

10. [New cases statutes and regulations](#)

11. [..... and finally](#)

1. [Redundancy - LIFO, FIFO and FIDO](#)

"Last in, First Out", "First In, off-off" and "First in, Drop = out" all describe redundancy selection processes which are potentially age = discriminatory and therefore unlawful if used on their = own. The Court of Appeal has recently ruled, however, that they can be legitimate if = used as just one part of a redundancy selection process in a way which = is not "plainly dominant" or "necessarily determinative".

The important practical point is that there is still life in LIFO. Employers can continue to use this as a criterion in = selecting staff for redundancy provided that it is not the main or sole = determining factor. In legal jargon, LIFO is capable of being justified = within the meaning of [Employment Equality \(Age\) Regulations 2006 SI 2006/1031 reg 3](#). Therefore its = use as a criterion in a redundancy selection process will not be automatically unlawful. It all depends on whether LIFO (or presumably FIFO = or FIDO) is in the particular circumstances a "*proportionate means of = achieving a legitimate aim*".

The legitimate aim in the case in question ([Rolls=
Royce PLC v UNITE the Union on 14th May 2009](#)) was carrying = out compulsory redundancies peaceably.

From a legal point of view, as interesting as the substantive = decision was the consideration of a preliminary point - was it proper for the Court = of Appeal to hear the case at all? The case concerned proper interpretation of the law without any particular factual dispute. = British courts do not entertain theoretical cases but the Court of = Appeal, after much agonising, decided it should hear this = case. It concerned the proper construction of a Statutory Instrument = deriving from a European Directive and that, said Wall LJ, "*is both a = matter of public importance, and one of this court's proper functions*". Further the underlying substantive point = was far from academic - if not resolved, it would lead to a dispute = between the company and the union.

Somewhat paradoxically, it was the UNITE Union rather than = Rolls-Royce which wanted to establish that LIFO (and therefore presumably by = the same token FIFO or FIDO) can be legitimately used as a criterion in the = redundancy selection matrix. Rolls-Royce wanted to change a collective agreement under which points were awarded for = length of service, with the likelihood of an individual being selected for compulsory redundancy being reduced the great the number of = points credited to him (or her). Rolls-Royce argued that this had = become unlawful since 1st October 2006 when the age discrimination = regulations came into force. Both the High Court and now the Court of Appeal agreed with Rolls-Royce that LIFO was indirectly age = discriminatory but both accepted the Union's argument that it could nevertheless be justifiable and therefore lawful.

- *For further information generally click here = on [Redunda=
ncy / selection for redundancy / last in, first out](#) and/or [Age discrimination / 2006 regulations / justification defence](#) to = go to notes on our website.*

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2. [Equal Pay and "Piggyback claims"](#)

Old Major, Napoleon, Snowball and Squealer might not be too = pleased. In *Animal Farm* some pigs were more equal than others but now the = EAT has ruled that in British Equal Pay law male colleagues of

women who have won equal pay claims can get what it referred to as a piggy-back ride to equalise their pay.

Some male Council employees were being paid less than other men for doing work assessed as of "equal value". The Equal Pay Act 1970 regime, being based purely on sex discrimination, would not allow them to bring claims. However their female colleagues could. In this case the men brought "contingent" claims on the basis that if the women they used as comparators were successful in their claims, then they, the men, would end up being paid less than the women for doing the same work.

In the EAT, Underhill P has ruled in favour of the men. The judgment provides that:

- once a female employee has secured a contractual term (here, a higher rate of pay) as a result of a claim under the Equal Pay Act 1970, then a male employee (doing like work etc) is entitled to claim that same contractual term. The fact that the female secured the contractual term only as a result of the 1970 Act was irrelevant - it was now a "term" of her contract. Furthermore, an employer could not argue that the fact that she had brought a claim, and the man had not, was a "material difference" between them - because the only reason for this difference was the difference in sex. In other words, even if not envisaged by Parliament, "piggyback claims" were valid.
- the female employee's pay was altered, by the Equal Pay Act, by virtue of the finding that her pay should have been at the higher level throughout the period she received less pay than her male comparator. Obviously this was unknown until the claim succeeded - hence the payment of arrears, due once the correct pay term was substituted. Following the logic, once this conclusion is reached, then the male employee who had been doing like work would also have been entitled to equal pay throughout that same period as his female comparator. Accordingly there was no reason that he too should not receive arrears of pay.
- although the male employees' claim cannot be determined until the females' claims (upon which they are contingent) are resolved, nonetheless it is not premature for the male employees to submit their claims at the same time as the female employees. Albeit they are placed "on the back burner" this is the most convenient approach.

Even if the pigs in *Animal Farm* might be disappointed at this result, the geese and the ganders would probably say "I told you so".

- *For further information generally click here on [Sex discrimination / equal pay and terms of employment / work rated as equivalent](#) to go to notes on our website.*

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[3. Race discrimination, Jews and Total/Lindsey](#)

With the BNP winning more than one seat in both the [County Council elections](#) and the [European Parliament elections](#) at the beginning of June and a resurgence of problems at Total's oil refinery at Lindsey in Lincolnshire, it may be topical and relevant to include a note on racial discrimination law in this newsletter.

Workers at the Lindsey refinery staged a "wildcat" strike at the end of January 2009 over the arrival of 200 Italian and Portuguese workers employed by a company which had been awarded a construction contract. That dispute was fairly quickly settled but questions were asked as to whether it might be a curtain-raiser (see for example [SkyNews 5th February 2009](#)). It looks as though it was. There have recently been more strikes and walkouts at refineries and power stations, not just related to employment of foreign workers, including at Didcot, Milford Haven, Drax, Eggborough, Ratcliffe-on-Soar, Immingham and at Lindsey itself (see for example the [Guardian, 18th June 2009](#)).

While the 647 construction workers involved in the latest strike at the Lindsey oil refinery voted on 29th June 2009 to accept a deal and return to work, a national ballot on whether there will be further strike action over both pay and use of non-British labour is on the cards.

In regard to employment of foreign workers there are several fundamental legal points to bear in mind, notably:

- [Race Relations Act 1976](#) makes it illegal in the employment field to discriminate against a person on grounds of "colour, race, = nationality or ethnic or national origins"
- A fundamental cornerstone of the original 1957 [EC Treaty](#) is freedom of movement of workers throughout the EU, = followed in June 2000 by an [EU Directive](#) formally prohibiting discrimination on grounds of racial = or ethnic origin.
- The [EU Posted Workers directive](#) provides that most workers who are temporarily working in a member state other than the one in which they = usually work must have proper employment law protections.
- European case law has established that under the EC Treaty and the = Posted Workers Directive it is unlawful for a trade union in a member state = (eg the UK) to take action designed to force a company established in another = member state (eg Italy or Portugal) which is doing work in the trade union's = state (eg the UK) to pay more than the local national minimum wage ([Laval = un Partneri Ltd v Svenska Byggnadsarbetareförbundet](#) in 2007).
- if an employee who is a member of a racist group is dismissed = because of the danger that his continuing employment might lead to violence in = the workplace, the dismissal can properly be regarded as being for = legitimate health and safety reasons and will not be unlawful race discrimination.

Finally, a recent Court of Appeal case is of interest in marking the = border line between religious discrimination on the one hand and racial = discrimination on the other. There can often be overlap. In this case a Jewish school in London prioritised for admission = children recognised as Jewish because of descent from a Jewish mother in = preference to children of mothers who converted to Judaism in procedures not = recognised by the Chief Rabbi. One of the latter who wanted her son to go to the = school objected.

Schools of a religious character are exempted from the full = rigour of the normal rules prohibiting discrimination by educational = establishments. However, the exemption covers only religious discrimination, not racial discrimination. The mother concerned claimed that = membership of a religious group based on descent amounts to membership of that = group by reason of ethnic origin. If that argument were successful the = school would be in breach of the Race Relations Act. Clearly a determined lady = she took the matter to the High Court. She lost in July 2008. However = she has now won on appeal to the Court of Appeal ([R \(E\) v = Governing Body of JFS \(formerly the Jews' Free School\), Court of Appeal on 25th June 2009](#)). The Court ruled: (a) that Jews constitute a = racial group defined principally by ethnic origin and additionally by = conversion, and (b) that to discriminate against a person on the ground that he or = someone else either is or is not Jewish is therefore to discriminate against him on = racial grounds.

- For further information generally click here = on [Racial discrimination / a general introductory note](#) and/or [European Law / posted workers](#) and/or [Religious discrimination / new regulations 2003](#) to go to notes on = our website.

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4. [Sex Discrimination, Sir Alan Sugar and the Apprentice](#)

"When the going gets tough, the tough get going" is not only a cliché and pop song title - you'd have to be tough to take on Sir Alan Sugar and now there are reports that a senior employee of one of his companies is doing exactly that.

Hanna Sebright, the founder of Amscreen Healthcare (*formerly Electronic Health Media Ltd which sold advertising space on digital information screens in schools and hospitals*) alleges that when the company was taken over in 2008, Sir Alan promised that she would be managing director of her own autonomous division. It seems she believes that promise was broken. In any event she has resigned and lodged claims of constructive unfair dismissal, sex discrimination and bullying at an employment tribunal.

According to newspaper reports (see [the Times](#), the [Daily Telegraph](#) and the [Daily Mail](#) all of 28th June 2009) Ms Sebright claims that she has been unable to work since early April 2009 as a result of stress and migraines caused by what happened to her after her company was taken over. She claims that Sir Alan deliberately undermined her at a meeting when he interrupted her and spoke to her in a disparaging manner, that she was subjected to lewd remarks made by another employee, *Apprentice* winner Lee McQueen, that responsibility for advertising revenue was taken away from her, that she was not allowed to attend financial meetings and that she was 'systematically undermined' from the outset by both Sir Alan's son Simon Sugar and the CEO, a Mr Keenan. They were, she alleges, determined to exclude her from their 'all-male leadership'. Sir Alan is reported as saying he has only met Ms Sebright "on one occasion for no more than 10 minutes" (the [Herald 2nd July 2009](#)) which suggests he is planning to fight back.

The case will no doubt attract enormous media attention if it is not settled. This will be not least because the Prime Minister recently announced proposals to elevate Sir Alan to the House of Lords and appoint him "Enterprise Czar" (but without a seat in the cabinet, which may be just as well as if a report in the [Independent of 6th June](#) is correct it is only a few years ago that Sir Alan wrote in the FT that "I do not know who Mr Gordon Brown is. Excuse my ignorance, but I don't. The man doesn't know what he's talking about."). The [Daily Mail of 2nd July 2009](#) carries a facsimile of a letter from Lib-Dem spokesman Lord Oakeshott to the House of Lords Appointments Commission suggesting that Sir Alan's elevation to the Lords should be postponed pending the outcome of the case.

- For further information generally click here on [Implied terms in employment contracts / duties of employer](#) and/or [Bullying at work / a general note](#) to go to notes on our website.

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5. [Back claims for holiday pay](#)

Early in 2009 the European Court of Justice ruled that the [EC Working Time Directive](#) gives employees the right to paid holiday even if they are absent from work on long term unpaid sick leave (arguably an odd conclusion as the European Commission has previously insisted that the Working Time Directive is about health and safety rather than money).

Following the ECJ judgment, it was clear that employers who had not provided holiday pay to workers absent on long term sick leave would at least in some circumstances be in breach of the Working Time Directive, or in the UK, the [1998 Working Time Regulations](#). It followed that, where relevant, employees on unpaid sick leave would be able to claim for unpaid holiday pay. However under the Working Time rules, there is a time limit of 3 months on back claims so in practice there would not be much to go for.

Some enterprising Inland Revenue staff (or their advisers) came up with the cunning idea that they might be able to make back claims for up to 6 years if they could establish that holiday pay which the European Court had ruled was their right could be claimed under the "unlawful deduction from wages" rules

instead of under the Working Time Regulations. It is well established = that employees have a statutory right to sue for unauthorised deductions from = wages going back for up to 6 years. The various legal questions underlying the case have kept lawyers = busy and have occupied much court time in the UK and Europe since at least = 2002. Finally, there has been a conclusion in June 2009. The House of = Lords ruled on 10th June that employees in the circumstances outlined above = are entitled to treat unpaid holiday pay as an unauthorised deduction from = wages and therefore are entitled to make back claims for up to 6 years (*HMRC v = Stringer & ors House of Lords [2009] UKHL 31*)

We understand that the amount of holiday pay in the case was no more = than around £20! But of course the principle is important and no = doubt a large number of claims will now be able to proceed.

- *For further information generally click here = on [Working Time Regulations / holidays](#) to go to notes on = our website.*

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6. Protection of Children and Vulnerable Adults - vetting procedures

After the Soham murders and the resulting Bichard = report Parliament passed the "[S= safeguarding Vulnerable Groups Act 2006](#)". A new Home Office vetting and = barring system implemented under that Act and designed to better protect = children and vulnerable adults is being phased in, starting in October = 2009. In due course the new arrangements will = replace those provided for by the Protection of Children Act 1999, the Care = Standards Act 2000, the Criminal Justice and Court Services Act 2000 and the Education = Act 2002.

The Home Office estimates that by 2014, 5 million additional jobs = working with vulnerable people, including voluntary positions, will be = subject to checks. The new system will include barring from 'regulated activities' and a new duty on employers, social services and professional regulators to share information. It will be a crime for a barred individual to seek or undertake work with vulnerable groups or for employers knowingly to take them on.

The first main step is due to come into effect on 12th = October 2009. As from that date, two barring lists administered by the = [Independent Safeguarding Authority](#) = will replace the three lists currently maintained by two different = Government departments (Protection Of Children Act List (POCA), Protection of = Vulnerable Adults List (PoVA) and List 99). A mechanism to keep = employers informed of an employee's suitability to work will be introduced = in July 2010.

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

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7. Inflation and compensation

The law requires the government to make annual = orders which index-link the maximum amount of many compensation = awards which can be made by employment tribunals. This is generally done with = effect from 1st February in each year, with index linking by reference to RPI = at the previous September.

This year is different. The RPI is likely to be = negative in September. No doubt with that in mind the April 2009 budget = provided that:

"To help provide adequate support for = individuals who have been made redundant the Government announces a one-off = increase in the level of statutory redundancy pay, making the weekly rate £380".

In spite of this = wording, the announcement did not mean that statutory redundancy pay would = be increased to £380 per week. It was presumably meant to mean that there would be an increase from £350, set at = 1st February 2009, to £380 in the maximum amount of weekly pay which = can be taken into account in calculating statutory redundancy pay. If so, = the increase would benefit those earning more than £18,200 (ie 52 X = £350) when made redundant but make no difference to others.

This and other uncertainties resulting from the announcement have = now been resolved.

There is to be no further increase until, = probably, February 2011 and a = [draft order](#) has been issued fleshing out other details as follows:-

1. it confirms that the interpretation above is correct;
 2. it provides that the = £380 will apply not just for statutory redundancy pay purposes but for all = purposes where the limit on a week's pay taken into account by employment tribunals in awarding compensation was set at £350 on 1st February = 2009 - including, for example, the basic award component of unfair dismissal compensation.
 3. it confirms that the = new limits apply where the "appropriate date" (eg date of dismissal) is on = or after 1st October 2009.
- *For further information generally click here = on [Compensation / 2009 limit increases](#) to go to notes on our website.*

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8. [do they get it? \(in spades\)](#)

Those earning less than £350 per week are not helped by the increase in compensation limits noted in the previous item = but may be amazed at the gap between what they and those at the top earn.

Latest examples, regardless of whether their companies are making = profits or losses, include:

- RBS - regardless of the row over Sir Fred Goodwin's resignation = package, the new chief executive, Stephen Hester, is apparently set for a = £9.6m incentive package
- National Express - £1.7m for top 2 directors = (2008) and even the non-executive chairman got £185,000, this only shortly before = the company says it is doing so badly that it will have to give up the East Coast = Mainline franchise
- BBC - no less that 47 top executives get more than the Prime Minister's salary of £194,000

On the other hand at British Airways some staff, including = the Chief Executive Willie Walsh, are taking pay cuts.

In the United States, the US treasury has introduced a new rule = to limit bonuses paid to senior staff of financial companies which it has = bailed out in its attempts to sort out the sub-prime mortgage crisis. = Specifically, companies that receive [TARP funds](#) will "be encouraged" to ensure that bonuses = are in the form of stock that must be held for a long time. In addition the new = rules will prohibit 'golden parachute' payments to senior officers or the next five = most highly paid employees, and allow bonuses to be reclaimed if it is found that they were based on 'materially inaccurate performance = criteria.'

- *For further information generally click here = on [Company Directors / remuneration](#) to go to notes on our website.*

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9. [No gender pay gap - only mothers' pay gap](#)

The Equality Bill had its 2nd reading in early May and is progressing rapidly through Parliament (156 clauses had been passed through Committee by the end of June, albeit leaving another 49 clauses and 28 schedules still to be covered).

In addition to making changes in discrimination law, the Bill will repeal and replace the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, much of the Equality Act 2006, the Employment Equality (Religion or Belief) Regulations 2003, the Employment Equality (Sexual Orientation) Regulations 2003, the Employment Equality (Age) Regulations 2006, and the Equality Act (Sexual Orientation) Regulations 2007 (all as subsequently amended), plus other ancillary pieces of legislation. So it is important and impressive.

There have been many references to the "gender pay gap" which the Bill is intended to help reduce. For example, clause 73 provides for regulations requiring employers with 250 or more employees *"to publish information relating to the pay of employees for the purpose of showing whether, by reference to factors of such description as is prescribed, there are differences in the pay of male and female employees."*

Some are now querying whether this is necessary. Recent [statistics from the ONS](#) suggest that for non-married people, females actually earn more than males. The ONS figures also show that while married males earn more than married females the "pay gap" varies enormously depending on now many dependent children they have, with a "pay gap" of 8% for those with no dependent children rising to 35.5% for those with 4 or more dependent children.

This has led at least one commentator to suggest that we don't have a gender pay gap in the UK - what we have is in fact a mothers' pay gap (the [Guardian, 18th June 2009](#)). The article says that this gap *"has already been sorted out by the direct subsidies that we give to women with children"*. It says that, for those on average income, the combination of child benefit and child tax credit more than eradicates this "pay gap" and concludes *"Why are we faffing about in parliament with an Equalities Bill to deal with something we've already solved?"*.

Well there's food for thought!

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

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10. [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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11. [..... and finally](#)

This is something of a David and Goliath story. A lady named = Natasha Keenan was given double pay by Barclays Bank. She worked part = time and had been earning £9,500 working for the Woolwich Building Society. = When the Woolwich business was taken over by Barclays a few years ago she = was told to expect a "significant" pay rise and did not question it when her new = contract of employment stated she would be on £17,000. The problem was = that this was the full time rate and the contract omitted to state that as a = part timer she would be paid pro rata.

Ms Keenan's contract was automatically transferred to Barclays = pursuant to the TUPE regulations. One of the general effects of TUPE is = that a variation to an employment contract is "*void if the sole or = principal reason for the variation is (a) the transfer itself; or (b) a reason connected = with the transfer that is not an economic, technical or organisational reason = entailing changes in the workforce*". On the face of it, this might seem = to let Barclays off the hook. However, as they were no doubt advised, = "void" in this context does not really mean "void" - it means "void" if the change = benefits the employer but not if it benefits the employee (the Court of = Appeal, agreeing with the EAT, held that this was so in a case called [Power v Regent Security Services](#) in 2007).

So Barclays did not try that route. Instead they tried to = recoup the overpaid money by making deductions from Ms Keenan's = wages. She was not having that and sued. By the time the case came to the = employment tribunal Barclays had agreed to let her keep the money they had overpaid = but Ms Keenan wanted to continue to receive double pay for the = future. That, she said, was her contractual right. She had taken on commitments = based on receiving the full salary and Barclays could not unilaterally vary her terms.

Barclays were not happy with that. They defended the = case on the basis that the excess payments were all a terrible mistake and that = Mrs Keenan either knew or should have known that that was the case. An = employment tribunal at Ashford, Kent, was impressed by Ms Keenan's = honest answers to questions and has found in her favour, also ruling that = Barclays must pay her interest at 8% on any amount due but still unpaid at = 3rd July 2009.

- *For further information generally click here = on [Changes to terms of employment](#) and/or [Deductions from wages etc / a general introduction](#) to go to notes on = our website.*

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prepared 28th June 2009.
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