The Government produced a [guidance leaflet](#) in November 2009 which includes some of the detail to be = included in the regulations.

- *For further information generally click here on [Time off work / training](#) to go to notes on our website. =*

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[3. Discrimination by reason of employee's philosophical belief](#)

The [Employment Equality \(Religion or Belief\) Regulations = 2003, SI 2003/1660](#) prohibit discrimination, victimisation and = harassment in the employment field, including vocational training, by reason of any = religion, religious belief, or philosophical belief.

Until 30th April 2007 a "philosophical belief" was only covered by = the regulations if it was "similar" to a religious belief. That requirement = was removed by the Equality Act 2006. Relying on this change there have been = two recent and well publicised attempts by dismissed employees to be allowed = to bring claims against their former employers based on non-mainstream = "beliefs". Both have been successful in persuading tribunals at preliminary = hearings that their beliefs are covered by the regulations. That of course does = not mean they win their discrimination claims but it does mean that their cases = can be heard.

The first was a claim by Tim Nicholson, an ex-employee of Grainger = plc, who has a sincere belief that "*mankind is headed towards catastrophic = climate change*". He claims that he was selected for redundancy because of = this belief. He has persuaded both an employment tribunal and, on 3rd = November 2009, the employment appeal tribunal that his belief is capable of being a philosophical belief within the meaning of the regulations and that = therefore his claim should at least be heard.

Two eminent employment law QC's argued the point in the EAT.

John Bowers QC for the employer argued that Mr Nicholson's assertion = is "*a scientific view rather than a philosophical one. Philosophy deals with = matters that are not capable of scientific proof.....What Mr Nicholson asserts = is a scientific claim that if we don't urgently cut carbon emissions, we will = not avoid catastrophic climate change. There is nothing philosophical about that*".

Dinah Rose QC for Mr Nicholson argued that the belief that "*..... = mankind is headed towards catastrophic climate change and that, as a result, we = are under a duty to do all that we can to live our lives so as to mitigate = or avoid that catastrophe for future generations*" amounts to a philosophical = belief within the meaning of the regulations.

In general, the judge in the EAT sided with Ms Rose and her client, = Mr Nicholson. The judge agreed that the case can go to trial on the basis = that the asserted belief held by Mr Nicholson is capable of being a belief = for the purposes of the regulations. However the judge made it quite clear that = if and when the case comes before a tribunal to be heard on its merits, as it = can now do, Mr Nicholson will need to provide (i) evidence that his belief is = genuine; (ii) evidence that it is a belief rather than "*an opinion or = viewpoint based on the present state of information available*" and (iii) evidence = that he was selected for redundancy because of that belief.

So Mr Nicholson has won a battle but still has a long way to go = before he can say he has won the war.

The second claim was by a spiritualist. Alan Power claimed that = Greater Manchester Police dismissed him from his post as a police trainer = because of his beliefs, specifically his belief that psychics can help solve criminal investigations. At a preliminary hearing the police argued that that = belief was not a "philosophical belief" within the meaning of the regulations. They = lost. The employment judge was "*.... satisfied that the claimant's beliefs = that there is life after death and that the dead can be contacted through = mediums are worthy of respect in a democratic society and have sufficient cogency, seriousness, cohesion and importance to fall into the category of a philosophical belief for the purpose of the 2003 Regulations*". The = case could therefore go forward to trial.

An employment tribunal heard the case at the end of November 2009. = After hearing evidence the tribunal was satisfied that Mr Power had not = been dismissed on the grounds of his beliefs but for other reasons. Mr Power therefore lost.

The lesson to draw from both these cases is, of course, that it is = not enough for the employee to show that his belief is covered by the regulations. = A claim will only be successful if a tribunal accepts that the employer = acted as he did, typically dismissing the employee, because of that belief.

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

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4. [Enhanced CRB checks can go too far](#)

In one of the first cases to be heard by the new Supreme Court (which replaced the House of Lords from the beginning of October as the final UK appeal court) the most senior judges in the land expressed concern that the culture of CRB checks may be going too far. They stressed that child protection procedures must be proportionate and contain adequate safeguards to protect individuals. If not they may breach the European Convention on Human Rights as well as being possibly counter-productive. The case in question concerned an anonymous "Ms L" who wanted to obtain employment in a school as a casual midday assistant. That involved supervising schoolchildren during their lunch break both in the school canteen and in the school playground and so an enhanced CRB check was carried out. An ordinary criminal record certificate gives details of any recorded convictions of the individual to whom the certificate relates. An "enhanced" certificate also provides any information which in the opinion of the chief officer of the relevant police force might be relevant and which "ought to be included" in the certificate.

The enhanced certificate issued in Mrs L's case disclosed that her son had been placed on the child protection register under the category of neglect. She applied for judicial review of the Police Commissioner's decision to disclose that information. The High Court refused her application and the Court of Appeal dismissed her appeal.

Mrs L. is clearly made of tough stuff and is a lady to be reckoned with. She appealed to the Supreme Court. Technically the question concerned the proper interpretation of the Police Act 1997, which governs the issue of enhanced criminal record certificate.

Although the Supreme Court (5 judges) unanimously dismissed Ms L's appeal, in doing so they considered in great detail whether the way in which the Police generally interpret the relevant part of the Police Act 1997 is compatible with an applicant's right to respect for his or her private life under article 8 of the [European Convention on Human Rights](#). The answer was essentially "no". The general interpretation by the Police places insufficient weight on the requirement in the Act that information should be included in an enhanced criminal records certificate only if it "ought to be included".

In the present case insufficient weight had been given to respect for Ms L's private life. However there was no doubt that the facts narrated were true and bore directly on the question whether she was a person who could safely be entrusted with the job of supervising children in a school canteen or in the playground. On that basis she lost her appeal.

Referring to the vetting scheme being run by the new Independent Safeguarding Authority set up after the Soham murders Lord Neuberger specifically pointed out that *"The widespread concern about the compulsory registration rules for all those having regular contact with children, as proposed by the Government in September 2009, demonstrates that there is a real risk that, unless child protection procedures are proportionate and contain adequate safeguards, they will not merely fall foul of the Convention, but they will redound to the disadvantage of the very group they are designed to shield, and will undermine public confidence in the laudable exercise of protecting the vulnerable"*.

- 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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5. [Employment Tribunals are not courts](#)

In a recent judgment the Court of Appeal has stressed that employment tribunals are not, and never have been, courts (*Governing Body of St Albans Girls' School & anor v Neary, 12th November 2009*). In some ways this is a distinction without a difference. But in other ways it can be extremely important. Industrial Tribunals were originally established under the Industrial Training Act 1964. Their importance grew significantly when the statutory concept of "unfair dismissal" came into existence under the Industrial Relations Act 1971. The idea was that these tribunals would be managed by non-lawyer members with a legally qualified chairman and with proceedings being conducted in an informal way. The Industrial Tribunals were given, and still have, exclusive jurisdiction in categories of cases specified by Parliament. The originally quite short list has grown longer and longer over the years - a [complete list](#) is available on the tribunal service website. The idea was and is that the courts, and the formality associated with them, would not be involved except where there was an appeal on a point of law. In practice industrial tribunals, renamed employment tribunals in 1998, have found it difficult to combine fairness with informality. In particular it has been difficult for legally qualified chairmen, often with years of experience as advocates in the courts, to operate with the degree of non-legalistic informality which the original proposers of the system intended.

The St Albans Girls' School case noted above was concerned with the difference between procedural rules in the Courts and in tribunals.

A supply teacher, Anthony Neary, brought various claims against St Albans Girls' School and Hertfordshire County Council. An employment tribunal struck out his application because he failed over a quite long period to provide documents and comply with directions. His application for a review of the strike out order was rejected. He appealed to the Employment Appeal Tribunal against that rejection and won because the original tribunal had failed expressly to consider "factors" set out in the Civil Procedure Rules which apply when similar applications are made in the Courts.

The School went to the Court of Appeal. The Court of Appeal pointed out that tribunals are not courts. The Civil Procedure Rules may provide useful guidelines for tribunals but no more than that. The Court of Appeal considered that the employment judge had acted properly in the way he exercised his discretion, overruled the EAT and reinstated the original decision. The Court of Appeal said that *"the proposition that [employment] judges should have regard to the [factors set out in the Court Rules] seems to have metamorphosed, as the cases came along, into a positive requirement that each and every one be discussed"*.

In addition to differences in the rules of procedure there are other major differences between Courts and Tribunals. Two of the most important are (i) that in many types of case (but significantly not discrimination cases) there is a statutory limit on the amount of compensation which an employment tribunal can award; and (ii) that the Courts generally order the losing party to pay costs. In employment tribunals the general rule is that no costs order is made, and if one is made it will generally be on the basis that the party concerned, whether winner or loser, conducted his case *"vexatiously, abusively, disruptively or otherwise unreasonably"*.

- For further information generally click here on [Employment tribunals](#) to go to notes on our website

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6. [Drivers Working Hours loophole](#)

Some oddities in statute law are deliberate, some are not (and should be sorted out). The government has said it will look into whether the oddity noted here is in the first or second category.

Employees have various rights in the event of infringement of the Working Time Regulations. For technical reasons many of these rights are set out in the Employment Rights Act rather than in the regulations. One result, again for technical reasons, is that employees in certain types of employment would not be protected unless special provision were made for them. These include merchant seamen, fishermen and cross-border rail staff all of which are protected by special provisions.

On 4th November 2009 an MP, Richard Burden, raised in the House of Commons the question of whether special provision should also be made for professional drivers. He is concerned that there may be a loophole in the current rules which would mean that professional drivers do not have the same rights as other employees in the event of infringement by their employers of the Working Time Regulations.

The government spokesman said that the matter is being looked into and "*When all the facts are known, a formal decision will be made on whether changes are needed*". There will be a formal consultation if any change is proposed so. Readers who have an interest in this matter should, as they say, "watch this space".

- For further information generally click here on [Working Time Regulations / HGV and PSV drivers](#) to go to notes on our website

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7. [Some technical matters](#)

Lawyers' fees. "Damages based costs agreements" are sometimes being used by lawyers and other representatives in employment tribunals, especially in group equal pay claims. For obvious reasons - think "champerty and maintenance" - they are generally considered to be undesirable and are banned in the courts. But tribunals are not courts (*see note 5 above*) and different rules apply. Damages based costs agreements are now to be banned in employment tribunal as well - or more accurately banned unless they comply with conditions yet to be announced.

Calculation of compensation for future loss in discrimination/dismissal cases. A Mr Chagger worked as an analyst at Abbey National on a salary of around £100K. He was made redundant when in his early 40's. He won a claim that he had been selected for redundancy in breach of race discrimination law. As he was very unlikely ever to get such a well paid job again he was awarded almost £3m compensation. The amount of compensation was subject to appeal which went all the way to the Court of Appeal. In essence, the Court of Appeal has confirmed that the compensation was correctly calculated, although subject to important tweaks. Specifically the Court of Appeal confirmed amongst other things that in assessing compensation for future loss in a discrimination/dismissal case it is wrong to take into account the possibility that the claimant might have resigned voluntarily before reaching retirement age; and that it is correct to take into account that getting a new job would be made more difficult, provided that could be proved, by reason of "stigma" attaching to the claimant as a result of his having enforced his rights.

Disability discrimination. On 25th June 2008 the House of Lords came to an important decision interpreting the Disability Discrimination Act 1995 in a way which overruled previous thinking (*London Borough of Lewisham v Malcolm*). The ruling led to it being more difficult than previously, at least in some circumstances, for a disabled person to win a case under the Act. A moment's thought makes it obvious that the decision has "retrospective" effect as it is interpreting wording set in 1995. Even though this is obvious it is worth stressing. In a recent case an employment tribunal made what the EAT called the "elementary error" of thinking that the House of Lords decision only applied to facts and judgments occurring after 25th June 2008.

Asbestosis/mesothelioma. It can be many years before a person who has inhaled asbestos fibres shows any symptoms but the results can be very serious. Enormous difficulties can be faced by sufferers who may have negligence claims against employers for whom they worked many years ago. The employer

may have gone out of business; there may have been more than = one employment which posed a risk; the asbestos which caused the damage may = have come from a different source altogether. In a November 2009 case the = last of these problems was a particular issue (*Sienkiewicz (Estate of Enid = Costello Dec'd) v Greif (UK) Ltd*). The Court of Appeal ruled that if at = least one possible asbestos source is non-tortious (here the local atmosphere at = Ellesmere Port in the 1960's and 1970's) the correct test for deciding whether an = employer is liable is whether the "tortious exposure" derived from the employer = increased to a "material extent" the risk of the person concerned contracting mesothelioma. The employer concerned (or their insurers) had argued that = a claimant must show that the risk derived from the employer was more than = twice the risk arising from the non-tortious cause or causes, This argument = has been rejected.

- *For further information generally click here on [Acts of Parliament / Coroners and Justice Act 2009](#) and/or [Compensation / a general introductory note](#) and/or [Disability Discrimination / comparator](#) and/or [Health and Safety at work / asbestos](#) to go to notes on our website*

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8. [Bias and employment tribunals](#)

There is always a winner and a loser in a court or tribunal case. = Going to court or tribunal is not a pleasant experience and it is natural for the = loser to think the court or tribunal made a mistake. Not infrequently the = loser thinks the judge or tribunal was biased against them.

If bias can be proved that is of course a valid ground for appeal. = Indeed, to get a re-hearing it is not essential to show actual bias. Apparent bias = is sufficient - it can be enough to show a legitimate fear that the court = or tribunal might not have been impartial. However, as a November 2009 whistle-blowing case shows, there is a difference between a tribunal = member being rude and their being biased (*Ross v Micro Focus Ltd, EAT on = 18th November 2009*).

In the case one of the lay members of an employment tribunal, an = experienced business woman, became impatient with a dismissed employee's criticisms = of the ex-employer and the way the case was being presented. In the event the = tribunal found against the ex-employee. There was then an appeal to the EAT on = the basis that decision was unsafe as the lay tribunal member had been guilty of = apparent bias.

The appeal notice alleged that during the original hearing the = tribunal member had smiled openly at the employer's barrister, nodded at the = employer's questions, muttered words of agreement or disagreement when the employee = gave her answers, leant back in her chair and looked disapprovingly down her = glasses at the employee and adopted an aggressive tone when questioning the = employee. Further examples of what was claimed to be the apparent bias were = provided to the EAT at the appeal. The employee's barrister had complained during = the original hearing and had obtained an apology and an assurance that the = lay member had not made up her mind prematurely.

The EAT accepted that the tribunal member's body language had been inappropriate and that she had not taken "*particular pains to = disguise her agreement with some of the points made on [the employer's]' behalf*". = However the EAT pointed out that there is a substantial difference = between falling below the appropriate standard for professional judging, breach = of which would or could amount to discourtesy, and being biased. The appropriate = test here was whether an obvious display, by body language, of approval of = what a witness was saying was sufficient to evidence a mind which had been made = up before conclusion of the hearing.

In this case, the EAT held that the evidence was not sufficient for a = reasonable observer to form the view that the tribunal member concerned = had made up her mind prematurely before hearing all the evidence. The appeal was therefore dismissed.

- *For further information generally click here on [Bias](#) to go to notes on our website*

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

As usual, you can find on our website summaries of all employment law = cases reported in the most recent (November and December 2009) editions of the = IRLR and ICR Law Reports, the two leading series of law reports covering = employment law.

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, sex and the City \(and what about Lord = Sugar?\)](#)

There can be big money in discrimination cases. Of course lawyers = know this as well as others and it was only a matter of time before one of them = was caught up personally rather than in a professional capacity. Well, more than = one actually.

In January 2010 it is expected that a remedies hearing will take = place in the well-publicised case of city lawyer Gillian Switalski. She had resigned = from her job as head of the legal department at F&C Asset Management in the = City of London, claiming sex discrimination and sexual harassment against her = employers. After a long struggle she won her case earlier in 2009. Compensation is = still to be assessed but according to newspaper reports she is expecting to be = awarded an amount considerably in excess of £10m.

Then in October and November 2009 an almost equally well publicised = case has been under way in the Central London Employment Tribunal. A barrister, = Aisha Bijlani, is claiming more than £30m as compensation for race = discrimination against former colleagues at her Lincoln's Inn chambers. Although her = case is a racial discrimination claim she has made allegations that prejudice = against her was fuelled by sexual relationships between two senior male members of = her chambers and an attractive female senior clerk.

Finally, could anyone accuse the newly ennobled Alan Sugar of sex-discrimination? It seems not. An employment related sex = discrimination case being brought against him by a lady named Hanna Sebright has been = dropped. And when a Sunday Times journalist asked him in a recent interview if he'd = employ a woman who was pregnant it seems he prevaricated before shouting = "*I'm not going to answer this question ... I've had enough of this type of = stuff*".

- *For further information generally click here on [Sex discrimination / recent examples](#) to go to notes on our website.*

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