

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

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#### 4. [Noise at work](#)

Under current rules there is a maximum permitted noise level of 87dB(A) in the workplace and employers must provide ear protectors to workers exposed to 85dB(A) and must make them available on request to workers exposed to 80dB(A) (see the [Control of Noise at Work Regulations 2005, SI 2005/1643](#)).

Long standing litigation involving some major companies in the knitting industry (sometimes called "the Nottinghamshire & Derbyshire Deafness Litigation") has recently concluded. The Court of Appeal has held that employees who can show they are suffering from hearing loss induced by noise at work have a free standing claim, regardless of the regulations, if the risk that they might be adversely affected was ascertainable and should have been ascertained by their employer.

In those circumstances a claim can be successfully brought under the general provisions in the old [Factories Act 1961](#), the relevant part of which simply provides that "*There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work, and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there*".

The case in point involved a woman who had been exposed to considerable noise at work between 1971 and 1989 ([Baker v Quantum Clothing Group & ors \[2009\] EWCA Civ 499 on 22nd May 2009](#)). Employers nowadays will be more concerned with the regulations mentioned at the beginning of this note than with the Factories Act rules but nevertheless the case serves as a salutary warning to employers who employ staff in noisy workplaces to check that they are not exposing staff to unacceptable noise levels.

- For further information generally click here = on [Health and Safety at work/noise](#) to go to notes on our website.

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#### 5. [Restaurant tips](#)

There has been a long standing legal problem about tips. Are they wages? Most people who leave a tip in a restaurant expect that it will go, directly or via some form of pooling, to the waiter or waitress who served them. But do tips count as "wages" for purposes of the National Minimum Wage?

It was established by the Court of Appeal many years ago (1996) that if tips are collected as part of the customer's bill and then paid out by the employer to staff they count as part of wages but if they are paid direct by a satisfied customer to, for example, a waitress they do not.

A private member's Bill designed to end the practice by which employers can use gratuities and service charges to 'top up' staff wages to meet the National Minimum Wage failed to become law in 2003 but the

idea was taken up = by the government. A [formal consultat= ion](#) paper on the subject was issued in November 2008. Now, in = May 2009, the government has announced that using tips to make up staff = pay to minimum wage levels is to be outlawed from October this = year. Coincidentally also in May 2009, the Court of Appeal has upheld = the EAT decision in the *Annabel's* case ([Annabels = \(Berkeley Square\) Ltd \(2\) George \(Mount Street\) Ltd \(3\) Harry's Bar](#) [2009] = EWCA Civ 361, Court of Appeal on 7th May 2009). This confirmed that tips = and gratuities paid via the particular *tronc* system operated by = the employers' concerned could not be included in "wages" for National = Mnimum Wage purposes. It is rumoured that in some clubs and = restaurants in London's West End the tips can be so great that they result in some staff being liable to higher rate income tax although of = course, at the other extreme, there are other places where a waiter = or waitress may not even earn the National Minimum Wage if tips are not = taken into account.

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

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## 6. [PUWER regulations](#)

In an important ruling which will be welcomed by employers the = House of Lords has held that equipment not provided by an employer, = particularly if it is not on the employer's premises, will not generally count = as "*equipment provided for use or used by an employee at his work*" = within the meaning of the [Provision and Use = of Work Equipment Regulations 1998](#). It follows that employers are = not generally liable to pay damages pursuant to those regulations to an = employee who suffers personal injury as a result of failure of such equipment.

In the House of Lords case a Mrs Jean Smith was employed by = Northamptonshire County Council as a driver and carer. As part of her job, she was = required to collect people in need of care from their homes and take them by minibus = to a day centre. An accident occurred at the home of one of these = people, a Mrs Cotter. Mrs Smith was pushing Mrs Cotter in a wheelchair down a wooden ramp. The ramp had been installed by the NHS about 10 years previously and led from the living room to the patio area outside = Mrs Cotter's house. Mrs Smith had performed this task many times before = without incident but as she was doing it on 1st December 2004 an edge of the = ramp crumbled beneath her foot, causing her to stumble and sustain injury. =

Mrs Smith brought a personal injury claim in the County = Court alleging that her employers were in breach of the 1998 = regulations. She won. The County Court judge found that the ramp = counted as "*work equipment*" and that it was "*provided for = use or used . . . at work*" within the meaning of the regulations.

The employers appealed and the case went all the way to the House of = Lords ([Smith v Northamptonshire County Council on 20th May = 2009](#)). The House of Lords pointed out that some degree of limitation has = to be implied into the Regulations to prevent absurd results - by way of = example one of the Law Lords suggested that if Mrs Smith's arguments and the County = Court judgment were right it would follow that there could be liability = for defects in such things as the chair in the committee room in the House = of Lords or the escalator in the Westminster Underground station. = While all involved accepted that the ramp counted as "*work = equipment*" for the purposes of the PUWER regulations, the House of Lords ruled = that on a proper understanding of the regulations it could not be said to have = been "*provided for use or used by an employee at his work*". So = Mrs Smith's claim failed.

- *For further information generally click here on [Health and Safety at work / PUWER regulations](#) to go to notes on our = website.*

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## 7. [Part-time workers](#)

As is well known, in general terms a part-time worker has the right "*not to be treated by his employer less favourably than the employer treats a comparable full-time worker .....[if] the treatment is on the ground that the worker is a part-time worker*" (there are qualifications and limitations to this rule but that is the general effect of the [Part-time workers = Regulations 2000](#)).

Two knotty problems as to proper interpretation of the regulations have recently been resolved by the Employment Appeal Tribunal. One is what happens if there is no "*comparable full time worker*"; in that situation, can a hypothetical full-time worker be used instead? The other is whether "*the ground that the worker is a part-time worker*" means that part time status has to be the sole reason for the less favourable treatment.

As to the first problem, the EAT has now ruled that, save in two situations specifically covered by the regulations, it is not permissible to use a hypothetical full time worker as the comparator (the two exceptional situations occur when a full-time worker switches to part-time work and/or vice-versa). As to the second problem, the EAT has ruled that "*Part-time work must be the effective and predominant cause of the less favourable treatment complained of; it need not be the only cause*".

In the case in point a lady worked part time as a teacher of shorthand in the Journalism Department at Sheffield University. She complained that full time workers were paid for preparation time but she was not and that this was a breach of the Part-time workers Regulations. She faced a problem because there were no full time teachers of shorthand with whom she could compare herself so instead she sought to compare her position with that of a 'generic teacher' on a University Teacher's contract. An employment tribunal accepted this as a valid comparison for the purposes of the regulations. The University appealed and has won. The EAT has ruled that (save in the two situations noted above) a hypothetical comparator cannot be used and that that is what a 'generic teacher' on a University Teacher's contract would be.

That was enough to mean the University won the case. Nevertheless the EAT went on to consider whether for the purposes of the regulations "*the ground that the worker is a part-time worker*" means that part time status has to be the sole reason for less favourable treatment. As noted above the EAT ruled that it is not necessary for a part time employee to show that their part time status is the only reason for the less favourable treatment complained of - but to win a claim under the regulations he or she must be able to show that it was an "*effective and predominant cause*".

- For further information generally click here on [Part-time workers / 2000 regulations / notes](#) to go to notes on our website.

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## 8. [The battle of the golden handshakes - and other things](#)

With all the hooah about rewards for failure, bonuses for bankers and = MP's milking the system, it's good to know that the Courts and tribunals, if = and when they are invited to get involved, are prepared to take a broad view and = move on from what might be regarded as a traditional approach. Two recent examples, one favouring employers and the other employees, show that the = law evolves as times and circumstances evolve.

The first is the case of **Rose Gibb**. = We mentioned this in our May newsletter but it had then only just been decided = and the full judgment transcript was not then available. It is now = available and an update may be of interest.

As a reminder, the background is that Ms Gibb resigned from her = job as chief executive of Maidstone and Tunbridge Wells NHS Trust, a few days = before publication on 10th October 2007 of a report on an outbreak of = c.difficile which had caused the deaths of 90 people at the hospital for which she = was responsible. As part of agreed severance terms Ms Gibb was promised = a total of some £250,000. A public outcry followed and Alan Johnson, the = Minister of Health, intervened. In the event, given the pressure to do = so, the Trust decided to go back on its promise. Ms Gibb sued. She = accused the Trust of "unjustly enriching itself" at her expense by withholding £175,000 of her £250,000 severance agreement. The High Court ruled, in essence, that the severance = package agreement was void. It was simply unreasonable in what = lawyers know as the *Wednesbury* sense (so-called after a 1947 = case in which the Court of Appeal ruled that the courts can consider = whether a local authority might have contravened the law by acting in excess = of its power and that this meant they can consider whether the local authority acted unreasonably by taking into account matters = that ought not to have been taken into account or disregarded matters that = ought to have been taken into account). The judge ruled that in this = sense the Maidstone and Tunbridge Wells NHS Trust had acted = unreasonably when it promised such a large payment, that it should not be forced to pay = it and that it had not unlawfully enriched itself or benefited. He = ordered Ms Gibb to pay the trust's legal costs.

Ms Gibb has now lodged papers at the Court of Appeal, where she = will seek to appeal the ruling. The Chief Executive of her union, Managers in = Partnership, has said "*This is all going to take time. = Separately, we are also bringing a claim in the employment tribunal. We can't say any = more at the moment about the grounds of appeal but will release further = information in due course.*"

Bankers such as Sir Fred Goodwin who presided over catastrophic = performances by their banks and then resigned with huge pensions will no doubt be = watching with interest.

The second case is that of a Mrs **Linda Sturdy**. This concerned compensation for injury = to feelings in a discrimination case. There is no formal or statutory limit = on the amount which a tribunal can award for injury to feelings in discrimination cases but in December 2002 the Court of Appeal = effectively set the normal absolute maximum at £25,000 (in *Vento v West = Yorkshire Police*).

That maximum has now been exceeded. An employment tribunal in = Leeds considered that Mrs Sturdy, who had won a claim of unlawful age = discrimination after 17 years unblemished service with the NHS, had been so badly = treated by her employers that she should be awarded the £25,000 = maximum. However the tribunal agreed to increase the award by 18.5% to take = account of inflation since the Court of Appeal's ruling noted above. So = Mrs Sturdy was awarded £29,500 for injury to feelings (plus interest). It = is understood that this is the largest sum ever to have been awarded by an employment tribunal for injury to feelings in a discrimination case.

By way of aside it is interesting that Mrs Sturdy's Counsel = had argued for £75,000 to be awarded for the injury to her feelings. This = was on the ingenious basis that she had made 3 separate claims and should get = £25,000 for each! Given that she only had one set of feelings to injure it = is not altogether surprising that the tribunal decided to make a single global award - but this does not detract from the achievement of = persuading a tribunal to award a greater amount than the Court of Appeal had set as = the effective normal maximum just a few years ago.

- *For further information generally click here on [Associated Provincial Picture Houses v Wednesbury Corporation CA 1947](#) and/or [Compensation / injury to feelings](#) to go to notes on our website. =*

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## 9. [Lewisham v Malcolm - update](#)

*Lewisham v Malcolm* was the important case in summer 2008 in which the House of Lords ruled, in effect, that for the last 9 or 10 years the courts and tribunals had been using a fundamentally wrong approach in deciding whether a person could or could not claim disability discrimination. *Lewisham v Malcolm* was a housing case not an employment law case, but within a few months the Employment Appeal Tribunal accepted that the House of Lords ruling applied in employment cases as well.

What is the problem? In shortest possible summary the problem stems from the fact that, as a matter of logic, for a claimant to show "discrimination" he normally has to show that he has been treated worse than someone else. The problem is deciding with whom the comparison should be made. Unfortunately, the wording of the Disability Discrimination Act 1995 in this respect is ambiguous.

The ambiguity was resolved in 1999. In essence, the Court of Appeal then held in an employment law context that the correct comparator was simply a work colleague who was not suffering from a disability = (*Clark v Novacold [1999] EWCA Civ 1091*). This meant that if a disabled person took time off work and was dismissed as a result, he would be able to show that he was treated worse than his fit colleague who, being fit, had not taken time off and was not dismissed. Thus he could claim that his dismissal was unlawful discrimination by reason of his disability. Now, however, following the House of Lords 2008 decision, the correct comparator is different. The House of Lords has ruled that the ambiguity in the 1995 Act was wrongly resolved in 1999. The House of Lords ruled, in essence, that in the case used as an example above the correct comparator would be a fit person who has taken time off work (without permission) and who has been dismissed for doing so. As the same treatment, dismissal, would have been meted out to both the person suffering from a disability and to his fit colleague, it would follow that there was no discrimination - and so no claim.

Not surprisingly this reinterpretation of the law caused consternation amongst employees suffering from a disability and their supporters and advisers.

Before noting the two recent developments which prompted this note, it should be explained that, on the facts of the *Lewisham v Malcolm* case, the House of Lords clearly came to a just result. Mr Malcolm was a tenant of a Council property who wanted to exercise his right to buy, possibly with a view to selling on at a quick profit. When the Council found that he was in breach of his tenancy agreement by not occupying the property and by allowing a third party to live there it refused to sell him the property. Mr Malcolm said that he suffered from a disability, that it was not possible for him to occupy the property personally because of the disability and that it followed that the Council's refusal to sell amounted to unlawful disability discrimination. On the basis of the 1999 Court of Appeal decision noted above, he was right. However this would clearly have been an unjust result - hence the House of Lords ruling.

The two recent developments which prompted this note are:

1. [A case in the Employment Appeal Tribunal](#). In May 2009, lawyers for a disabled employee found a way of at least partially circumventing the problem created by *Lewisham v Malcolm*. An argument was put forward based on the "reasonable adjustment" provisions in the Disability Discrimination Act 1995. These impose an obligation on employers of an employee who suffers from a disability to make reasonable adjustments for their benefit without requiring comparison to be made with a fit person. The Employment Appeal Tribunal has now accepted that in appropriate cases an employer's failure to make "reasonable adjustments" (such as offering appropriate alternative employment) can mean that dismissal of an employee suffering from a disability can be unlawful under Disability Discrimination Act 1995. In money terms the final outcome, therefore, so far as the claimant is concerned, could be similar to what it would have been before the *Lewisham v Malcolm* ruling.

2. The Equality Bill 2009 now before = Parliament. Clause 14 of this Bill proposes that if a person treats a person who = he knows or could reasonably be expected to know is disabled in a way which = because of their disability amounts to a detriment, then that will be unlawful discrimination unless justified as "*a proportionate means of = achieving a legitimate aim*". If and when this becomes law the general effect should be to eliminate completely the problem = Parliament itself caused when in 1995 it enacted ambiguous wording in = the Disability Discrimination Act.
  - For further information generally click here on [Disability Discrimination / comparator](#) and/or [Disability Discrimination / reasonable adjustments](#) 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](#)

While on the subject of the Equality Bill (see item 9 above) it is = worth noting that, if enacted as it stands, one little noticed effect will be = to force churches to employ gay lay staff even if they do not wish to do so. Under current law there is an exemption which makes it lawful to reject a gay job applicant if = the intended employment is "for the purposes of an organised = religion" provided certain specified conditions are fulfilled (*Employment Equality = (Sexual Orientation) Regulations 2003 reg 7(3)*).

The new Bill uses similar wording to the 2003 regulations (which it = will replace) but adds the crucial extra words that "*Employment is for = the purposes of an organised religion only if the employment wholly or = mainly involves (a) leading or assisting in the observation of liturgical or ritualistic practices of the religion, or (b) promoting or explaining = the doctrine of the religion (whether to followers of the religion or to others)*" (*Equality Bill sch 9 para (2)(8)*).

The official explanatory note to the Bill = confirms that the proposed revised version of the exemption would not entitle a = church to refuse employment to a gay person who applied for a post as a = church youth worker or accountant if the reason for the refusal was the person's = sexual orientation.

Cynical lawyers with reasonable memories might point out = that at least one employment tribunal seems to have jumped the gun and = effectively applied the proposed new law as long ago as 2007. The C of E = Bishop of Hereford had refused to employ a gay man as Diocesan Youth Officer = because he was gay. The man sued. Notwithstanding that it = recognised that it must not substitute its own view as to what

was reasonable for = the view of the Bishop, the tribunal ruled that this was unlawful. It ordered the diocese to pay the man almost = £50,000 compensation for breach of the 2003 sexual orientation regulation = (*Reaney v Hereford Diocesan Board of Finance Cardiff ET, July = 2007*). So maybe the Equality Bill is, in this respect, doing no more than = specifically spelling out what the law already is.

- *For further information generally click here on = [Sexual Orientation Discrimination / sexual orientation regulations 2003](#) to go to notes on our website. =*

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FINISH>