

Appendix 4 – Dealing with absence (guidance = about unauthorised short-term and long-term absences and failure to return = from extended leave).

Appendix 5 – Basic principles of the Data = Protection Act 1998 and Disability Discrimination Act 1995. Now for the transitional rules. The "old" compulsory = statutory procedures and the penalties for failing to observe them will continue = to apply, even in some situations where a claim is made as late as 4th October = 2009. And of course it can be expected that even "ordinary" cases under the old = rules will continue to come before tribunals well into 2010.

In disciplinary/dismissal cases, the transitional = position is relatively straightforward. The current rules will apply if the employer = started the disciplinary action or dismissal action before 6th April 2009 (this = will usually be a step 1 letter or if none has been sent the date of the = disciplinary action/dismissal). Otherwise the new rules will apply.

In grievance cases the transitional position is more = complicated. The pre-6th April 2009 regime will continue to apply, subject to final = cut off dates, if an employee complains on or after 6th April 2009 about action = taken by the employer which began before that date but continues thereafter.

The cut off dates for the employee to make a tribunal = claim are 4th July 2009 and 4th October 2009, the deciding factor being the normal = time limit for making the particular claim. For most types of claim 4th July = will be the cut off date as for most types of claim there is normally a 3 month = time limit. In equal pay and statutory redundancy pay cases the normal time = limit is 6 months so the cut off date will be 4th October.

Thus, as set out at the start of this note, it will be = possible, albeit probably in rare cases only, for the compulsory statutory dispute = resolution procedures to continue to apply in respect of claims made by employees even as late as early October 2009.

Inevitably the devil is in the detail (the [Employment = Act 2008 \(Commencement No. 1, Transitional Provisions and Savings\) Order 2008, SI = 2008/3232](#)). In any case of difficulty employers and/or = employees would be well advised to seek expert advice.

- *For further information click here on [Acts of Parliament etc / Employment Act 2008](#) to go to notes on = our website.*

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2. [How discretionary is a bonus?](#)

With all the recent concern about bankers' bonuses, the "bonus = culture" generally and the suggestion that much of Sir Fred Goodwin's early = retirement pension from RBS was "discretionary", it is appropriate to take a look = at some of the relevant law.

This note does not consider the question of whether = shareholders can sue the members of a panel which awards excessive discretionary bonuses. = It looks at the other side of the coin - whether an employee can sue his = employer for cutting or not paying a discretionary bonus. In particular a recent = case in the Employment Appeal Tribunal shows how dangerous it can be for an = employer to assume that he can cut a bonus just because it is labelled as = "discretionary".

It is well established law that where an employer has an absolute = discretion, it must not exercise, or fail to exercise, that discretion irrationally = or perversely. In the case noted above, which involved not a City bank but = Boots the chemist, the EAT pointed out that "discretionary" in the context of "discretionary bonus" can have various applications - it could be = referring to:

- the provision of an overarching bonus scheme;
- a decision to pay or not pay a bonus in a particular year;
- the method of calculation of a bonus (for example fixed amount or percentage of salary and if so what percentage);
- the threshold or performance target which triggers a = bonus.

So the starting point in considering whether an employee is legally = entitled to a bonus is to look carefully at the terms of his or her contract.

In the case ([Small v The Boots Co PLC and Boots UK Ltd](#), EAT on 23rd January 2009), Mr = Small and other warehousemen employed by Boots claimed for unlawful deduction from = wages. They said that they had not been paid performance related bonuses to = which they were entitled. The position was complicated by the fact that the = division for which they worked had recently been sold by Boots to Unipart and then = bought back again so that the legal scenario also involved the TUPE regulations = but this complication did not affect the basic position.

An employment tribunal decided that the bonuses were purely = discretionary. Boots' Staff Handbook said so, in so many words - it said "*After a qualifying period of service, there are additional discretionary = benefits, such as bonuses... However, they are not intended to be contractual*". = Having lost at the tribunal on this basis, Mr Small and his colleagues appealed to = the EAT. The EAT found in their favour to the extent that it remitted the case = back for reconsideration. Although superficially clear, the wording of the = handbook was in fact ambiguous.

The important factor, according to the EAT, was that the original = employment tribunal had failed to take into account "*all relevant circumstances = including the invariable practice of making payments over many years in = deciding whether the discretion in the documentation is to be construed as having = contractual content*". In other words, the wording of the Staff = Handbook was not sufficiently clear to mean only what the employment tribunal thought = it meant and it was possible that the customary practice of Boots in = relation to bonus payments had led to there being an implied contractual term that a = bonus would be paid even if its amount might be discretionary (a discretion = which as noted above could not be exercised irrationally or perversely).

In addition to the obvious conclusion that an employer should not = assume that he can cut a bonus just because it is a "discretionary bonus" this case highlights two significant practical points:

1. a purchaser of a business should make full enquiries about any = staff bonus schemes. If a discretionary staff bonus scheme operated by the vendor = of a business has contractual status, the TUPE regulations will ensure that = liability to continue it automatically transfers with the business.
 2. a claim may have to be made in a Court rather than in an = employment tribunal. An employment tribunal's jurisdiction to consider claims for = unlawful deductions from wages arises under the Employment Rights Act = 1996. The relevant provisions do not apply where the amount claimed is = uncertain, as it might well be if a discretionary bonus is in point. In that case = the claim would have to be pursued as a claim for damages for breach of contract = rather than as a claim for unlawful deduction from wages under the 1996 Act. = An employment tribunal has jurisdiction to consider breach of contract = claims only if the employee making the claim is no longer working for the = employer - and even then cannot award more than £25,000 - so it would follow = that the claim would normally have to go to a County Court or the High Court. =
- *For further information click here on [Implied terms in employment contracts / duties of employer to go = to notes on our website.](#)*

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3. [What is a "Sham"?](#)

It is one thing to consider whether a "discretionary" bonus is as discretionary as it might seem. It is quite another to consider whether = an arrangement is what it seems on the face of it to be or whether it is in = fact a sham. If it is a sham, then as a general rule it will be legally = unenforceable at least to create the rights and obligations it purports to set out. = Thus in a recent case it was held that an individual who worked under what = purported to be a partnership agreement was in reality an employee, with all the =

employment law rights of an employee ([Protectacoa v Firthglow Ltd v Szilagy](#), Court of Appeal on 20th February = 2009); in another recent case (= [Train v DTE Business Advisory Services Ltd and Rosen](#), EAT on 6th = January 2009) it was held that an accountant working under what purported to be an = employment contract was really a partner without those rights!

The consistent theme underlying both cases was, in the words of one = of the Court of Appeal judges, that "*..... in the field of employment at = least, it is more helpful and relevant to ask not whether the = written agreement is a sham but simply what the true legal relationship is. = Although there will be in many cases (as there was in this one) an intention to = conceal or misrepresent the actual relationship, there is no logical reason why = this should be a universal requirement.....*".

An employment tribunal can and will imply a contract of employment = where the formal written contracts are a sham in the sense that they are = deliberately intended to mislead third parties or the Court as to the true nature of = the relationship. Indeed, it can and will do so even if there is no joint = intention to deceive third parties or the court but the parties have a common = intention that it is not intended to create the legal rights and obligations it = purports to set out.

- For further information click here on [Definitions and interpretation / sham](#) to go to notes on our = website.

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4. [Health and Safety Offences Act 2008](#)

The [Health = and Safety Offences Act 2008](#) came into force on Friday, 16 January = 2009. It is a criminal law provision but clearly is of significance for employers = and, indeed, employees and their advisers. The Act does not apply to offences = committed before 16th January 2009 even if prosecuted afterwards. It = extends to England and Wales, Scotland and Northern Ireland

The Act increases the maximum penalties for certain health and safety = offences. In particular it increases the maximum fines which a = Magistrates Court can impose (generally from £5,000 to £20,000) and gives Magistrates = Courts power to impose prison sentences in serious cases. It also makes certain = offences which were previously triable only in the Magistrates Courts triable = either there or in Higher Courts.

The Chair of the Health & Safety Executive, Judith Hackitt, says = about the Act:

"Our message to the many employers who do manage health and = safety well is that they have nothing to fear from this change in law. There are no = new duties on employers or businesses, and HSE is not changing its approach = to how it enforces health and safety law. We will retain the important = safeguards that ensure that our inspectors use their powers sensibly and = proportionately. We will continue to target those who knowingly cut corners, put lives at = risk and who gain commercial advantage over competitors by failing to comply with = the law"

- For further information click here on [Acts of Parliament etc / Health and Safety \(Offences\) Act 2008](#) to go to = notes on our website.

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5. [Unfair constructive dismissal and compensation](#)

The compensatory award element of unfair dismissal is intended to compensate an unfairly dismissed employee for losses suffered as a consequence of being dismissed. Therefore if he or she gets a new job at once at the same or a higher salary it will follow, as a general rule, that loss of earnings will be zero and so compensatory award in respect of loss of earnings will be zero.

While that is true as a general principle, there is a long standing, well established and important exception. This is that an employee who has been dismissed without being given the contractual notice to which he or she is entitled and who is subsequently found to have been unfairly dismissed is entitled to compensation in respect of the contractual notice period even if he or she found another job during that period. This means that unfairly dismissed employees can receive both compensation from a previous employer and salary from a new one in respect of the same period, a potentially valuable entitlement for unfairly dismissed employees, particularly for those with long contractual notice periods. The basis for this exception to the general rule is that if an employer gives pay in lieu of notice to a dismissed employee it would be neither good nor normal industrial practice to demand a refund if the employee got a new job before the end of the notice period.

For a long while there has been uncertainty as to whether this well established exception to the general rule applies where the employee was not actually dismissed but rather was unfairly "constructively dismissed" - in other words where the employee resigned "*in circumstances such that he is entitled to terminate [his contract] without notice by reason of the employer's conduct*". It could be argued for an employer that the requirements of "normal industrial good practice" are not the same in constructive dismissal cases as in direct dismissal cases and that therefore the general principle should apply. If that argument were accepted compensatory award in respect of loss of earnings would be zero where an employee who has been constructively unfairly dismissed immediately gets a new job at the same or a higher salary. This argument was put forward for an employer in a recent case before the Employment Appeal Tribunal. It failed. In [Stuart Peters v Bell](#), the EAT held that compensatory award should be calculated in the same way in constructive unfair dismissal as in normal direct unfair dismissal cases. Unfairly dismissed employees can thus receive both compensation from a previous employer and salary from a new one in respect of the same period whether the dismissal was constructive dismissal or a normal "direct dismissal".

Although there is to be no further appeal in this particular case the judge in the EAT concluded his judgment by recognising that there is a "continuing controversy" on this issue and expressed the hope that the position could be "settled by the House of Lords in the near future, when the opportunity arises".

- For further information click here on [Unfair dismissal / compensation calculation / compensatory award](#) to go to notes on our website.

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6. [SMP, SSP and benefit rates](#)

This note is just a reminder that the following are amongst social security benefit increases which will take effect in April 2009:

- the flat rate for statutory maternity, paternity and adoption pay will increase to £123.06 (currently £117.18)
- the rate for statutory sick pay will increase to £79.15 (currently £75.40)
- For further information click here on [Social Security / Employment related benefits / a guide to maximum rates of benefit](#) to go to notes on our website.

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7. [Religious discrimination](#)

It is now just over 5 years since discrimination, harassment or = victimisation on grounds of religion or belief, defined as any "religion, religious = belief or similar philosophical belief", was made unlawful in the workplace (the = [Employment = Equality \(Religion or Belief\) Regulations 2003](#) came into force on 2nd = December 2003). There has been one significant change to the regulations since then and = cases on proper interpretation of the regulations are now getting to the higher = tribunals and courts. So now is a good time for a brief review.

Firstly, the change to the regulations. From April 2007 the wording = has been changed to ensure (i) that any philosophical belief is covered whether = or not it is "similar" to a religious belief and (ii) that lack of religious or philosophical belief is also covered.

Secondly, recent case law shows that:

- **it can be lawful to dismiss an employee because he or she = is inappropriately promoting a religion or belief.** That is not = dismissal because of religion or belief. Liverpool Council specifically = prohibited overt promotion by social workers in the course of their work of any = religious beliefs that they might hold. A Christian social worker disobeyed that = instruction and in one incident a complaint was made to the Council = that "he was talking about God and church and crap like that". Disciplinary = proceedings were started and he was eventually dismissed. An employment tribunal = rejected his claim that his dismissal was contrary to the regulations and the = EAT has agreed with the tribunal (= [Chondol v Liverpool City Council](#) on 11th Feb 2009).
- **in deciding whether action by an employer is contrary to = the regulations a tribunal must look at the employer's reasons for doing = what he did rather than at the employee's reasons for acting as he or she did.** In December 2008, the EAT ruled that an employment = tribunal had fallen into the trap of confusing these two concepts. The tribunal had = found Islington Council guilty of unlawful discrimination in disciplining a Christian registrar who refused to conduct marriages for same sex = couples on the basis that to do so would be contrary to her religious beliefs. = The EAT ruled that the original tribunal was in error - the reason for the = dismissal was not the registrar's religion or belief but her refusal to comply = with the Council's "Dignity for all" policy. Her complaint was not that she had = been treated differently from others but rather that she had not been = treated differently (<= EM>[London Borough of Islington v Ladele](#) on 19th Dec 2008). It is = understood that she has said she will appeal.
- Miss Nadia Eweida, a Pentecostal Christian working in customer = services at Terminal 5 in Heathrow airport, sued British Airways for religious discrimination after being barred from wearing a cross on a necklace = while at work. An employment tribunal dismissed her religious discrimination = claim and she appealed to the EAT. She lost again. This was on the rather = technical ground that any possible discrimination was indirect rather than = direct so she would have to prove that a group was put at a "particular = disadvantage" by reason of not being allowed visibly to wear a cross. She had not done = that ([Eweida v British Airways plc](#) on 20th Nov 2008). It is understood = that she has said she will appeal and that BA subsequently changed its policy. =
- **it can be unlawful for an employee to be harassed not only = on grounds that he holds certain religious beliefs but also = because someone else holds religious beliefs.** An advice centre = employer took disciplinary action against a Hindu manager, ostensibly = for misconduct but really because he was of the Hindu faith. The manager = was dismissed. One of the manager's subordinates who had been interviewed = by the employer in an attempt to get evidence about the alleged misconduct = felt he was being pressured to provide the employer with ammunition to justify = action against his manager. He resigned. Both the manager and the subordinate = claimed unfair dismissal (constructive unfair dismissal in the case of the subordinate) and religious discrimination. Both won their unfair = dismissal claims but only the manager won his unlawful religious discrimination = claim. The subordinate, who had lost his religious discrimination =

claim, appealed to the EAT and won. The EAT found that the employer had a policy which amounted to religious discrimination contrary to the regulations. Its treatment of the subordinate was harassment because of that policy and therefore was unlawful ([Saini v All Saints Haque Centre & ors](#) on 24th October = 2008).

Finally, although the case never went to court, it is worth noting that a Baptist nurse (Caroline Petrie) was suspended without pay in December = 2008 after an elderly patient complained to her employer, North Somerset Primary = Care Trust, that the nurse offered to pray for her. It is understood that the = nurse has now been told she can return to work.

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

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8. Unfair dismissal and compensation for loss of pension rights

A recent case provides a salutary warning to any employer who still = provides a final salary pension scheme. The case also provides a potential bonus = to those, mainly now civil servants, who are lucky enough still to be = members of a final salary scheme but who are unfairly dismissed.

The case concerned a lady, Ms Roberts, who was dismissed as redundant = by her employer, Aegon UK Corporate Services Ltd in January 2007. Aegon had a = final salary pension scheme which Ms Roberts had been a member of for almost = six years, her salary was well over £60K a year and they paid her some = £25K enhanced redundancy pay when they dismissed her.

She got a new job immediately. It provided a better remuneration = package than she had had from Aegon, save that the pension scheme run by the new = employer was a money purchase scheme, not a final salary scheme. She considered it to = be a permanent job but in the event it lasted less than a year. Ms Roberts = suffered health problems and her performance deteriorated. The new employer gave = her the option of being dismissed or resigning. She chose to resign and accepted = a termination package of 3 month's salary plus over £4K accrued bonus = plus an ex gratia payment of £10K. That was in October 2007.

Meanwhile Ms Roberts was pursuing an unfair dismissal case against = Aegon. Her case came before a tribunal in February 2008 when she was still = unemployed. She won that claim.

In assessing compensation the tribunal correctly took the view that = fresh employment does not by itself stop the clock running as far as losses = flowing from the original dismissal are concerned. This had important = implications so far as pension rights were concerned. In a final salary scheme the risk = is very much on the employer and the reverse is true as far as a money purchase = scheme is concerned. The tribunal found that "*It is unlikely that the = Claimant will find employment that will offer a final salary pension. It is more = likely that any pension arrangements in her new employment would involve a money = purchase scheme. That accords with our understanding of the trend in the = provision of pensions*".

In other words, in calculating Ms Roberts' loss (and her = compensation) it was it was proper to take into account that nowadays it is almost impossible = to find a job in the private sector which provides membership of a final salary = pension scheme. As she had been lucky enough to be employed by an employer which = had a final salary scheme, when they unfairly dismissed her this meant = compensation should include an amount to reflect this new reality. The tribunal = awarded her some £37K.

Aegon appealed against this ruling but has lost. The EAT, in a = judgment delivered in February 2009, agreed that the employment tribunal had = correctly applied the law.

- *For further information click here on [Unfair dismissal / compensation calculation / compensatory award](#) = to go to notes on our website.*

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

You can find on our website summaries of all employment law **cases** reported in the most recent editions of = the IRLR and ICR Law Reports (the two leading series of law reports covering = employment law cases). You can also find on our website notes on all recent employment law = related **Acts of Parliament** and = **Bills** currently before Parliament.

- For further information 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](#)

After looking at the serious matter of religious discrimination = ([item 7 above](#)), here, more by way of light relief than serious = comment, is a semi-religious possible anomaly.

The [Health Act 2006](#) makes smoking in public premises, including workplaces, a = criminal offence. Churches are clearly premises open to the public so smoking in = a church would clearly be a criminal offence. But what is "smoking"? The Act = states that it "refers to smoking tobacco or anything which contains tobacco, or = smoking any other substance" (*our emphasis*). But there is no = definition of "smoking" itself.

The Oxford Dictionary provides three main meanings for the verb "to = smoke": (i) to produce or give forth smoke; (ii) to fumigate; and (iii) to = inhale (and expel again) the fumes of tobacco etc from a pipe, cigar or cigarette. = As a main purpose of the 2006 Act was to protect the public from breathing in = smoke produced by others (ie secondary smoking) the first two definitions = would seem to be at least as relevant as the third. If so, the common practice of = burning incense in church has now been criminalised.

During the passage of the Health Act a questioner in the House of = Lords specifically asked the Government "*does incense and ting-a-ling come = into the ban on smoke generally?*" There was no reply, or more accurately = the reply was simply that "*ting-a-ling is exempted*", without = mentioning incense (*there was no explanation either of what is meant by = ting-a-ling or where the exemption is to be found*). Experience in the Irish Republic, where burning incense in church is = perhaps even more normal than in the UK, is not helpful either. Their no-smoking = law, passed several years before the British version, prohibits only smoking = of tobacco products.

Perhaps the solution is provided by Church law itself. In the House = of Lords debate from which the extract above is taken, a peer noted that "*in = 1650 the Catholic Church passed a papal bull that prohibited smoking in churches = and cathedrals and the taking of snuff*". So if prosecuted under the = Health Act a church minister might point out that for 400 years "smoking", at least = in a church context, could not possibly have been meant to include burning = incense. Holy smoke - not guilty, M'lud!

- For further information click here on [Smoking at work](#) to go to notes on our website. =

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