

**SEMINAR – 6TH OCTOBER 2009**  
**TOPICAL EMPLOYMENT ISSUES**

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# 1) Introduction

Busy but pace of change may have slowed down.

April 2009

- Statutory dismissal and disciplinary/grievance procedures replaced with ACAS Code.
- Extension of right to request flexible working for parents of children under 17 (previously 6).

October 2009

- Maximum gross weekly figure for statutory redundancy/basic award calculation increased from £350 to £380.
- National minimum wage figures increased from £5.73 to £5.80 (£4.77-£4.83 for 18-20 year old workers and £3.53 to £3.57 for junior workers).
- New Supreme Court takes over from House of Lords.

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## 2) On the horizon – the Equality Bill

### The Equality Bill

- When is the Equality Bill likely to become law?
- What are the problems with the current law that the Equality Bill intends to change?

# Protected characteristics

What are the protected characteristics?

- Age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
- How the protected characteristics to be applied to:-
  1. Direct discrimination
  2. Indirect discrimination
  3. Victimisation
  4. Harassment

# 1. Direct discrimination

- What is direct discrimination under the current law?

“A claimant must show that they have been treated less favourably than a real or hypothetical comparator on the grounds of a particular characteristic.”

- What does the Equality Bill intend to change?

Replacement of the phrase “*on the grounds of*” with “*because of*”.  
“A claimant must show that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

## 2. Indirect discrimination

- What is indirect discrimination under the current law?
- What does the Equality Bill intend to change?

Harmonisation of the definition of indirect discrimination across all protected characteristics (with the exception of pregnancy and maternity leave) and the introduction of the prohibition on indirect discrimination on the grounds of gender reassignment or disability.

“A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.”

### 3. Harassment

- What is harassment under the current law?
- What does the Equality Bill intend to change?
- Harassment will be defined as “unwanted conduct related to a relevant protected characteristic” (excluding marriage & civil partnership and pregnancy & maternity).

## 4. Victimisation

- What is victimisation under the current law?
- What does the Equality Bill intend to change?

Removal of the requirement of a comparator in all victimisation cases.

### 3) Important developments in holiday and sick leave:

- Stringer simplified.
- Deferring holiday until after sick leave – *Pereda v Madrid Movilidad*
- “Fit” notes!

## Sick Notes

- Out with old in with the new – “FIT NOTES”
- A can do approach
- Economic loss of sickness - £100 Billion annually.

### Key Objectives

- Prevention and promotion
- Early intervention
- Support

# Fit Notes – the Legal Implications

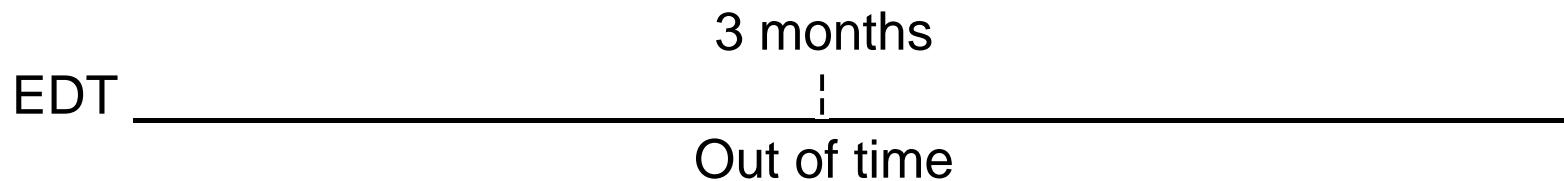
- Discrimination
- Disputes between Doctor and Patient
- Forced back to back

# Annual Leave and Long Term Sickness

- Sick Leave and Holiday Rights
- Stringer Judgment
- Financial Impacts on Employers
- The Pereda Judgment
- Applicability

## Other recent cases of note on dismissals

- *Stuart Peter Limited v Bell (CA)* - credit for income derived during notice period in constructive unfair (not actual unfair) dismissals.
- Termination takes effect on date that dismissal is communicated – *Gisda Syf v Barratt*.



## 5) How has the repeal of the old dismissal procedures and the new ACAS Code bedded in 6 months on?

Key Factors -

- ACAS Code applies to all warnings not just dismissals.
- But not Redundancy or expiry of fixed term contracts.
- No automatic unfair dismissal or 50% uplift.
- 25% uplift.

AR's observations

Not too much change in practice.

## 6) Redundancy

Over the worst?

Length of service as a criteria *Rolls Royce v Unite*

- Age discrimination.
- Justification – proportionate means of achieving a legitimate aim.
- Rewarding loyalty and/or achieving a stable workforce.

## 6) Redundancy

Beware – reorganisations/redundancies and collective redundancy regime

- Action short of dismissal.
- Ways of avoiding redundancies or minimising the numbers.
- If 20+ = collective consultation.

## **7) Default Retirement Age and Age Discrimination**

65 is the default retirement age – the Heyday Case.

## 8) **Belief in Climate Change can amount to a philosophical belief**

*Nicholson v Grainger plc (ET)*

- The thin end of the wedge?
- What about vegetarianism or veganism, animal rights activism or political party membership?
- Still have to show treatment was due to those beliefs.

## 9) **TUPE** – it gets everywhere.

- Service Provision Changes
  - *OCS (UK) Ltd v Jones and another (EAT).*
    - activities wholly different.
  - *Metropolitan Resources Limited v Churchill Dulwich Limited in liquidation and others (EAT).*
    - activities fundamentally or essentially the same before and after the transfer.

## 10) Insolvency

Majority share holders – *Secretary of State v BERR Neufeld*.

- Can majority shareholders be employees and claim from the Redundancy Fund in an insolvency?

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