

An employment tribunal concluded that the dismissal was fair - it was for a "substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held" (namely 3rd party pressure). Under the terms of its contract the Council had the absolute right to veto the employment of any individual to provide the service. The tribunal found that the employer had done all it reasonably could to support Mr Henderson but in the end had had no choice but to dismiss him. The tribunal held that this dismissal was within the range of reasonable responses available to the employer. Mr Henderson appealed to the EAT.

The EAT has upheld the original tribunal's ruling, while noting that such cases are "very uncomfortable". The customer or client is under no obligation to behave fairly towards the employee. In this case Mr Henderson may have been unfairly treated by being unable to put his case to the South Tyneside Safeguarding Children Board but however unfortunate for him that did not make it unfair for the employer to dismiss him.

The other case was the much publicised case earlier in October of the London Underground employee who called a passenger "a jumped up little git" before apparently threatening to "sling him under the train". The employee, Ian Morbin, was [caught on video](#) by another passenger who published the story [on his blog](#). The matter came to the attention of Boris Johnson, the Mayor of London who asked TfL (London Underground) to investigate urgently. TfL suspended Mr Morbin.

It is understood that Mr Morbin later apologised and resigned - no doubt a sensible move as he may have reckoned that dismissal was the likely alternative, which would not look good on his CV. If he took legal advice it would no doubt have been to the effect that, on the basis noted above, he would not win an unfair dismissal claim.

- *For further information generally click here on [Unfair dismissal / some other substantial reason \("SOSR"\) for dismissal](#) to go to notes on our website.*

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### **[3. Improved safeguarding arrangements go live](#)**

The first practical stage of a new "Vetting and Barring" scheme for protection of children and vulnerable adults in England and Wales, under the [Safeguarding and Vulnerable Groups Act 2006](#), started on 12th October 2009.

After the murders in 2002 of Soham schoolgirls Holly Wells and Jessica Chapman by the convicted sex offender Ian Huntley, and the resulting [Bichard report](#), the government passed the Safeguarding Vulnerable Groups Act. This is intended to prevent, so far as possible, similar tragedies happening in future. The Act will not be fully in force before autumn 2010 but important parts have now been implemented. As from 12th October 2009:

1. it is a criminal offence for a barred individual to seek or undertake work with vulnerable groups or for "Regulated Activity Providers" knowingly to employ such a person;
2. the previous barring lists (POVA, POCA and List 99) are replaced by two new barred lists, both administered by the [Independent Safeguarding Authority](#) rather than by different Government departments. Checks of the two lists can be made as part of an Enhanced CRB check;
3. employers, social services and professional regulators must refer to the ISA information about why they stopped or considered stopping an individual from working with vulnerable groups where they consider them to have caused harm or posed a risk.

The next stages will be:

- July 2010 - new entrants and employees looking to work or volunteer with vulnerable groups can start to apply to become ISA registered;

- November 2010 – new entrants must become ISA registered before = starting work with vulnerable groups; and
- April 2011 – existing workers must start to become = ISA-registered.

There is a significant risk that the public outcry and backlash = after the Soham murders, which led to the disclosure that 88 other sex = offenders had been cleared to work in schools and the passing of the [Safeguarding and Vulnerable Groups Act](#), could go too far. Fears have = already been expressed that new Ofsted regulations designed to protect = school children combined with a requirement for CRB checks in = arguably inappropriate cases may lead to, for example, parents giving up normal = volunteer work with school children.

However although it may take time for a proper balance to be = achieved, the Courts are already giving sensible guidance. The issue is essentially = one of proportionality. The law under which enhanced CRB certificates are = provided is contained in the Police Act 1997 which specifically requires the = police to consider what information "*ought to be included in the certificate*". In one of the first cases to be decided by the = new Supreme Court (which as from October 2009 performs what used = to be the judicial functions of the House of Lords) the Court has suggested that not enough attention is being given = to that requirement. The Court pointed out that "*....the idea that = priority must be given to the social need to protect the vulnerable as against = the right to respect for private life of [a job applicant]*" can = lead to infringement of the job applicant's Human Rights and that "*the correct approach .... is that neither consideration has precedence over the other*" ([R \(on the = application of L\) v Commissioner of Police of the Metropolis \[2009\] UKSC = 3 on November 2009](#)).

On this basis, the Supreme Court suggested that as a general rule, before the results of an enhanced CRB check on a job applicant are = disclosed to the prospective employer the job applicant should have the opportunity of making appropriate representations.

No doubt it will be some while before a proper balance is = struck. The issues involved are as sensitive as they are important and we = expect that developing case law will play a significant role over the next few = months and years in helping to achieve a proper balance.

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

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#### 4. [Springboard injunctions](#)

Recently there has been an increase = in interest in what are sometimes called "springboard" or "head start" = injunctions. This is the catchy name given to an injunction which an employer can = sometimes obtain to prevent an employee or former employee using information = belonging to the employer (for example a customer list) as a springboard to launch a = new business.

The name "spring board injunction" appears to have first been used = in a case in 1967 (*Terrapin Ltd. v. Builders' Supply Co. (Hayes) = Ltd*) in which the High Court said:

*".....the essence of this branch of the law, whatever the = origin of it may be, is that a person who has obtained information in confidence is = not allowed to use it as a spring-board for activities detrimental to the = person who made the confidential communication, and spring-board it remains = even when all the features have been published or can be ascertained by actual inspection by any member of the public."*

Following this judgement, it used to be thought that a springboard = injunction could only be obtained where the ex-employee was in breach of a duty = of confidence owed to his or her former employer. In other words, it used = to be thought that a springboard injunction could be obtained only if information which was "confidential" had been misused. = However in 2008 the High Court ruled that this was not an

= essential pre-condition and that in appropriate cases such an injunction should be = "available to prevent any future or further serious economic loss to a previous = employer caused by former staff members taking unfair advantage ..... of any = serious breaches of their contract of employment (or if they are acting in = concert with others, of any breach by any of those others)".

It would be going too far to suggest that this has opened any = floodgates but it does mean that employers have a greater chance than previously of = preventing former employees from making improper use of information = obtained while in their employment. For example, just recently a = Birmingham law firm won a springboard injunction to restrain a former employed solicitor from poaching = clients. The solicitor's employment contract did not include a restrictive covenant which would prevent him = from taking the firm's clients and his employers won the injunction = on the basis of breach of the implied term of fidelity.

The message from this for employers who consider themselves to = be at risk of unfair competition from ex-employees is that it may be = appropriate to apply to the courts for an injunction to restrain the ex-employee from = misusing information obtained while in their employment. Expert legal advice = should be taken in any such case.

- *For further information generally click here on [Implied terms in employment contracts / duties of employee](#) and/or [Sumarised cases / UBS Wealth Management \(UK\) Ltd v Vestra Wealth LLP & = ors HC 2008](#) to go to notes on our = website.*

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## 5. [Agency Workers Directive](#)

The government has published draft Agency Workers Regulations 2010 to = implement the [EC Agency Workers Directive](#) in Great Britain = with effect from October 2011, together with draft consequential amendments = to the [Conduct of Employment Agencies and Employment Businesses Regulations 2003](#). Both sets of draft regulations are included as annexes to a [consultation = document](#). The consultation ends on 11th December 2009.

An [accompanying press release of 15th October 2009](#) confirms that "*the = Government is committed to getting this legislation on the Statute Book by the end = of this Parliament*" and that "*the law will come into force in the UK in = **October 2011***".

The main effect of the regulations will be to ensure that after = 12 weeks in a given job agency workers will be entitled to equal treatment = with other staff in so far as basic working and employment conditions = are concerned, including pay and holidays, as if they had been recruited = directly by the hirer.

In addition, from the first day of their assignment agency workers = will be entitled to (i) information about vacancies the hirer may have to give = them the same opportunity as other workers to find permanent employment; = (ii) equal access to on-site facilities such as child care and transport services; = (iii) additional rights for new and expectant mothers including right to = reasonable time off to attend ante-natal appointments and adjustments to working = conditions and working hours.

Employment tribunals will be given jurisdiction to hear complaints = from agency workers who consider their rights under the regulations have been = breached or that they have suffered a detriment for asserting their = rights under the regulations. There will be a 3 month time limit from the = date of alleged breach or detriment for making an application to a = tribunal. In detriment cases, tribunals will be able to award compensation = for injury to feelings.

- *For further information generally click here on [Employment Agencies / EU directive on temps \(2008\)](#) to go to notes on = our website.*

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## **6. Dressing up unfair dismissal as wrongful dismissal**

10 years ago the absolute maximum compensation for unfair dismissal = was £18,600. Since then it has been increased very substantially so = that the absolute maximum is currently £77,600. Even so, that can be = relatively small beer for high fliers on huge salaries who are unfairly = dismissed. In such cases it can be tempting for them to see if they can = dress up their unfair dismissal claim as a breach of contract (otherwise called = wrongful dismissal) claim. As such it could be brought in the ordinary = courts where there is no statutory limit on the amount of damages which can be = awarded.

A recent case has shown how difficult it can be for this tactic to work.

A Mr Edwards was employed by the Chesterfield Royal Hospital NHS = Foundation Trust as a Consultant Trauma and Orthopaedic Surgeon. In late 2005 = allegations were made that he had undertaken an internal vaginal examination of a = woman patient in the Hospital's A&E Department and then denied that such = an examination had taken place. A disciplinary hearing was held in February = 2006, following which he was dismissed for gross professional and personal misconduct.

Mr Edwards brought an unfair dismissal claim to an employment = tribunal but then withdrew it and instead filed a claim for breach of = contract in the High Court. He claimed around £4m for loss of earnings on the = basis that his career had been ruined

The alleged breach of contract was that the employer had failed to = follow the disciplinary procedure which applied under the terms of his employment. Under that procedure he would have been = entitled to a hearing before a panel which would have included a clinician in = the same medical discipline as himself and been chaired by a legally qualified = member. He would also have had the right to legal representation.

Mr Edwards pointed out that after his dismissal the allegations = against him had been considered by the General Medical Council. The GMC had = dismissed the allegations and decided that no further action needed to be = taken. He argued that if the proper disciplinary procedure to which he was = entitled under his contract had been followed the same conclusion would have been = reached by his employers - in effect he would have been exonerated.

The High Court has dismissed the bulk of Mr Edwards' claim. It confirmed old case law to the effect that as a general rule damages for = wrongful dismissal cannot exceed the income that a claimant would have received = if he had been given proper notice under his contract. In this case Mr = Edwards was entitled to a three month notice period, so three month's salary was the = maximum he could receive - although he was also awarded an amount to compensate = for the salary he would have earned during the period that the contractual = disciplinary procedure would have taken if it had been followed.

The thinking underlying this is that at common law an employer = is always entitled to dismiss an employee for any reason on giving him contractual = notice. It follows, on this basis, that the employee's loss cannot = be more than the amount which would have been payable to him if contractual = notice had been given and therefore damages for breach of an employment = contract will generally be limited to that amount.

- *For further information generally click here on [Wrongful dismissal / unfair dismissal and wrongful dismissal = compared](#) and/or [Wrongful dismissal / damages for](#) to go to notes on our = website.*

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## 7. [Disability Discrimination, carers and interpretation of UK law in the light of EU law](#)

A senior employment judge (formerly, "chairman of an = employment tribunal") ruled in November 2008 that an employment tribunal has jurisdiction to hear a disability discrimination claim by an employee on = the basis that she was discriminated against by her employer because she = took time off work to look after her disabled son. The tribunal refused to = accept the employer's argument that the [Disability Discrimination Act 1995](#) only outlaws discrimination against = employees who suffer from a disability and that it does not apply where the = alleged discrimination was against a fit employee who is caring for a disabled person.

The employment judge found that an employment tribunal had = jurisdiction by, in effect, inserting new words into the Act. Employment = tribunals only have jurisdiction in so far as they are given it by Act of = Parliament so without taking this quite bold step the employment judge would have been = obliged to hold that the tribunal could not hear the case. She held that = effectively inserting words into the Act was necessary to comply with EU law.

The employer appealed and = the matter went to the Employment Appeal Tribunal in July 2009. The = President of the Employment Appeal Tribunal has now handed down his judgment. = He has agreed with the employment judge that, on a proper interpretation = of the [Disability Discrimination Act 1995](#), employment tribunals do = have jurisdiction in such a case ([EBR Attridge Law \(1\) Law \(2\) v Coleman on 30th October 2009](#)). The = result is that Mrs Coleman's case can now go to an employment tribunal for a = hearing on its merits.

This result follows a ruling by = the European Court in July 2008 that the [Equal Treatment Framework Directive = \(2000/78/EC\)](#) requires Member States to outlaw what is often referred to as = "associative discrimination". On the face of it, the UK [Disability Discrimination Act 1995](#) does not do so. In an employment context, = the wording of the Act assists only employees who suffer from a = disability and does not help fit employees who are carers of disable people. The = EAT President's decision confirms that as a matter of law a broad, = purposive, interpretation must be given to the UK Act to bring it into = line with EC law even though this effectively means adding words which = Parliament never included.

Apart from the obvious and considerable importance of establishing that so = called "associative discrimination" can be unlawful under the = Disability Discrimination Act, the rulings of the employment judge and of the EAT = are of particular interest in that they confirm the lengths to which courts and tribunals will go to ensure that UK statute = law is interpreted in line with EC requirements. They are prepared actually to = insert ("interpolate" is the expression used by both the employment judge and = the President of the EAT) wording into a UK statute if that is the only way = to ensure conformity with EC law, provided the interpolated wording is not = contrary to the wording actually used in the statute and is "compatible with the underlying thrust of the legislation". That is what has been done in = this case - new wording, carefully specified, was effectively added into the = Disability Discrimination Act by the EAT. There is precedent for this. Notably in a 2004 case, referred = to in the present case, the House of Lords interpreted the words "wife or husband" in the 1977 Rent Act as extending to same-sex = partners. That was plainly not the intention of Parliament in 1977 and "nor does it = correspond to the actual meaning of the words, however liberally construed". However the implication was necessary in order to = give effect to European Convention rights and went "with the grain of = the legislation".

This is going much further than merely resolving ambiguities in a way = which ensures conformity with EC law. It can, as recognised by the EAT President, result in changing the meaning of the statute = concerned.

- *For further information generally click here on [European Law / priority over English law](#) and/or on [Summa= rised cases / Coleman v Attridge Law & anor](#) to go = to notes on our website.*

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## 8. [Jewish School](#)

The JFS (formerly Jewish Free School) was established more than 250 years ago in Spitalfields and recently moved to high standard premises in Kenton, London. It has been ranked as the top mixed comprehensive school in the official DFES league tables and in 2009 was rated by the Times as the leading non selective secondary comprehensive school in England and Wales. As might be expected the school is popular and oversubscribed.

The JFS has its own special entrance criteria and, being popular, has to apply them selectively. One result is that, in general terms, priority is given to children who are recognised as Jewish by the orthodox Chief Rabbi because they are descended from a Jewish mother in preference to children of mothers who converted to Judaism in procedures not recognised by the Chief Rabbi.

The [Equality Act 2006 s.50](#) exempts schools of a religious character from the full rigour of the normal rules prohibiting discrimination by educational establishments. However, this exemption covers religious discrimination only, not racial discrimination. A child whose mother was a convert to Judaism failed to get a place at the JFS in 2006. The Jewish father complained that this was because of the entrance criterion noted above and eventually took the matter to court. He claimed that membership of a religious group based on descent amounts to membership of the group by reason of ethnic origins within the meaning of the Race Relations Act. On that basis the "religious character" exemption could not apply and the JFS policy based on the criterion was a racially based policy which would therefore be unlawful.

The interest of the case in an employment law context is in the detailed examination being given to the various factors which may lead to a person being considered to be a Jew - a matter which can clearly be relevant in employment situations potentially involving religious and/or racial discrimination.

At first instance the High Court (in July 2008) considered that the entrance criterion noted above was lawful (ie religious based) but the Court of Appeal (in June 2009) concluded that it was race based and unlawful. The JFS appealed to the new Supreme Court (formerly the House of Lords) where at the end of October the case completed its hearing before nine judges. The Government has supported the JFS but both the Equality and Human Rights Commission and the British Humanist Association have backed the case against the school. The Supreme Court has reserved judgment. This is expected within the next two or three months and will finally determine the issue.

For those interested in understanding more of the detail the following extract from the judgment of Sedley LJ in the Court of Appeal is illuminating. He said (at paras 32 and 33 of [his judgment](#)):

*"... it appears to us clear (a) that Jews constitute a racial group defined principally by ethnic origin and additionally by conversion, and (b) that to discriminate against a person on the ground that he or someone else either is or is not Jewish is therefore to discriminate against him on racial grounds. The motive for the discrimination, whether benign or malign, theological or supremacist, makes it no less and no more unlawful. Nor does the factuality of the ground. If for theological reasons a fully subscribed Christian faith school refused to admit a child on the ground that, albeit practising Christians, the child's family were of Jewish origin, it is hard to see what answer there could be to a claim for race discrimination.*

*The refusal of JFS to admit M was accordingly, in our judgment, less favourable treatment of him on racial grounds. This does not mean, as [counsel for the school] suggested it would mean, that no Jewish faith school can ever give preference to Jewish children. It means that, as one would expect, eligibility must depend on faith, however defined, and not on ethnicity".*

- For further information generally click here on [Definitions and interpretation / racial grounds](#) and/or on [Religious discrimination / new 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 (October and November 2009) editions of the IRLR and ICR = Law Reports, the two leading series of law reports covering employment = law.

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: Cycle to work guarantee scheme - with tax relief. =](#)**

The Department for Transport is promoting what it calls the "[Cycle to Work Guarantee](#)". Employers are asked to sign up to a scheme which = provides certain tax exemptions. It involves the employer guaranteeing = to provide, amongst other things, safe bike parking facilities and = changing and locker facilities.

It seems that more than 30 per cent of the staff of large = urban employers live within a half an hour bike ride of their place of work, = but only about 3 per cent currently cycle to work. The = government aim is to double or treble that figure.

A long [list of employers](#) who are currently participating in the scheme is = provided on a website. Interestingly, the vast majority are in the = public sector which may suggest that the tax benefits need to be = improved if private sector employers are to be persuaded to take part in = significant numbers. To qualify for the tax exemption, cycles and cyclists' safety = equipment are loaned to staff by the employer. Details are in an [Implementation Guidance](#) document. An important proviso is that to = qualify for tax relief the scheme must be available to employees generally with no = groups of employees excluded.

The detail is wonderful - for example normal tax rules provide for a 20p per mile tax-free mileage business travel allowance = for employees who use their own bicycles for business purposes (which does = not include getting to work). The [Implementation Guidance](#) makes it clear that this allowance cannot be claimed for = travel on a bicycle loaned to the employee under the "Cycle to Work = Guarantee" scheme.

- *For further information generally click here on [Tax / benefits in kind](#) to go to notes on our website.*

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