

A few observations may be useful:

- Any religious organisation, Christian, Muslim or any other denomination (and including Atheist organisations) which wishes to restrict employment or promotion to those who share its beliefs should take expert advice if there is any chance that disaffected employees, prospective employees or ex-employees, might bring a claim under the 2003 regulations.
- A useful article on the [implications for Muslim employers](#) of the *Prospects* case (by barrister = Fatim Kurji) is available on the web.
- There is no statutory limit to the amount of compensation payable on breach of the 2003 regulations.
- These cases were decided at employment tribunal level. They are therefore not binding on other tribunals - only decisions of the EAT or a superior court are binding precedents.
- It is worth noting that no reference was made in the tribunal judgments to the EAT case of [Glasgow City Council v McNab](#), decided in January 2007, in which a senior judge had considered the "genuine and determining occupational requirement" exception provided by the 2003 regulations.
- For further information click here on [Religious discrimination / new regulations 2003](#) to go to relevant notes on our website.

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2. [and Religion is in.](#)

In July 2008 an employment tribunal found in favour of a marriage registrar who claimed she was harassed by Islington Council for refusing to conduct same-sex ceremonies and civil partnership registrations. The registrar, Miss Lillian Ladele, claimed that the Council which was her employer had given her an ultimatum: either to perform the ceremonies or face dismissal for gross misconduct. According to a [Daily Mail article](#) on the case, the Central London employment tribunal said that *"Islington Council decided that the service it provided was secular and that the rights of the lesbian, gay, bisexual and transsexual community must be protected. In so acting, it took no notice of the rights of Miss Ladele by virtue of her orthodox Christian beliefs"*. Accordingly the employer had acted in breach of the 2003 regulations. Thus this case is another example of an employment tribunal finding that an employer had acted contrary to the regulations.

The considerations involved in this case are obviously not of such general significance as those in the *Prospects* cases noted above. The case itself should be contrasted with that brought in 2007 by the Christian magistrate Andrew McClintock. Mr McClintock requested that he should not be required to sit in family court cases which, under new legislation, might involve him sanctioning the removal of a child from its natural family into the care of a gay couple. His request was refused and he took a claim for religious discrimination to an employment tribunal in Sheffield. He lost his case.

All these cases emphasise the importance of the 2003 Employment Equality (Religion or Belief) Regulations. They all show that employers ignore the regulations at their peril and suggest that at present there is little consistency in the way employment tribunals will interpret them. As noted above, they all resulted in employers being found to have acted in breach of the regulations.

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

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[3. Disciplinary and grievance procedures - new Acas guidance](#)

We are now beginning to see what will replace the ill fated 2004 = compulsory statutory dispute regulations with which employers and employees = currently have to be careful to comply if an employment tribunal is to have = jurisdiction (in most cases). Under the Employment Bill currently nearing its final = stages in Parliament they will be replaced by less prescriptive rules, based on = a new Acas Code of Conduct. The Government has announced that the new = rules are intended to come into operation from 6th April 2009. Acas published a short (14 page) draft new Code of Practice in = May and in June published a much longer (74 page) draft "Guidance = Document". It contains sample procedures, letters, notices and warnings and is likely = to be of great help to employers. The draft Guidance suggests = that it may sometimes be helpful to use a neutral mediator to help sort out a = grievance and maintain working relationships but does not address one of the central = problems which arise in connection with mediation of employment disputes: namely, = money. There is little incentive to an employee to agree to = mediation if that will cost him or her money when a hearing by an employment = tribunal is free of charge. Acas has been promised large amounts of additional = funding to help it extend its role in settlement of employment disputes. = Although there is no indication in the guidance that free mediation may be offered it = may be hoped that this is under consideration.

Failure to follow the revised Acas Code will not, in itself, make a = person or organisation liable to proceedings and it will not result in = the automatic unfair dismissal which can and does follow if an employer fails to abide = by the current rules. Instead, under the new rules, tribunals will = be given a discretionary power to increase awards of compensation to = employees by up to 25% if an employer unreasonably fails to comply with the Code. =

In addition, on 1st July 2008 the Government (not Acas) published a consultation document which supplements the proposals so far announced = and includes proposed amendments to the employment tribunals rules of procedure.

Most of this is fairly technical stuff which will not affect day to = day operation of most businesses. The general and welcome approach is = to trust employment tribunals to come to fair decisions rather than to try and = legislate for every eventuality. Nevertheless there is a lot of material for = HR managers and business owners to consider and digest.

- For further information click here on [Bills before Parliament / Employment Bill](#) to go to relevant notes = on our website.

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[4. Right to request time off for training](#)

The government is proposing that once they have completed 6 months employment, employees should have the right to request time = off work for training. The plans closely mirror existing rights to = request flexible working. There is no suggestion that employers would be = legally obliged to allow such requests but it is proposed that they will be = legally obliged to seriously consider them, with employment tribunals = having power to award compensation to an employee if his employer simply rejects a = request out of hand without proper consideration.

The government suggests that requesting time to train = will "complement other rights in relation to training, most notably for 16 to 18 year = olds and for Union Learning Representatives". Those are rights

to time off = with pay. Under the current proposals there is no suggestion that the new = right will include a right to pay during time off taken for training.

The paper begins with a sermon on the need for high-skilled employees = due to globalisation, and the government's view of what it has achieved so = far. Chapter 2 provides a useful explanation of government advice and financial = support ('Train to Gain') available to employers and for individuals.

The "[Time to Train](#)" consultation about how the scheme might work closes on = 10 September 2008. The new right itself is unlikely to = come into operation before April 2010.

- For further information click here on [Time off work / training](#) and/or on [Time off work / study leave](#) to go to relevant notes on our = website.

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5. [Retirement and age discrimination](#)

We have noted in = previous newsletters that attempts are being made by Age Concern (under the name "Heyday") to persuade the European Court of Justice to rule that the = "default age 65 retirement age" provision in the [British anti-age discrimination regulations](#) is contrary to the relevant [EC = directive](#). The case is now progressing before the European = Court.

The first hearing has = taken place and the opinion of the ECJ's Advocate General is expected to be = published on 23rd September 2008. The full judgment is then likely by early 2009 or = possibly by the end of 2008. Meanwhile the President of the Employment = Tribunals has ordered that all cases brought by employees forced to retire due to = their age shall be put on hold pending the ECJ's ruling.

While the Age Concern = case was waiting in the queue of litigants, the ECJ decided similar issues in a = Spanish case, *Palacios de la Villa v Cortefiel Servicios = SA*. In that case the ECJ did not, as the employers and governments had wanted, take = a literal view of a clause in the Directive's which provides = that '*this = Directive shall be without prejudice to national provisions laying down retirement = ages*'. But neither did it, as the older employees had wanted, proclaim that age discrimination is never permitted.

In the Spanish case = the ECJ decided that European governments must justify laws = allowing compulsory retirement ages as a proportionate means of achieving a = legitimate aim. It ruled that the Spanish government's retirement age = policy passed this test. British employers are now relying upon the Secretary = of State for Business, Enterprise and = Regulatory Reform's persuasive skills to achieve the same = result.

When the regulations were brought in, Jim Fitzpatrick MP, then Parliamentary = Under Secretary of State for Employment Relations and Postal Services, = declared the age 65 default retirement age exception to be '*a tool that employers can use if = they want to. They're completely free not to use it, and in time we believe that = the culture of retirement will change so that they don't use it. But if = they do use it, they can rely on it*'. We shall soon know whether the = ECJ will agree with him.

- For further information click here on [Age discrimination / retirement](#) to go to relevant notes on our = website.

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6. [Tips, trons and the national minimum wage](#)

Most of us would be pretty upset if we thought the tip we left for a waiter or waitress who has done a good job of serving us at dinner was being used by the restaurant owner to justify paying the waiter or waitress less than the national minimum wage (currently £5.52 per hour for adults, rising to £5.73 on 1st October 2008). But at exclusive West End clubs such as Annabels, the famous night club in Berkeley Square or Harry's Bar the tips can be so big that they take some of the staff into the higher rate tax band and doubtless those lucky few are not particularly concerned whether their basic wage is above or below the National Minimum Wage.

But the law is the law is the law and in the case of the NMW it is enforced by Her Majesty's Revenue and Customs, an agency not noted for taking a relaxed view of its duties. The basic part of the relevant law (in [NMW Regulations 1999 reg 30](#)) provides that "*all money payments paid by the employer to the worker in the pay reference period*" count towards the NMW so it is quite clear that if tips are added to the bill and paid by the employer to his staff they count as wages for NMW purposes. It is equally clear that tips which are paid direct by a customer to a waiter or waitress are not part of wages for NMW purposes. But there is a grey area in between when some versions of the "tronic" system are in use.

The word "tronic" comes from the French for a collecting box. In the hotel trade it is an arrangement for the pooling and distribution of tips. A tronic master distributes the money in agreed shares amongst staff and may even be in charge of PAYE administration. It can be arguable, depending on the version of the tronic system being used in any particular case, whether the monies are "*paid by the employer to the worker*" or not. HMRC took the view that the version of the tronic system in operation at Annabels and at Harry's Bar until 2003 was one where the monies were not "*paid by the employer to the worker*". The relevant monies (voluntary service charges, credit card tips and cash tips) were all collected by the relevant employer and handed to one of the staff who was tronic master on a weekly basis. He allocated the tronic monies to the participating workers in accordance with a points based system depending on length of service and distributed the money in cash. The tronic master deducted and accounted for PAYE tax and issued wage slips.

National Minimum Wage matters come within the jurisdiction of employment tribunals and HMRC brought a tribunal case against the employers. The tribunal found against HMRC and in favour of the employers but later, on 13th June 2008, that ruling was overturned by a judge in the EAT. HMRC promptly issued a press release under the slightly gruesome headline "Friday 13th a good day for the UK's bar and restaurant workers" saying that "This is good news for bar and restaurant workers across the UK". Almost as promptly the employers announced that they would appeal to the Court of Appeal. Those interested in the detail may care to read the [full EAT judgment](#).

It should be noted that most businesses operating a tronic system use a version where the tronic master merely informs the employer how much to pay out to staff in tips and the employer then makes the payments through the normal pay roll. Under this, more normal, version of the tronic system it is, of course, quite clear that the monies involved are "*paid by the employer to the worker*". Whether this is a good or a bad thing depends on your point of view - but it is worth recalling that only 5 years ago in July 2003, a National Minimum Wage (Tips) Bill was introduced in Parliament. The idea was to ensure that tips would never be treated as counting towards the National Minimum Wage. It never became law so even if you give your tip direct to that charming waitress, you are unlikely to know whether her employer is able to use it as counting towards her wage for NMW purposes.

- For further information click here on [Minimum Wage / what is wages?](#) to go to relevant notes on our website.

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7. [Disability discrimination - technical but very important](#)

A ruling by the House of Lords at the end of June has caused some turmoil in the employment law world.

Since the Disability = Discrimination Act was passed in 1995 there has been difficulty in = deciding what Parliament meant when it provided that a person discriminates against a = disabled person "*if for a reason which relates to the disabled person's = disability, he treats him less favourably than he treats or would treat others to = whom that reason does not or would not apply*".

The nub of the = problem has been to work out what "that reason" should be. The = Court of Appeal said in 1999 that "linguistically" the wording is ambiguous. = It could refer either to:

- (i) a reason = which relates to the disabled person's disability; or
- (ii) the facts = constituting the reason for the treatment.

Which of the two meanings = is correct is fundamentally important. = To take an example: two employees are absent on sick leave for 7 months. One of them is "merely" sick but not = disabled for DDA 1995 purposes (for example, perhaps because he had severe measles = but is now almost recovered and will be able to come back to work well before 12 = months is up); the other is = suffering from a condition which is a disability for DDA purposes (eg he suffers from = severe rheumatoid arthritis). = The employer has a stated policy, applicable to all employees, of dismissing any who are absent on sick leave = for 6 months or more. So both = are dismissed.

Leaving aside any question = of unfair dismissal (where compensation is restricted by statute), does either of = them have a claim under the DDA 1995 (where compensation is not subject to = any statutory restriction)?

Obviously the man who had = measles has no claim under the DDA – he simply was not disabled. But what about the second man? = The reason for his dismissal was his absence from work. Clearly that is not a = "disability" so clearly there is no direct disability discrimination. But the reason for his absence = was his rheumatoid arthritis. So it can be argued that his case is one of = indirect disability discrimination. Whether this is so and whether or not he has = a claim under the DDA depends on whether (i) or (ii) above is correct.

In 1999, the Court of = Appeal held (in favour of the employee) = that (ii) above is the correct interpretation. In the example above, it would follow that the arthritic man = dismissed because of long term absence would have a claim under the DDA.

However, now in *Mayor and Burgesses of the London = Borough of Lewisham v Malcolm* [2008] UKHL 43 the House of Lords has opted (by a = majority) for (i) as the correct interpretation. = *Malcolm* was a landlord and = tenant law case involving a disabled tenant rather than an employment case = involving a disable employee - but exactly the same ambiguous wording applied. Where it leaves = disability discrimination law in an employment context will require further = clarification from the courts and possibly Parliament. Even in *Lewisham = v Malcolm*, although the House of Lords came to a clear conclusion it = did so only by a majority, "with some hesitation" and "not without misgivings" - and the case did not = involve an employer and employee.

Enough has been said here = to demonstrate that the issue is not clear cut. However one thing = does seem clear: if the ambiguous words which have caused such difficulty = are to mean to have the meaning which in 1999 the Court of = Appeal thought Parliament intended them to have, then the best thing would be for = Parliament to amend the DDA 1995 as quickly as possible to make that = completely clear. In the meantime, no doubt much time and ink will be spent and = spilled in considering the implications of the House of Lords = ruling.

- For further = information click here on [Disability Discrimination / comparator](#) to go to relevant notes on our website.

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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. We also provide notes on recent employment law related Acts of Parliament and employment law related Bills currently before Parliament, = along with 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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