

Age Concern have now, 3 years later, finally lost, but only on 2 points. In a judgment handed down on 25th September 2009 the High Court ruled that the age 65 default retirement age (or "DRA") exception is lawful. That therefore is the current position. However although Age Concern lost the Court battle it seems likely that they will win the war.

Age Concern (or more accurately the National Council on Ageing = operating under its "Heyday" banner) originally applied to the High Court for = judicial review in 2006. The argument was that [Employment Equality \(Age\) Regulations 2006 SI 2006/1031 reg 30](#) was unlawful as = it was not compliant with the [Equal Treatment Framework Directive 2000/78/EC](#) (which the 2006 regulations = implemented in the UK). The High Court referred basic questions to the = European Court of Justice. In March 2009 the European Court ruled, unsurprisingly = as this is what art 6 of the Directive says, that the question of whether the = age 65 "DRA" is or is not lawful depends on whether it can be justified as a proportionate means of achieving a legitimate aim.

Age Concern, which by now had amalgamated with Help the Aged, was = still optimistic. This was because the European Court specifically said that a = high standard of proof would be required for the British government to = justify the DRA and there was little such proof on offer. Nevertheless the advocacy = skills of Dinah Rose QC and Lord Lester QC, with back up from junior barristers = Emma Dixon and Diya Sen Gupta, persuaded the High Court judge that the = British government had managed to meet the standard of proof required.

It may well be that Age Concern and Help the Aged feel they were = unfairly outmanoeuvred by the Government outside the courtroom. Only 3 days = before the final High Court case started on 16th July 2009 the Government announced = that it was going to bring forward to 2010 a review of the whole question of = whether the age 65 DRA should be changed or abolished (a review had been promised = right from the outset but was originally proposed for 2011). On 13th July 2009 the Government issued a [consultation = document](#) on age policy generally. It included the announcement that "*we = will bring forward the review of the Default Retirement Age to 2010, to = reflect the change in economic circumstances since it was introduced*". Cynics = might have been tempted to add "*and to help us win the Court case starting = in 3 days time.*"

The judge made it clear in his judgment that he had been strongly = influenced by the fact that the government review was imminent. He said:

*"The claim [by Age Concern that the British age 65 retirement = exception is unjustified] fails and I do not grant the claimant the relief = sought. It will, however, be apparent from my observations .... above that the = position might have been different if the government had not announced its = timely review. I cannot presently see how 65 could remain as a DRA [default retirement age] after the review....."*

The government consultation runs until 12th October 2009.

In the light of the judge's comment and the government consultation = it seems almost certain that the age 65 DRA will not last much longer. Whether it = is raised to 68 or 70 or some other age or simply scrapped altogether = remains to be seen. A not immediately obvious factor which will no doubt be taken into = account is that any increase above 65 will have a knock-on effect on damages and = compensation awards in personal injury and unfair dismissal cases - the = more working years a claimant has left, the greater the amount generally = awarded for "loss of earnings". And that, in turn, will affect business generally as = insurance premiums will no doubt rise accordingly.

- *For further information generally click here on [Age discrimination / 2006 regulations / retirement](#) to go to notes on our website.*

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## 2. [Sickness and holidays](#)

The European Court of Justice handed down a controversial decision on 10th September. It seems to have said that if an employee falls ill while absent on holiday then European law requires the employer to provide additional holiday later to compensate.

The Court hadn't been asked to consider such a wide question. Therefore whether the decision will stand, at any rate without modification, and indeed why it was considered at all, must be up in the air. That being said, the decision does block a dubious practice by which, it is said, some employers sometimes deliberately require employees to take their holiday while they were off sick.

What happened in the case ([Pereda v Madrid Movilidad SA](#), ECJ case C-277/08 on 10th September 2009) was that a Sr Vicente Pereda had booked holiday leave for the end of July 2007. However he had an accident at work in early July. This meant he was away on sick leave and (apart from the last two days) he couldn't take the holiday.

His employer, Madrid Movilidad SA, without giving reasons, turned down his request for substitute holiday leave (he asked for 15th November to 15th December). He challenged this in the appropriate Court in Madrid. The Court stayed proceedings pending an answer from the European Court to the following question:

*'Must Article 7(1) of Directive 2003/88/EC [the Working Time Directive] be interpreted as meaning that when the period of leave allocated in the undertaking's annual planning of leave coincides in time with a temporary disability following an accident at work which happened before that period of leave began, the employee affected, once he returns to work, has the entitlement to use his leave on dates different from those originally allocated, irrespective of whether the calendar year to which they relate has ended?'*

The question put by the Madrid Court to the ECJ expressly concerned the holiday rights of a worker who couldn't take his holiday because he suffered an accident at work before his holiday began. The ECJ in its answer disregarded three parts of the question, namely the supposition that (i) there had been an accident; (ii) that the accident occurred at work; and (iii) that the accident happened before the holiday began. Instead of answering the question put to it by the Madrid court it rephrased the question in much broader language and then answered that much broader question.

In its answer the ECJ said that:

*"..... a worker who is on sick leave during a period of previously scheduled annual leave has the right, on his request and in order that he may actually use his annual leave, to take that leave during a period which does not coincide with the period of sick leave".*

It seems that the European Court's conclusion is therefore that not only are workers entitled to postpone holiday because of sickness (as in this case) but also that if they fall sufficiently ill while absent on holiday to qualify for "sick leave" they will be entitled to insist on being allowed additional holiday to compensate after their recovery.

Whether this result, at least in its basic unrefined form, is really what the ECJ intended will no doubt be a matter for further discussion. Apart from any other considerations, in practice it would be impossible properly to monitor whether an employee on holiday was genuinely suffering from a condition serious enough to entitle him or her to sick leave. Also it would open the door to abuse, both from false claims and from genuine claims resulting from self-imposed accidents and sickness (eg a fall while rock climbing at one end of the spectrum to illness brought on by binge drinking at the other). It would certainly also lead to yet more unfair dismissal litigation.

At the very least the case shows how dangerous it can be for a Court to recast questions put to it and to answer a question which it was not asked to consider and which may not have been properly argued before it - and demonstrates the wisdom of the refusal by British courts and tribunals to do exactly that, however frustrating it may sometime be.

- For further information generally click here on [Illness, sickness and accidents / general](#) to go to notes on our website.

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### **[3. Without prejudice discussions - a warning](#)**

There is a common misconception that if something is said, verbally or in writing, on a "without prejudice" basis then there is an absolute bar against it being admissible in evidence in a court or tribunal. In an employment law context "without prejudice" discussions are common when settling the terms of compromise agreements after a potentially unfair or wrongful dismissal - but of course the expression is used in many other contexts.

The effect of the expression "without prejudice" was considered in a case in July 2009. Two companies had entered into a written settlement agreement in relation to a disputed invoice. Prior to entering the agreement they had had extensive "without prejudice" negotiations about the outstanding amount. Subsequently one of the companies sued the other, claiming that the other had defaulted on its obligations under the settlement agreement. Although the negotiations had been "without prejudice" the allegedly defaulting company wanted to adduce details of them in evidence. The High Court has allowed it to do so.

In consenting to allow evidence of the without prejudice discussions "to the same extent as if they had not been without prejudice" the judge pointed out the general principle that "without prejudice" communications between parties in order to resolve a dispute are not admissible in evidence is based on public policy and is not an absolute rule. The policy reasons for the rule require the courts to be careful not readily to allow exceptions but nevertheless "without prejudice" material can be admissible in evidence for a variety of reasons when the justice of the case requires it.

It can be dangerous to over-shorten a complicated decision which involves balancing different considerations. Subject to that caveat the decision in the case in point ([Ocea nbulk Shipping & Trading SA v TMT Asia Ltd & ors](#), High Court, 29th July 2009) can be summed up as follows:

"The general rule is that 'without prejudice' negotiations which fail to achieve settlement of a dispute are generally inadmissible as evidence in subsequent litigation to resolve that dispute. However if the negotiations led to a concluded settlement evidence of them may in appropriate circumstances be admissible if there is subsequent litigation concerning the meaning and effect of the settlement to the same extent that it would be admissible evidence if the negotiations had not been 'without prejudice'".

To be more precise, the judge said *"The law generally admits evidence of the contractual context, by way of background facts known or taken to be known to both or all the parties, because it is recognised that such information assists in ascertaining the parties' (objectively evinced) intention. It undeniably follows that, if the court is deprived of such evidence in the case of settlement agreements following without prejudice exchanges, it will be the less well equipped to discern the parties' intentions and the less likely to construe the contract in accordance with them."*

- For further information generally click here on [Compromise agreements / general position](#) to go to notes on our website.

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### **[4. Unfair dismissal - compensation](#)**

If an employee has been unfairly dismissed he is entitled to compensation for loss suffered. How should his loss of earnings be assessed if he gets another job at once or almost at once? His loss will be that much smaller as a result of having earnings from new employment and so it can be strongly argued that compensation, as it is compensation for loss, should be reduced accordingly. On the other hand it seems

unfair that the benefit of the earnings from his = new employment should effectively accrue to the employer who had unfairly = dismissed him.

This basic problem was amongst the first to come before industrial = tribunals when unfair dismissal law was "created" by the (conservative) government = in 1971. The National Industrial Relations Court, the predecessor of the = Employment Appeal Tribunal, took a pragmatic approach in [Norton Tool Co = Ltd v Tewson](#) [1972] ICR 501 - a case well known to students of employment = law.

An employee had been unfairly dismissed without either notice or pay = in lieu of notice. The employee got another job before the end of the period of = notice which he should have been given. In assessing compensation the NIRC = pointed out that if the employer had given the employee pay in lieu of notice, as it = should, there would have been no question of the dismissed employee having to = make a refund to the employer if he got another job during the notice period. = The NIRC ruled that the same principle should apply, as a matter of sound = industrial practice, in assessing compensation when an employer failed to give an = employee pay in lieu of notice. This made an exception to the normal rules but it = is an exception which has been applied consistently by courts and tribunals = ever since.

However there is a problem. Nowadays there is no doubt that the = *Norton Tool* exception to normal rules applies where the unfair dismissal = is actual dismissal. But does it apply where the unfair dismissal was a = constructive dismissal, that is where an employer has treated an employee so badly = that the employee was entitled to resign, and did resign, in response to that bad = treatment?

It seems amazing that it has taken nearly 40 years to get an = unequivocal answer, but at the end of July 2009 the Court of Appeal has ruled = categorically that the exception to normal rules made by the *Norton Tool* case = does NOT apply in constructive unfair dismissal cases. It applies only in = cases of actual dismissal. Therefore the normal rules must apply.

Thus a constructively dismissed employee must give credit for sums = earned from other employment during the notice period and compensation payable = to him for loss of earnings must be based on actual loss suffered. His earnings = during the notice period from other employment must be taken into account. That = is the conclusion of the Court of Appeal. However as a rider it should be noted = that this conclusion overruled the Employment Appeal Tribunal's decision in = the same case - the EAT had come to the opposite conclusion and finished it's = judgment by expressing "*the hope that what we recognise as a continuing = controversy about the narrow principle in Norton Tool might be settled by the = House of Lords in the near future, when the opportunity arises*".

So maybe we haven't yet heard the end of what is effectively a 37 = year old saga.

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

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## 5. [Unfair dismissal - percentage uplift](#)

The "percentage uplift" rules contained in the discredited and now = revoked 2004 dispute resolution regulations have to a substantial extent been = reenacted in the post-April 2009 replacement rules. Under both sets of rules, an Employment Tribunal can order an uplift in compensation awarded to an = unfairly dismissed employee if the employer failed to follow proper procedures, = subject of course to the overall statutory "cap" on the maximum which can be = awarded (*compensatory award is currently subject to a statutory cap of £66,200*).

The main differences between the pre- and post- April 2009 rules in = relation to "uplift" are:

- a reduction from 50% to 25% in the maximum increase to an unfair = dismissal award which can be made by an Employment Tribunal if the employer had = failed to follow proper procedures. However in cash terms even 25% can be a substantial increase.

- there is no requirement in the post-April 2009 rules that a tribunal must apply a minimum uplift if the employer had failed to follow proper procedures (a minimum uplift of 10% was required by the pre-April 2009 rules = "save in exceptional circumstances").

Employers may take some relief from a recent decision of the EAT = which suggests that there will be some situations in which an employer will be = able to avoid any uplift.

The EAT has pointed out that a tribunal's discretion to order an = uplift in compensation is limited to ordering an uplift in the amount it has = actually awarded. It follows, therefore, that an employer who realises before = an unfair dismissal tribunal hearing that he had failed to follow proper = procedures in dismissing an employee (and thus accepts that he is bound to have to = pay compensation) should be able to avoid or reduce any uplift by paying a = suitable amount to the employee in advance of the hearing. Making a suitable = payment to the employee in advance of the hearing should prevent the tribunal from = making "an award" or at least reduce the amount of the award.

The EAT case explaining the position ([Tim Arrow = & Sons v Onley, EAT on 14th September 2009](#)) was concerned with = procedures under the 2004 dispute resolution regulations but, as pointed out above, = similar considerations apply under the post-April 2009 regime. The current = wording (in the Employment Act 2008 amending the Trade Union and Labour Relations (Consolidation) Act 1992) allows a tribunal to increase by up to 25% = 'any award it makes' for unreasonable failure to follow the April 2009 [ACAS Code of = Practice](#).

In the case the EAT agreed with the tribunal's rationale for setting = the percentage uplift at the then maximum permissible amount of 50%. However = the original tribunal had failed to take into account a payment made by Tim = Arrow & Sons to Mr Onley in the week before the tribunal. As this included = notice pay and redundancy pay, the EAT found that Mr Onley was only entitled to = one week's pay (in respect of the additional week he would have stayed in = employment had he been dismissed fairly) plus holiday pay. The award made by the = original tribunal was therefore adjusted accordingly. Taking these matters into = account and eliminating the 50% uplift reduced the award payable to Mr = Onley from some £20,000 to a little over £1,000.

Other employers should take note. The effect is to provide a possible = way, in appropriate cases, to remove the tribunal's discretion to order an = uplift in compensation.

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

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## **[6. Unfair dismissal - unofficial strikes](#)**

A recent EAT case provides a useful reminder of the rule that an = employee has no right to complain of unfair dismissal if at the time of dismissal he = was taking part in an unofficial strike or other unofficial industrial = action. The EAT has held in [Sandhu & ors v Gate Gourmet London Ltd \(17th July 2009\)](#) = that dismissal of unofficial strikers was lawful. In those circumstances an employment tribunal simply has no jurisdiction.

Gate Gourmet provided pre-packaged airline meals at Heathrow. On 10th = August 2005 they sacked some 600 hundred staff in a dispute relating to = employment of seasonal staff. Hundreds of British Airways baggage handlers stopped = work in sympathy, thousands of passengers had their flights disrupted and the = matter hit the national press headlines.

Although an agreement was reached to end the dispute, a number of = Gate Gourmet employees refused to accept it and brought unfair dismissal = claims. Most of the claims were later withdrawn and many of the remaining ones were = settled but some went to employment tribunals. In some of the tribunal cases the = employees won and in others lost. Six of those who lost appealed to the = EAT. In July 2009 the EAT dismissed their appeals.

The EAT considered amongst other things:

- what makes a strike "unofficial" (*basically that it does not = have backing from a trade union*);
- what constitutes "taking part" in a strike (*noting that case = law establishes that unauthorised and unexplained absence from work at a = time when industrial action is in progress constitutes participation*);
- the position where an employee is dismissed for taking part in = industrial action after he or she has ceased to do so (*in such cases the = ordinary unfair dismissal rules apply so an employment tribunal will have jurisdiction*).

The EAT went on to consider each of the six appeals = individually. The overall conclusion, as noted above, was that all six = appeals were dismissed. In simplest terms the EAT concluded that either the = employment tribunal had no jurisdiction for the reasons outlined above or that in = those cases where it did have jurisdiction the dismissals were fair on = ordinary principles.

The lesson, of course, for employees is that taking part in = unofficial industrial action can result in dismissal without compensation. For = employers it is that the law entitles them to be tough if employees take industrial = action without going through the proper preliminary procedures.

- *For further information generally click here on [Unfair dismissal / unofficial industrial action](#) to go to = notes on our website.*

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## 7. [Maternity and Paternity leave](#)

In May 2009 there were reports that the government was = reviewing its proposals to extend rights to statutory maternity pay and to allow = ppppps to share a year's paid maternity leave.

In September the government is reported to have decided = to abandon the promised extension of maternity pay from nine months to a year as a = result of being forced to tackle the budget deficit created by the banking = bailout.

At the same time it is proposing that employed mothers = will be able to transfer all or part of the last 26 weeks of their maternity = leave to the father. To the extent that this "additional paternity leave" is = taken during the mother's 39 week maternity pay period, it would be paid at the = same rate as Statutory Maternity Pay (currently £123.06).

It seems likely that parents will be able to "self = certify" their entitlement to this additional paternity leave. Also, in an effort to = counter possible misuse, it is likely that employers will be given the right to = carry out checks.

Existing rights will not be affected (employed fathers are currently = entitled to two weeks paid paternity leave and mothers to 52 weeks maternity = leave, of which up to 39 weeks are paid. Employed parents are also entitled to a = total of 13 weeks unpaid parental leave until the child's fifth birthday. = Parents of children aged 16 and under have the right to request flexible = working).

A [consultation = document "Choice for Families: Additional Paternity Leave and Pay"](#) was issued = at the end of September. It includes draft Additional Paternity Leave = Regulations 2010, draft Additional Statutory Paternity Pay (General) Regulations 2010) and = draft, inelegantly named, Statutory Paternity Pay and Statutory Adoption Pay (Administration and Weekly Rates) (Application to Additional Statutory = Paternity Pay) Regulations 2010 plus a Code of Practice. The consultation closes = on 20th November 2009.

Subject to the results of the consultation and parliamentary procedure, the Government intends that the new law will be = in force by April 2010 and have effect for parents of children due on or = after 3 April 2011.

- *For further information generally click here on [Maternity / 2006 changes](#) and/or on [Paternity Leave / an outline of the right](#) to go to notes on our website.*

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## 8. [Immigration law and Baroness Scotland](#)

Baroness Scotland's breach of the law regarding employment of = immigrants who do not have the right to work in the UK has highlighted the need for = employers to comply with every aspect of immigration law. Before we look at the law and rules, it may be of interest to note = that the Home Office publishes on the Border & Immigration Agency website a = [complete list](#) of employers on whom penalties have been imposed. A quick look = at the list suggests that, until Baroness Scotland's case, no private = individual employer had been subjected to penalties. The Home Office website also = provides a "[BIA Framework for assessment of civil penalties](#)".

The BIA (in the 2nd edition of its guidance on "[Prevention of Illegal Working](#)", April 2009) recommends that employers undertake = "right to work in the UK" checks on **ALL** prospective = employees "*as this will enable employers to establish a statutory excuse = against payment of a civil penalty for employing an illegal migrant = worker*". Most employers might think that advice demonstrates an excess of bureaucratic = enthusiasm. Worse, because it is incomplete, it is positively = misleading. To establish the statutory excuse, as Baroness Scotland found to her cost, = an employer must also provide specified evidence that he has undertaken the = checks.

Now the law: For many years there have been rules applying to = employment of a non EC/EEA immigrant who is not authorised to work in the UK. New rules = under the [Immigration, Asylum and Nationality Act 2006](#) and the [Immigration = \(Restrictions on Employment\) Order 2007](#) came into effect on 29th February 2008. = They replaced previous rules made under the Asylum and Immigration Act 1996. = The 2007 Act makes a distinction between knowingly employing such a person = (a criminal offence punishable by an unlimited fine or a prison sentence) = and doing so unknowingly (a civil offence punishable by a penalty of = up to £10,000 unless specified evidence of a statutory excuse is provided). =

While it may simplify law enforcement to require specific types of = evidence to be produced as a condition of avoiding a penalty it must be = questionable whether this is acceptable policy in a free society, especially in a = case where lack of knowledge is no defence. Leaving that policy aspect to one side, = and assuming that an employer is not knowingly employing an illegal = immigrant, what is of most practical importance for most employers will be "what amounts = to a statutory excuse?" and "what is the specified evidence?".

The full detail is long and complicated. It is set out in the [Immigration = \(Restrictions on Employment\) Order 2007](#). What follows is merely a basic, = condensed, summary

### 1. The statutory excuse.

Employers who unknowingly = employ someone who is not authorised to work in the UK will be excused from = payment of a penalty if they undertook *specified checks* of = *specified documents* prior to the commencement of employment. They must = repeat the checks at least once every twelve months for those employees with = limited leave to enter or remain in the United Kingdom.

What are the = specified checks: there is an overriding requirement to take all reasonable steps to check the validity of the document and that the prospective employee or employee is its rightful owner. The precise = checks then depend on the type of document, for example:-

If a = document contains a photograph, the employer must satisfy himself that the = photograph is of the prospective employee or employee; if it contains a date of = birth, the employer must satisfy "*himself that the date of birth is = consistent with the appearance of the prospective employee or employee*".

What are the specified documents: there = are two lists of specified documents. List A documents

show an ongoing right = to work and List B documents show a right to work for up to twelve months. = Production of any one of the documents from the appropriate list = suffices.

List A consists of documents such as a British passport or a passport or = national identity card showing that the holder is a national of the European = Economic Area or Switzerland or a full UK birth certificate *"which includes = the name(s) of at least one of the holder's parents, when produced in = combination with an official document giving the person's permanent National = Insurance Number and their name issued by a Government agency or a previous = employer"*.

List A also includes documents such as a = *"Biometric Immigration Document issued by the Border and Immigration Agency to = the holder which indicates that the person named in it is allowed to stay = indefinitely in the United Kingdom, or has no time limit on their stay in the United Kingdom"* or a *"passport or other travel document endorsed to = show that the holder is exempt from immigration control, is allowed to stay = indefinitely in the United Kingdom, has the right of abode in the = United Kingdom, or has no time limit on their stay in the United Kingdom"*.

List B consists of documents such as a passport *"endorsed to show that the holder is allowed to stay in the United = Kingdom and is allowed to do the type of work in question, provided that it = does not require the issue of a work permit"* or *"A work permit or = other approval to take employment issued by the Home Office or the Border = and Immigration Agency when produced in combination with either a passport = or another travel document endorsed to show the holder is allowed to stay = in the United Kingdom and is allowed to do the work in question, or a letter = issued by the Home Office or the Border and Immigration Agency to the holder = or the employer or prospective employer confirming the = same"*.

The specified = evidence.

If the document is a = passport or other travel document, the following pages of that document must be = *copied in a format which cannot be subsequently altered* (i) the front cover; (ii) any page containing the holder's = personal details including nationality; (iii) any page containing the holder's photograph; (iv) = any page containing the holder's signature; (v) = any page containing the date of = expiry; and (vi) any page containing information = indicating the holder has an entitlement to enter or remain in the UK and undertake the work in = question.

If the document is not a passport or other travel document the = employer must retain a *copy of whole of the document in a format = which cannot be subsequently altered*.

In either = case the copy or copies must be *"retained securely by the employer for a = period of not less than two years after the employment has come to an end"*.

As noted, the above is merely a summary. It's enough to show the = awkwardness of the regulations. Clearly either expert advice should be taken or = reference should be made to the relevant law in any case of doubt.

Busy = employers who have read even part of this note or looked at the regulations may = sympathise with Baroness Scotland, but their sympathy will no doubt be tempered by = the knowledge that, as the minister who introduced the relevant law, she has = merely been hung on her own petard.

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

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## 9. [October 1st 2009 regulations \(and new cases, Acts and Bills\)](#)

In December 2003 the DTI announced that it would introduce domestic employment regulations for which it has responsibility on two dates each = year: April 6th (the start of the tax year) and October 1st (the annual date = on which the minimum wage is revised). The BIS, the current incarnation of what = was the DTI, has continued this policy. So we have included on our website = information on new statutory instruments in effect on 1st October 2009.

Importantly these include new rules, all highlighted in previous = editions of these newsletters, which:

- increase the National Minimum Wage (see notes at [Minimum Wage / 2008 and 2009 increases](#))
- increase the cap or limit on a "week's pay" which can be taken = into account in assessing compensation in many employment law situations = (see note at [Compensation / 2009 limit increases](#))
- introduce on 12th October the first main steps which implement the = new "vetting and barring" scheme designed to protect children and = vulnerable adults (see notes at [Acts of Parliament etc / Safeguarding Vulnerable Groups Act 2006](#))
- introduce a new ACAS Code of Practice on Time off for trade union = duties and activities, including guidance on time off for Trade Union = Learning Representatives (see notes at [ACAS / codes of practice](#)).

You can also 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) and on all recent employment law related **Acts of Parliament** and **Bills** currently = before Parliament.

For further information generally click here on [October 2009 new employment law](#) and/or [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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## 10. [and finally .....](#)

The Court case taken by the Equality and Human Rights Commission = against the British National Party is not going to go anywhere.

In June 2009 the EHRC wrote to the BNP asking for a written = undertaking that it would not discriminate contrary to the Race Relations Act in its = employment and recruitment policies, procedures and practices. The EHRC said the = BNP's membership criteria was unlawful as it restricts membership to those who = the BNP regards as belonging to particular 'ethnic groups' and those whose skin = colour is white. That did not achieve the EHRC's desired result and in August = the EHRC issued formal proceedings in the County Court.

A mini-spat followed: a BNP press officer said "*One has to = question what the CEHR's motivation is in bringing this action now. We wonder what = has suddenly changed. It is obvious that this is a politically motivated = ploy caused by our successes at the polls in June this year, and nothing else*". = In reply the EHRC pointed out what had "suddenly changed" - it was that it = only started operations in October 2007 and its predecessor (in this context = the CRE) had no power to bring this type of legal action.

Then in early September, demonstrating political and financial sense, = the BNP backed down. Its leader, Nick Griffin, said that whatever the result of = the court proceedings "*the forthcoming Equality Bill will, in any case, = simply and unavoidably ban any political party from discriminating on grounds of = ethnicity. The entire court case is therefore pointless .... to pursue the = case all the way to an appeal in the House of Lords could cost the party more = than a million pounds .....*This would effectively strip the party of = its ability to fight the next general election".

- For further information generally click here on [Racial discrimination / a general introductory note](#) to go to = notes on our website.

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