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1. [Illegal immigration](#)

The first phase of the new immigration points system started at the end of February 2008. Under the system, to qualify to come to work, train or study in the UK a person must "earn" a certain number of points in various categories. The first phase covers highly skilled individuals (known as "tier one") already in the UK or applying from India. The second phase is due to start this month and covers tier one workers from other parts of the world plus investors, entrepreneurs and a category known as "post-study" (inelegantly described on the [Home Office web-site](#) as "if you are studying now and have in past in the United Kingdom, and also to boost the United Kingdom as a somewhere you want to come as an international student to keep the best international graduates").

There is a "[points based calculator](#)" on the same Home Office website which can be used to calculate how many points a person has to see if they are eligible to work in the United Kingdom as a highly skilled worker. There is also a "[timetable for PBS launch](#)" which shows May 2008 as the time for start of the process for Tier 2 (skilled workers with a job offer), due to be fully effective "in the autumn of 2008".

Importantly, at the same time as the government introduced the points system it also introduced new rules to penalise employers of illegal immigrants and started a highly effective crackdown on such employers. Since 29th February 2008 an employer who employs someone subject to immigration control aged over 16 who is not entitled to undertake the work in question is liable to pay a civil penalty unless he can show that he had checked and copied specified original documents **before** the worker concerned started working for him. The penalty is calculated on a sliding scale - it can be up to £10,000 per illegal worker. It is separate from the unlimited fine and/or prison sentence of up to two years which can be imposed on an employer who is prosecuted for knowingly employing an illegal worker.

The new system has teeth. There are reports that during March and April 2008 fines and penalties totalling around £500,000 have already been levied on 137 employers caught employing illegal immigrants. A [BBC report of 5th May](#) says that this is 10 times the number caught in 2007, and more than double the number prosecuted in the previous decade. Clearly the government is taking the issue of illegal immigration extremely seriously. Employers with staff who may be illegal immigrants, whether newly taken on or who have been employed for some while, would be well advised to check carefully and brief themselves as fully as possible on the detail of the new rules.

- For further information click here on [Immigration / illegal workers](#) to go to notes on our website.

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2. [Public sector strikes - police and prison officers](#)

Given the strikes at the end of April by members of the National = Union of Teachers and of the Public and Commercial Services Union and dire = newspaper headlines warning of a "summer of discontent", the legal aspect of = recent actions by the police and by prison officers in pursuit of improved pay = are likely to be of general interest as well as of specific interest to = those directly involved.

As regards the police, the position is straightforward. As the = law stands it is a criminal offence for anyone to do "*any act calculated = to induce any member of a police force to withhold his = services*". This provision, in the [Police Act 1996 s.91](#), effectively prevents the Police from going on = strike.

The position of prison officers is more complicated. = Until recently they were not allowed to strike by virtue of a similar provision to that = covering the Police, but in a different statute ([Criminal Justice and Public Order Act 1994 s.127](#)). Then in May = 2003 the government announced that this provision would be "repealed" = following the success of a Voluntary Agreement which had been made between the = Prison Officers Association, the Prison Governors' Association and the Prison = Service in 2001. A new "[Joint Industrial Relations Procedural Agreement](#)" or JIRPA was then = agreed. In May 2007 the Prison Officers Association gave the requisite 12 = months' notice to terminate the JIRPA agreement and it comes to an end on 8th May = 2008. In the meantime, in August 2007 prison officers attempted to stage a = strike anyway but had to call this off after the government obtained a High = Court injunction. In February 2008 the High Court extended this = injunction until 8th May. This did not prevent 1,000 prison officers taking unofficial = strike action at the end of April 2008, in support of 2 officers at Lindholme = near Doncaster who had been threatened with summary dismissal.

That very recent strike was quickly called off but in the = meantime the government had been busy. It decided in late 2007 to = reinstate provisions making it a criminal offence for prison officers to go on = strike by making somewhat last minute additions to the current [Criminal Justice and Immigration Bill](#). This will make further = amendments to [Criminal Justice and Public Order Act 1994 s.127](#) the effect of which = will be to make it impossible for prison officers to strike without a = criminal offence being committed. The government is trying to get = these provisions onto the statute book before 8th May 2008.

So for practical purposes the conclusion is, or very soon will be, = that matters are back to where they were a few years ago - neither the police = nor prison officers can go on strike (or to be more accurate it will be = impossible for them to go on strike without a criminal offence being committed) =

- *For further information click here on [Specific employments / prison officers](#) and/or on [Specif= ic employments / policemen and special constables / general](#) to = go to notes on our website.*

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

There have been several employment cases recently in which one party = or the other has claimed that documents or procedures were a "sham". = In the most recent the EAT did not disturb an employment tribunal's = finding that an employer's grievance and appeals procedures were a sham and were = designed simply to find out details of the employee's = case and to help in contesting it at a tribunal ([C= orpora Software Ltd v Perry](#), EAT on 1st May 2008). In another case = an employment tribunal found that certain terms of a contract = between an employment agency and its end user client were a "sham" - this = was part of the reason why the tribunal found the agency was the = employer of temps it provided to a particular end-user ([Consis= tent Group Ltd v Kalwak & ors](#), Court of Appeal on 29th April = 2008 which the Court of Appeal remitted back for rehearing).

So what is a "sham" for employment law purposes? The meaning is = more restricted than in tax law in which even an arrangement = creating genuine legal rights can be treated as a "sham" if its only purpose was = to avoid tax (this was established by the House of Lords some 27 years ago in the = well

known [Ramsay](#) tax case). For employment law purposes the classic definition of a "sham" is derived from normal contract law - "it means acts done or = documents executed by the parties to the 'sham' which are intended by them to = give to third parties or to the court the appearance of creating between the = parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create" ([Snook's case](#) in 1967).

The effect of a finding that a procedure or document was a "sham" is = somewhat similar to that of a finding that a contract is illegal or is being = operated illegally. It is that the party who sets it up or voluntarily = concurs with it cannot rely on it at law. In general, this is likely to = work in favour of employees - for example a document might purport to be a = partnership agreement but in reality the relationship between the parties might be = that of employer and employee. In that case the latter would have employment law = rights such as the right to claim unfair dismissal. But it can work the = other way - for example if an employer and an employee collude in not = paying PAYE tax by pretending that the putative employee is self-employed the = latter will not be able to claim employment law rights. Although really a = separate matter, it is worth noting that new PAYE regulations in force from April = 2008 ensure that HMRC will in those circumstances offset any sch D tax paid = by the individual against the employer's PAYE liability.

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

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4. [Don't call the barmaid "love"](#)

It is well known that an employee can bring a claim against her (or = his) employer that she (or he) has been sexually harassed at work by a fellow = employee. As from 6th April 2008, new = regulations mean that an employee can bring such a claim even if = the harassment was by a customer or other member of the public. Under = the new regulations ([the Sex = Discrimination Act 1975 \(Amendment\) Regulations 2008](#) which make appropriate changes = to the Sex Discrimination Act 1975) an = employer is responsible for protecting staff from sexual harassment by third = parties subject to two important provisos. The first is that the = employer had failed to "take such steps as would have been reasonably practicable = to prevent the third party from doing so" and the second is that it = must be at least the third occasion on which the woman has been subject to = harassment by a third party in the course of her employment.

The new regulations follow a High Court ruling in March 2007 to the = effect that Britain was not properly implementing the European [Equal Treatment Directive 76/207/EC](#) (as amended). The High Court ruled = that association with sex, not causation by sex, should define harassment. The new regulations achieve the desired result, = leading to a Daily Mail headline "Don't call the barmaid 'love', by order of = Harriet Harman".

The position of employers in the event of racial discrimination = by 3rd parties against their employees is less clear. The Courts have not been = wholly consistent. The 2007 ruling noted above, although not concerned = with racial discrimination, is likely to be relevant if a case is argued in = future. However the new regulations do not directly affect the position in race discrimination cases.

- [For further information click here on Sex discrimination / vicarious liability of employers and = principals to go to notes on our website.](#)

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5. [The new statutory holiday entitlement](#)

All workers (not just employees) are entitled to an increase in = their basic statutory minimum holiday entitlement since October 2007. = The increase is being phased in over two and a half years - until 30th = September 2007 the statutory minimum annual holiday entitlement for a full = time worker was 20 days including bank holidays and from 1st April 2009 it = will be 28 days including bank holidays. There is a pro-rata entitlement for part = time workers.

The phasing in can give rise to complicated calculations especially when calculating the holiday entitlement of part-time workers and especially so if the business is closed on bank holidays and the part-timer normally works on a Monday (or other day which in a particular week is a bank holiday).

We provide a table below, adapted from one in the official = explanatory guide, which we hope will be helpful for calculating statutory holiday = entitlement during the phase-in period. To work out the statutory = minimum number of days holiday to which a worker is entitled in a year, multiply the = weeks number in the table below by the number of days per week usually worked = by the individual concerned. For example, 4.4 weeks x 5 days = 22 = days, 4.4 weeks x 4 days = 17.6 days. Then adjust for bank holidays as = appropriate bearing in mind that the rules regarding time off on bank and public = holidays remain unchanged - there is no statutory right to holiday on those days, = with or without pay.

Leave year starts:	2006-07	2007-08	2008-09	2009-10
1 November	4.07 weeks	4.8 weeks	5.26 weeks	5.6 weeks
1 December	4.13 weeks	4.8 weeks	5.33 weeks	5.6 weeks
	2007	2008	2009	2010
1 January	4.2 weeks	4.8 weeks	5.4 weeks	5.6 weeks
	2007-08	2008-09	2009-10	2010
1 February	4.27 weeks	4.8 weeks	5.47 weeks	5.6 weeks
1 March	4.33 weeks	4.8 weeks	5.53 weeks	5.6 weeks
1 April	4.4 weeks	4.8 weeks	5.6 weeks	5.6 weeks

1 May	4.47 weeks	4.87 weeks	5.6 weeks	5.6 weeks
1 June	4.53 weeks	4.93 weeks	5.6 weeks	5.6 weeks
1 July	4.6 weeks	5 weeks	5.6 weeks	5.6 weeks
1 August	4.67 weeks	5.07 weeks	5.6 weeks	5.6 weeks
1 September	4.73 weeks	5.13 weeks	5.6 weeks	5.6 weeks
1 October	4.8 weeks	5.2 weeks	5.6 weeks	5.6 weeks

- For further information click here on [Holidays / 2007 proposals](#) to go to notes on our website. =

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6. [Part-time workers](#)

Since 1st July 2000 part time workers have had the right to the same conditions of employment and the same rates of pay (pro rata) as = full timers unless different treatment can be objectively justified (*the [Part-time = Workers \(Prevention of Less Favourable Treatment\) Regulations = 2000](#)*). The EAT has recently clarified an important aspect of how the = regulations work.

For a while it had looked as though a coach and horses could be = driven through the regulations. In 2004 and again in 2007 it was held = that the regulations apply if the less favourable treatment of part-time workers = was solely on the grounds that they worked part time. That is = clearly correct. However it seemed to follow from the 2004 and = 2007 judgments that if there was another reason as well then the regulations do **not** apply. = Clearly that was controversial. It came about = because the regulations had been introduced to implement in Britain the [EC&= nbsp:Part Time Work Directive](#) which provides that "..... *part-time = workers shall not be treated in a less favourable manner than comparable = full-time workers **solely** because they work part time*". The ingenious argument was that the word "*solely*" had to be read into the British regulations to give = effect to the well established principle that British regulations implementing an EC Directive must be interpreted in accordance with = that Directive.

In March 2008 the EAT in London firmly ruled that while the principle = is correct the conclusion drawn from it is not. Sir Patrick Elias, the = President of the EAT gave a simple example, pointing out that if an = "*employer decided to discriminate against all part timers over the = age of 30 it could be said that there were two reasons for the discrimination; = being a part timer, and being of a certain age*Can it really be said = that because only some part timers are selected for the less favourable = treatment, the Directive (and by extension the Regulations) are not intended to be applicable? In our judgment it is = inconceivable

that the Directive was not intended to outlaw such treatment (subject to = justification) and we have no doubt whatsoever that it would inevitably be construed by = the ECJ to do so".

He went on to say that anyway it is open to a Member State to "gold-plate" EC Directives (in his words "*to give more = favourable protection than the Directive affords*").

Thus it is now quite clear that if a part timer is treated less favourably than a comparator full timer and being part time is one of = the reasons, that will suffice to trigger the Regulations. The = ingenious argument which had seemed to find favour in 2004 and 2007 has now been = finally scotched (a word deliberately chosen as those who are interested enough = to want to look deeper into this question will immediately = understand).

- *For further information click here on [Sharma & ors v Manchester City Council EAT 2008](#) to go to notes = on our website.*

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7. Pregnancy and employment

For employers, especially small employers, the "pregnant woman problem" can be a nightmare. Although employers = generally are well aware that it is against the law to refuse a woman a job = because she would be taking time off for maternity leave soon after starting = work, or to subject an employee to a detriment because she has become pregnant, it = is worth restressing the importance of these rules.

More than 10 years ago the government was asked in Parliament = "*what steps they will take to prevent mischievous applications by pregnant women in = order to obtain financial gain from provisions intended for their = protection*". Answer came there none. The question followed a tribunal = award in favour of a pregnant job applicant which it was feared would result in bankrupting the employer. The substance of the = government's reply then was that it could not comment on individual industrial = tribunal decisions and there has been no realistic answer since.

Matters were made more difficult for employers, especially = smaller employers, as a result of rule changes in 2007. = Following the changes, a woman who was pregnant when interviewed for a = job can insist on taking a full year off work, not 26 weeks as previously, even if the baby is expected soon after the start of the new = job and regardless of whether the employer has only a couple of staff or = is a multi-national corporation. And of course if she = doesn't get the job and thinks the reason had something to do with her pregnancy or maternity leave rights she can, as was the case before, claim = unlawful sex discrimination.

There is evidence that employers are still not paying sufficient = attention to the rules. As recently as 2nd May 2008 the Times = reported a tribunal case in which a sales executive named Louise Manning was = awarded £37,100 for injury to feelings and £20,509 for loss of earnings = after a tribunal found that her employers, Kent-based Safetell and their MD, had discriminated against her after learning about her = pregnancy.

From an employer's point of view, one of the few possible let outs is where refusal to employ a pregnant job applicant, or discrimination against a pregnant employee, is necessary to ensure compliance with health and safety regulations. In that case, the = law recognises that it is in the woman's own interest to allow the = employer to take steps which otherwise would be unlawful. In practice there is = also some modest protection for employers as a result of the government's desire to protect public finances. Although a new employee can now take 52 weeks maternity leave shortly after starting work, she will not be entitled to = state funded Statutory Maternity Pay (SMP) for the full period. For the = time being, the period for which SMP is payable is 39 weeks. Although = the government has plans to extend SMP entitlement to 52 = weeks that is something for the future - probably for women whose babies are due = in or after April 2010.

- For further information click here on [Pregnancy](#) and/or [Maternity / maternity leave](#) to go to notes on our website. =

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[8. Employer not liable for gay teasing of a straight worker](#)

A “straight” worker was subjected to taunts by work = colleagues on account of characteristics they associated with a gay person. They = did not actually believe him to be gay but the facts that he = had lived in Brighton and had been at a boarding school were enough to = lead to the teasing. The worker concerned, a Mr Stephen English, did not find the = teasing funny. He brought a complaint against his employer, the = Sanderson Blinds Company, on the basis that they had failed to protect him. In September 2007 an employment tribunal in Brighton ruled that the [Employment Eq= uality \(Sexual Orientation\) Regulations 2003](#) did not protect him in this situation. It dismissed the harassment claim he had brought = under those regulations.. He appealed to the EAT. In February 2008 he lost again. The EAT agreed with the = original tribunal that the regulations protect employees who = actually are homosexual (or heterosexual) from being harassed for being = homosexual (or heterosexual) but that in effect there is a loophole which means = that a heterosexual employee cannot claim harassment for banter suggesting = that he or she might be gay. However the EAT was not confident that its = decision, which interprets the UK regulations, is correct under EC law. It = has encouraged Mr English to appeal to the Court of Appeal so there may = still be more to come before this particular saga is played out.

- For further information click here on [Se= xual Orientation Discrimination / sexual orientation regulations 2003](#) 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), of recent employment law = related Acts of Parliament and employment law related Bills currently before = Parliament and 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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