



EMPLOYMENT MEMO 2009

Newsletter Issue 2

October 2009

- ▶ [Contents](#)
- ▶ [Focus on...](#)
- ▶ [Recent cases](#)
 - ▶ [Highlights](#)
 - ▶ [Cumulative list](#)

Welcome to the second Employment Law Memo 2009 newsletter, which complements our online updating service. This newsletter rounds up all the changes which have come into force this October, and highlights cases of particular interest. Further, it also provides a cumulative list of all case updates published to date.

For the online update service, please click [here](#) for a month-by-month listing of the cases, legislation and proposals covered, and for the facility to search by topic or specific paragraph. We also send emails detailing our updates. Further, all updates are automatically integrated into the online version of the Memo, which means that you can be confident that you are fully up to date.

We hope you find our service useful and informative and welcome any comments you may have as to how we can improve our service.

- ▶ [All newsletters](#)
- ▶ [Online updates](#)
- ▶ [Contact us](#)



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In this issue...

Focus on:

- » [Round up of legislative and other changes](#)

Recent cases:

- » [Highlights](#)
- » [Cumulative list](#)

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FOCUS ON... LEGISLATIVE CHANGES IN OCT 2009

Here is a summary of the many legislative changes that occur in October. Further information can be found at the relevant paragraphs listed below.

- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases
 - ▶ Highlights
 - ▶ Cumulative list
- ▶ All newsletters
- ▶ Online updates
- ▶ Contact us



PDF printer friendly version

Focus on...

PRE-EMPLOYMENT

Start of Vetting and Barring Scheme (VBS) – phased introduction

See EM ¶619, ¶621

On 12 October 2009, the three current barring lists (information held under Section 142 of the Education Act 2002 (List 99), the Protection Of Children Act (POCA) list, and the Protection Of Vulnerable Adults (POVA) list) will be replaced by a new Vetting and Barring Scheme (VBS). This scheme has two barred lists, one for those who are barred from engaging in regulated activity with children, and one for those barred from engaging in regulated activity with vulnerable adults. The introduction of barring from 'regulated activities' will mean that those included on the new barred lists will be barred from a wider range of jobs and activities than previously, particularly in areas of work with vulnerable adults such as the NHS and the Prison Service.

The Vetting and Barring Scheme will be run by the Independent Safeguarding Authority (ISA), the Criminal Records Bureau (CRB) and Access Northern Ireland. The ISA will make the barring decisions and will maintain the two barred lists and the CRB will be responsible for the administration of the scheme. From 26 July 2010, new starters and those moving jobs who want to work with children or vulnerable adults can start to apply for ISA registration and the online ISA-registration service will be introduced at the same time. Such workers must register from November 2010. Registration will cost £64 in England and Wales and £58 in Northern Ireland, although this fee is waived for volunteers. All others who work with children or vulnerable adults will be phased into the scheme by 2015. Once the online service is up and running, subsequent employers or service providers will be able to check an individual's status online free of charge. In most cases, they will also be able to or must obtain a CRB check.

From 12 October, all employers, who are able to or must obtain a CRB check which includes information held on the barring lists, must apply for an enhanced CRB check as the standard CRB check will no longer include such information (although it will continue to be available for all other positions covered by the Exceptions Order 1975 to the Rehabilitation of Offenders Act 1974, for example positions within the security industry and financial services). From 1 October 2009, the cost of a standard CRB check reduces from £31 to £26, the cost of an enhanced CRB check remains at £36.

There will also be a new ongoing duty to share information and employers, social services and professional regulators must notify the ISA of relevant information. Employers who knowingly permit a barred individual to engage in regulated activity will face a penalty of up to 6 months in prison plus a fine. It will also be a criminal offence for a barred individual to seek or undertake work with children or vulnerable adults.

The CRB website contains more details and the Vetting and Barring Scheme Contact Centre can be contacted with regard to any questions or queries on 0300 123 111.



FOCUS ON... cont...

DIRECTORS

Companies Act 2006 – final implementation

See EM ¶2103, ¶2112

The implementation of the Companies Act 2006 was finally completed on 1 October. The principal topics covered by the provisions which are newly in force are: incorporation, the memorandum and articles, shares and share capital and Companies House. For details of the main changes brought into force and the last-minute regulations published, see *Company Law Memo 2009 Newsletter Issue 5*.

In summary, these include:

- » the introduction of a new incorporation regime, which includes new default articles governing the management of companies (i.e. the articles relied on by companies that do not register their own articles or amendments to the default form). These new Model Articles replace Table A for companies incorporated on or after 1 October;
- » the automatic changing of existing companies' memoranda;
- » no longer requiring directors to disclose their residential addresses on the public register. Instead, directors can register a service address at Companies House at which they can be contacted (the service address can be the director's residential address if he wishes, but there will be nothing on the register to identify it as such). So that directors can still be traced by the authorities if necessary, each director's residential address must still be submitted to Companies House and the company must keep a new register of directors' residential addresses to accompany its register of directors and secretaries;
- » all Companies House forms changing including those used to register information about directors, see the Companies House website for details: <http://www.companieshouse.gov.uk/index.shtml>; and
- » companies now being allowed to keep copies of directors' service contracts at a single alternative inspection location (SAIL) instead of their registered office. This also applies to other records and registers that a company must make available for inspection.

Companies Act 2006
 Companies (Model Articles) Regulations SI 2008/3229
 Companies (Company Records) Regulations SI 2008/3006
 Companies (Disclosure of Address) Regulations SI 2009/214

REMUNERATION

National minimum wage – gratuities paid through payroll system

See EM ¶2846, ¶2875

From 1 October 2009, tips and gratuities paid through the employer's payroll system are not to be treated as part of an individual's pay for the purposes of NMW.

National Minimum Wage Regulations 1999 (Amendment) Regulations SI 2009/1902

- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases
 - ▶ Highlights
 - ▶ Cumulative list
- ▶ All newsletters
- ▶ Online updates
- ▶ Contact us



PDF printer friendly version

Focus on...



FOCUS ON... cont...

National minimum wage – new rates

See EM ¶2869, ¶2875

The new national minimum wage rates from 1 October 2009 are as follows:

Worker	Hourly rate
16 to 17 years who are no longer of compulsory school age (does not apply to apprentices)	£3.57
18 to 21 years (the “development rate”)	£4.83
22 years and over	£5.80
18 to 25 years on a contract of apprenticeship	No entitlement for first 12 months then according to age

The accommodation offset will rise from £4.46 per day to £4.51.

National Minimum Wage Regulations 1999 (Amendment) Regulations SI 2009/1902

Awards based on a week’s pay – October increase

See EM ¶2923, ¶8575, ¶9005, ¶9054

There is a statutory cap on the amount of a week’s pay which is used to calculate certain awards, the most important of these relating to:

- » statutory redundancy payments; and
- » basic awards and additional awards in unfair dismissal cases.

The current maximum will be increased from £350 to £380 for events giving rise to the entitlement to compensation or other payments on or after 1 October 2009.

The following table sets out the resultant changes:

Entitlement or right subject to the statutory cap for a week’s pay: £380	Maximum limit
Employer’s insolvency: guaranteed debts	£3,040 (arrears of pay) £2,280 (holiday pay)
Failure to comply with notification requirements (retirement)	£3,040
Flexible working: failure to consider/correctly consider employee’s request	£3,040
Redundancy pay: statutory (SRP)	£11,400

▶ Contents

▶ Focus on...

▶ Recent cases

▶ Highlights

▶ Cumulative list

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer friendly version

Focus on...



FOCUS ON... cont...

- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases
 - ▶ Highlights
 - ▶ Cumulative list
- ▶ All newsletters
- ▶ Online updates
- ▶ Contact us



PDF printer
friendly version

Redundancy pay: statutory (SRP)	£11,400
Right to be accompanied: disciplinary/grievance hearing/flexible working hearing/meeting to consider his request to continue working beyond retirement date	£760
Trade unions (statutorily recognised): employer's failure to consult on training	£760
Unfair dismissal: basic award	£11,400
Unfair dismissal: additional award (employer's failure to follow statutory disciplinary/grievance procedures)	£1,520
Unfair dismissal: additional award (failure to re-employ or reinstate employee)	between £9,880 and £19,760
Written particulars: employer's failure to provide statement/incomplete or inaccurate statement	£760 or £1,520

Work and Families (Increase of Maximum Amount) Order SI 2009/1903

Comment There will be no further increases in February 2010. However, the amount of other awards, which are not based on a week's pay (for example, the maximum limit for unfair dismissal compensatory awards), may increase next February.

DATA PROTECTION

Notification – change in fee structure

See EM ¶5993

Certain data controllers should notify the Information Commissioner before they process personal data (see ¶5990). Notification to the Commissioner must be accompanied by an annual fee, currently £35. From 1 October 2009, this will be replaced by a two-tiered fee structure. The fee for a data controller in tier 1 will be £35 and the fee for tier 2 will be £500. A data controller will be in tier 2 if it has 250 or more members of staff and either has a turnover of at least £25.9 million or is a public authority. Charities and small occupational pension schemes are exempt from tier 2.

Data Protection (Notification and Notification Fees) (Amendment) Regulations SI 2009/1677

Focus on...



FOCUS ON... cont...

APPEALS

New UK Supreme Court

See EM ¶9830+

On 1 October 2009 the Supreme Court of the United Kingdom will replace the House of Lords in its judicial capacity. Further details can be found on its website: <http://www.supremecourt.gov.uk/index.html>

Constitutional Reform Act 2005
 Supreme Court Rules SI 2009/1603
 Practice Directions 1 to 14

- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases
 - ▶ Highlights
 - ▶ Cumulative list

- ▶ All newsletters
- ▶ Online updates
- ▶ Contact us



PDF printer friendly version

Focus on...

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- Abolition of the commissioners' system for tax cases and introduction of the new tribunals
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- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases
 - ▶ Highlights
 - ▶ Cumulative list
- ▶ All newsletters
- ▶ Online updates
- ▶ Contact us



PDF printer
friendly version

Recent cases

RECENT CASES - HIGHLIGHTS

We send email updates which detail all the recent changes that have been added to our online updates page and the online version to all subscribers. These can be accessed by clicking on the updates in the emails, by using the online updates page or by using the online version of your Memo. We have selected a few of the cases most likely in our view to have a widespread impact since our first Newsletter, and summarise these below.

TIME OFF

Annual leave – workers may recover unpaid holiday pay as an unlawful deduction of wages

See EM ¶4040, ¶3056

The House of Lords has held that workers may claim unpaid holiday pay under the provisions relating to deductions from pay, rather than being restricted to claiming under the Working Time Regulations. This means that employees will be able to recover accrued holiday pay for substantial periods, potentially the whole of their employment, as the provisions relating to deductions from pay allow recovery for a series of deductions as long as the claim is made within 3 months of the last deduction. Recovery under the Working Time Regulations requires employees to bring claims within 3 months of the date that each payment was due.

HM Revenue and Customs v Stringer and ors [2009] UKHL 31

Annual leave – sickness during annual leave – entitlement to take leave lost after recovery

See EM ¶4008

The European Court of Justice has held that where an employee is sick during a period of annual leave he will be entitled to take an equivalent period of annual leave after he is fit to return to work, and that, if necessary, this leave may be taken in a subsequent leave year.

Vicente Pereda (Free movement of persons) [2009] EUECJ C-277/08

Comment As a result of this decision, the Working Time Regulations will require amendment to permit workers to carry forward annual leave in such circumstances.

EQUALITY AT WORK

Victimisation – non-payment of discrimination compensation award may amount to post-employment victimisation

See EM ¶5222, ¶9715

The Court of Appeal has held that failure to pay a discrimination compensation award may constitute post-employment victimisation and be a ground for new proceedings, even though there may be other routes the claimant could use to enforce the award.

Rank Nemo (DMS) Ltd v Coutinho [2009] EWCA 454



- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases
 - ▶ Highlights
 - ▶ Cumulative list

- ▶ All newsletters
- ▶ Online updates
- ▶ Contact us



PDF printer
friendly version

Recent cases

RECENT CASES - HIGHLIGHTS cont...

Disability discrimination – “likely to recur” means “could well happen”

See EM ¶5476, ¶5481

The House of Lords has upheld the decision of the Northern Ireland Court of Appeal that in the Disability Discrimination Act “likely to recur” means “could well happen”, overturning previous authorities which required it to be “more likely than not” that the condition would recur.

SCA Packaging v Boyle [2009] UKHL 37

Disability discrimination – access to a profession not treated as a day-to-day activity

See EM ¶5486

The EAT has held that a person who did not meet the eyesight standard required for service as a police officer was not disabled, so that refusal of her application did not amount to unlawful disability discrimination. A civilian police employee who was also a special constable applied to be a police officer but failed the medical because the eyesight in her left eye was impaired. While the impairment affected some normal day-to-day activities to a minor extent, the EAT held that exclusion from a profession did not amount to a substantial adverse effect in this case.

Lothian and Borders Police v Cumming [2009] UKEAT 0077_08_2907

Equal pay – “piggyback” claims allowed

See EM ¶5653, ¶5667

The EAT has considered “piggyback” contingent claims for equal pay by men comparing themselves to women who were themselves bringing equal pay claims using other men as comparators. If they were successful in their claims, the women comparators would be paid more than the male claimants for like work. The EAT ruled that:

- » a man can claim equal pay with a woman who is paid a higher rate for like work as a result of her own equal pay claim;
- » that claim can extend to any period of arrears awarded to the female comparator; and
- » it was permissible for a man to start proceedings before the equal pay claim made by the female comparator was completed.

The EAT also found that the men could claim under the Sex Discrimination Act where they had been denied bonuses paid to women in settlement of equal pay claims.

McAvoy and ors v South Tyneside Borough Council and ors [2009] EAT cases 0006/08, 0057/08, 0058/08, 0168/08, 0276/08



RECENT CASES - HIGHLIGHTS cont...

DISCIPLINE AND GRIEVANCE

Disciplinary hearings – whether legal representation should be allowed

See EM ¶6557

The Court of Appeal has allowed an appeal against the decision of the High Court in *Kulkarni v Milton Keynes Hospital NHS Trust*. In this case, a doctor was subject to disciplinary proceedings in which he was represented by a medical defence organisation, who considered that he should be legally represented. An earlier contract giving him an express right to such representation had been varied in 2005, and replaced by a contract which provided that the employee could be represented by a:

- » colleague, friend, partner or spouse; or
- » representative from or retained by a trade union or defence organisation.

The clause went on to say that such a representative could be legally qualified but would not be acting in a legal capacity. However, it also said that a representative was entitled to present the employee's case, address the panel and question any evidence. The Court considered that the wording of the clause permitted the employee to be legally represented providing that the representative was instructed by his defence organisation, and that any legally qualified representative could use all his professional skills once retained.

Kulkarni v Milton Keynes Hospital NHS Foundation Trust [2009] EWCA Civ 789

Comment Because it was found that in this particular case the employee was contractually entitled to legal representation, it was not necessary to rule on whether refusal to allow legal representation was a breach of human rights. However, the Court commented that had they been required to decide on the point, they would have ruled that refusal of legal representation at the initial disciplinary hearing would be a breach of the right to a fair hearing under Art 6 of the European Convention on Human Rights and under the concept of natural justice, because the doctor was facing what was in effect a criminal charge, although it was being dealt with by disciplinary proceedings. These comments are in line with *R (on the application of G) v Governors of X School* [2009] UKHC 504 (Admin), where the High Court held that a dismissal could have greater consequences for the employee than losing his job, for example if dismissal may also lead to a ban from further employment involving children, an employee is entitled to have representation at the internal hearing as part of his right to a fair trial under Art 6 of the European Convention of Human Rights.

As a result of these decisions, employers of medical professionals, those providing educational or care services to children or vulnerable adults and other regulated professions should ensure that employees are allowed legal representation at internal disciplinary hearings.

ENDING EMPLOYMENT

Retirement – default retirement age justified by UK social policy objectives

See EM ¶8201

The High Court has held that the default retirement age of 65 is justified by social policy objectives, including facilitating workforce planning and avoiding an adverse impact on occupational pensions. It commented, however, that had the review of the retirement age

- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases
 - ▶ Highlights
 - ▶ Cumulative list
- ▶ All newsletters
- ▶ Online updates
- ▶ Contact us



PDF printer friendly version

Recent cases



RECENT CASES - HIGHLIGHTS cont...

not been brought forward to 2010 (EN09/10 item 10) it would not necessarily have come to the same conclusion.

▶ Contents

▶ Focus on...

▶ Recent cases

▶ Highlights

▶ Cumulative list

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer
friendly version

Recent cases

Age UK, R (on the application of) v Attorney General [2009] EWHC 2336 (Admin)

Redundancy – length of service as a factor in redundancy selection not age discrimination

See EM ¶8836, ¶5615

The Court of Appeal has considered whether it is permissible to use length of service as a factor in redundancy selection and has held that service could be justified as promoting loyalty and a stable workforce, and that, as part of a matrix where it was only one of a number of criteria, it was proportionate. The Court also agreed that giving weighting to long service constitutes a benefit to employees.

Rolls Royce plc v Unite the Union [2009] EWCA Civ 387

EMPLOYMENT CLAIMS

Online submission of employment tribunal claim – importance of setting out details of workplace

See EM ¶9510

This case concerned a tribunal application presented online. The claimants' representative submitted the form completed with the address of the employer in Bristol, but omitted the claimants' place of work, which he did not know. The central server relayed the form to the Bristol tribunal as the most appropriate office because where no place of work is completed it is assumed that the place of work is the employer's business address. In fact the claimants worked in Scotland and only a Scottish tribunal would have jurisdiction. The Bristol tribunal office therefore rejected the claim, and a subsequent attempt to present the claim in Scotland was out of time. The EAT rejected an argument by the claimants that once a claim is submitted online to the single server dealing with all tribunal claims in the United Kingdom, it is held for all tribunals in the UK and should be treated as submitted to the correct tribunal.

McFadyen and ors v PB Recovery Ltd and ors [2009] UKEAT 0072_08_3107

Comment While it is not compulsory to complete the section of the ET1 form showing the employee's place of work, if different from the employer's place of business, this case shows the importance of doing so, as failure to complete it may result in the form being directed to the wrong tribunal office. Where employees work for an English company, but work in Scotland, or vice versa, the mistake may, as in this case, mean the claim is rejected.



- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases
 - ▶ Highlights
 - ▶ Cumulative list

- ▶ All newsletters
- ▶ Online updates
- ▶ Contact us



PDF printer
friendly version

Recent cases

RECENT CASES - CUMULATIVE LIST

Types of employment relationship

- ¶15 Archer-Hoblin Contractors Ltd v MacGettigan
- ¶15 MPG Contracts Ltd v England
- ¶15 Premier Groundworks Ltd v Jozsa
- ¶35 Little v BMI Chiltern Hospital
- ¶43 Secretary of State for Business, Enterprise and Regulatory Reform v (1) Neufeld and (2) Howe
- ¶50 Kovats v TFO Management LLP and the Family Group of Companies
- ¶53 Protectacoat Firthglow Ltd v Miklos Szilagyi

Pre-employment

- ¶625, ¶706 Cheltenham Borough Council v Laird
- ¶785 Osborne Clarke Services v Purohit

Employment contract, variation and breach

- ¶1246 Bournemouth University Higher Education Corporation v Buckland
- ¶1307 Enfield Technical Services Ltd v Payne; Grace v BF Components Ltd
- ¶1313 Blue Chip Trading Ltd v Helbawi
- ¶1655 Rogers v Microblade Ltd
- ¶1716 Bridal Fashions Ltd v Burke
- ¶1760 Cook v MSHK Ltd and ors

Flexible working

- ¶1882, ¶1888 Carl v University of Sheffield
- ¶1983 Secretary of State for Children Schools and Family v Fletcher

Assignment

- ¶2280 Dolphin Drilling Personnel Pte Ltd v Winks and Dolphin Drilling Ltd

Remuneration

- ¶2832 Small and ors v Boots Co PLC and anor
- ¶2846, ¶2875 Annabel's (Berkeley Square) Ltd and ors v The Commissioners for Her Majesty's Revenue and Customs
- ¶2875 Smith v Oxfordshire Learning Disability NHS Trust
- ¶3056 HM Revenue and Customs v Stringer and ors, HL
- ¶3065 Patel v Marquette Partners (UK) Ltd

Time off

- ¶4007 Stringer and ors v HM Revenue and Customs, Case C-520/06, ECJ
- ¶4008 Vicente Pereda (Free movement of persons)
- ¶4017 Craig and ors v Transocean International Resources Ltd and ors



- ▶ Contents
- ▶ Focus on...
- ▶ Recent cases
 - ▶ Highlights
 - ▶ Cumulative list

▶ All newsletters

▶ Online updates

▶ Contact us



PDF printer friendly version

Recent cases

RECENT CASES - CUMULATIVE LIST cont...

¶4040 HM Revenue and Customs v Stringer and ors, HL

Sickness, injury and absence

¶4102 Stringer and ors v HM Revenue and Customs, Case C-520/06, ECJ

¶4252 Chaplin v Howard Kennedys Solicitors

Health and safety

¶5082 N, R (on the application of) v Secretary of State for Health

Equality at work

¶5222 Coutinho v Rank Nemo (DMS) Ltd, EAT

¶5222 Rank Nemo (DMS) Ltd v Coutinho, CA

¶5270 Nelson v Newry and Mourne District Council

¶5300 Somerset County Council and ors v Pike

¶5361 English v Thomas Sanderson Blinds Ltd

¶5381 R (on the application of E) v The Governing Body of JFS and ors

¶5381, ¶5411 Osborne Clarke Services v Purohit

¶5383 Chondol v Liverpool City Council

¶5383 London Borough of Islington v Ladele (Liberty intervening)

¶5383 McConkey and anor v Simon Community Northern Ireland

¶5383 Nicholson v Grainger plc and ors

¶5391 Ahmed v Amnesty International

¶5393 London Borough of Camden v Miah

¶5435 Richmond Pharmacology Ltd v Dhaliwal

¶5455, ¶5486 Chief Constable of Dumfries and Galloway Constabulary v Adams

¶5476, ¶5481 SCA Packaging v Boyle, NICA

¶5476, ¶5481 SCA Packaging v Boyle, HL

¶5486 Lothian and Borders Police v Cumming

¶5515 Child Support Agency (Dudley) v Truman

¶5515 Stockton on Tees Borough Council v Aylott

¶5530, ¶5548 Fareham College Corporation v Walters

¶5535 Eastern and Coastal Kent PCT v Jocelyn Grey

¶5610 Chief Constable of West Yorkshire Police v Homer

¶5610 London Borough of Tower Hamlets v Wooster

¶5615 Rolls Royce plc v Unite the Union

¶5653, ¶5667 McAvoy and ors v South Tyneside Borough Council and ors

¶5658, ¶5720 Hovell v Ashford and St Peter's Hospital NHS Trust

¶5680 Fearnon and ors v Smurfit Corrugated Cases (Lurgain) Ltd

¶5682 Wilson v Health and Safety Executive



- ▶ [Contents](#)
- ▶ [Focus on...](#)
- ▶ [Recent cases](#)
- ▶ [Highlights](#)
- ▶ [Cumulative list](#)

- ▶ [All newsletters](#)
- ▶ [Online updates](#)
- ▶ [Contact us](#)



PDF printer
friendly version

Recent cases

RECENT CASES - CUMULATIVE LIST cont...

¶5683 Hartley and ors v Northumbria Healthcare NHS Foundation Trust and ors

¶5720 Potter and ors v North Cumbria Acute Hospitals NHS Trust

¶5722 Matuszowicz v Kingston upon Hull City Council

¶5723 Slack and ors v Cumbria County Council

¶5731 B and C v A

¶5734 Edozie v Group 4 Securicor Plc and anor

¶5751 Da'Bell v NSPCC

Data protection and privacy

¶6287 N, R (on the application of) v Secretary of State for Health

Discipline and grievance

¶6520 Zimmer Ltd v Brezan

¶6557 Kulkarni v Milton Keynes Hospital NHS Foundation Trust

¶6557 R (on the application of G) v Governors of X School

¶6564, ¶6605 Sandsfield Gravel Co Ltd v Loving

¶6588 Compass Group UK and Ireland Ltd t/a Eurest v Okoro

¶6626 Knight v Treherne Care and Consultancy Ltd

¶6732 Bridal Fashions Ltd v Burke

¶6765 Burns v Killgerm Group Ltd

¶6773 Suffolk Mental Health Partnership NHS Trust v Hurst and ors; Mid Staffordshire NHS Foundation Trust v Kaur and ors; Arnold and ors v Sandwell Metropolitan Borough Council, EAT

¶6773 Suffolk Mental Health Partnership NHS Trust v Hurst and ors; Sandwell Metropolitan Borough Council and ors v Arnold and ors, CA

Trade unions, collective bargaining and industrial action

¶7368 Briggs and ors v Nottingham University Hospitals NHS Trust

Information and consultation in the workplace

¶7710 Darnton v Bournemouth University

Transfer of the business

¶7934 Klarenberg v Ferrotron Technologies GmbH

¶7936 Metropolitan Resources Ltd v Churchill Dulwich Ltd (in liquidation) and ors

¶7936 OCS Group UK Ltd v Jones and anor

¶7936, ¶7957 Clearsprings Management Ltd v Ankers and ors

¶7936, ¶8035 Royden v Barnetts Solicitors

¶7972 Gutridge and ors v Sodexo Ltd and anor

¶7972, ¶8035 Tapere v South London and Maudsley NHS Trust

¶7976 Small and ors v Boots Co PLC and anor



- ▶ [Contents](#)
- ▶ [Focus on...](#)
- ▶ [Recent cases](#)
 - ▶ [Highlights](#)
 - ▶ [Cumulative list](#)
- ▶ [All newsletters](#)
- ▶ [Online updates](#)
- ▶ [Contact us](#)



PDF printer
friendly version

Recent cases

RECENT CASES - CUMULATIVE LIST cont...

- ¶7985 Alemo-Herron and ors v Parkwood Leisure Ltd
- ¶7998 Oakland v Wellswood (Yorkshire) Ltd
- ¶8067 Royal Mail Group Ltd v Communication Workers Union
- ¶8071 UCATT and ors v Glasgow City Council and anor

Ending employment

- ¶8155 Welsh v Cowdenbeath FC Ltd
- ¶8155, ¶8162 Benveniste v Kingston University
- ¶8201 Age UK, R (on the application of) v Attorney General, HC
- ¶8201 R (on the application of the Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform, Case C-388/07, ECJ
- ¶8201 Seldon v Clarkson Wright & James
- ¶8234 Wishaw and District Housing Association v Moncrieff
- ¶8349 Gisda Cyf v Barratt
- ¶8349 Kirklees Metropolitan Council v Radecki
- ¶8437 West London Mental Health NHS Trust v Sarkar
- ¶8475 Chaplin v Howard Kennedys Solicitors
- ¶8585+, ¶8591 Saunders v OCS Group Ltd
- ¶8598 Sheffield Forgemasters International Ltd v Fox; Telindus Ltd v Brading
- ¶8601 Evans v Barclays Bank plc
- ¶8601 Roberts v Aegon UK Corporate Services Ltd
- ¶8620, ¶8626 Islam Channel Ltd v Ridley
- ¶8685 Central and North West London NHS Foundation Trust v Abimbola
- ¶8836 Rolls Royce plc v Unite the Union, HC
- ¶8836 Rolls Royce plc v Unite the Union, CA

Handling disputes and alternative resolution

- ¶9259, ¶9353 McLean v TLC Marketing plc and ors
- ¶9353 Gibb v Maidstone and Tunbridge Wells NHS Trust

Employment claims

- ¶9471 Cambridge and Peterborough Foundation NHS Trust v Crouchman
- ¶9490 Gutridge and ors v Sodexo Ltd and anor
- ¶9510 McFadyen and ors v PB Recovery Ltd and ors
- ¶9534 Enterprise Liverpool Ltd v Jonas and ors
- ¶9545 Beck v Canadian Imperial Bank of Commerce
- ¶9545 Canadian Imperial Bank of Commerce v Beck
- ¶9573 Force One Utilities v Hatfield



- ▶ [Contents](#)
- ▶ [Focus on...](#)
- ▶ [Recent cases](#)
- ▶ [Highlights](#)
- ▶ [Cumulative list](#)

- ▶ [All newsletters](#)
- ▶ [Online updates](#)
- ▶ [Contact us](#)



PDF printer friendly version

Recent cases

RECENT CASES - CUMULATIVE LIST cont...

- ¶9583 Davidson v McMillan
- ¶9620 AB v Ministry of Defence (Rev 1)
- ¶9703 Daleside Nursing Home v Mathew
- ¶9703 Dunedin Canmore Housing Association v Donaldson
- ¶9715 Coutinho v Rank Nemo (DMS) Ltd, EAT
- ¶9715 Rank Nemo (DMS) Ltd v Coutinho, CA
- ¶8626 Islam Channel Ltd v Ridley
- ¶8685 Central and North West London NHS Foundation Trust v Abimbola
- ¶8836 Rolls Royce plc v Unite the Union, HC
- ¶8836 Rolls Royce plc v Unite the Union, CA

Handling disputes and alternative resolution

- ¶9259, ¶9353 McLean v TLC Marketing plc and ors
- ¶9353 Gibb v Maidstone and Tunbridge Wells NHS Trust

Employment claims

- ¶9471 Cambridge and Peterborough Foundation NHS Trust v Crouchman
 - ¶9490 Gutridge and ors v Sodexo Ltd and anor
 - ¶9510 McFadyen and ors v PB Recovery Ltd and ors
 - ¶9534 Enterprise Liverpool Ltd v Jonas and ors
 - ¶9545 Beck v Canadian Imperial Bank of Commerce
 - ¶9545 Canadian Imperial Bank of Commerce v Beck
 - ¶9573 Force One Utilities v Hatfield
 - ¶9583 Davidson v McMillan
 - ¶9620 AB v Ministry of Defence (Rev 1)
 - ¶9703 Daleside Nursing Home v Mathew
 - ¶9703 Dunedin Canmore Housing Association v Donaldson
 - ¶9715 Coutinho v Rank Nemo (DMS) Ltd, EAT
 - ¶9715 Rank Nemo (DMS) Ltd v Coutinho, CA
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