

## Employment Newsletter

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The members of Hardwicke's Employment Team have specialised skills and experience in all aspects of employment law including matters such as discrimination, unfair dismissal and redundancy, restrictive covenants as well as non-contentious work. We represent both employers and employees via conventional means in addition to direct access.

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Welcome to the April edition of our Employment Newsletter. We have been busy as ever here at Hardwicke, and we hope you enjoy this update on the employment market. In this edition, we include some recent cases which may be of interest to you.

If you have any comments or suggestions for future editions, please contact our Marketing Manager Louise Poppelwell on [louise.poppelwell@hardwicke.co.uk](mailto:louise.poppelwell@hardwicke.co.uk).

### Mostly this month we have been . . .

- **Stephen Lennard** is leading **Zeeshan Dhar** in defending a company against TUPE-related claims by a Union and multiple claimants. The case arises from the fragmentation of a service contract for a Local Authority between five of six Respondents.
- **Barbara Hewson** was led in a test case in the Court of Appeal considering media access to private hearings and the interface between Articles 8 and 10 (*A v Independent News & Media*). She has also been in Dublin helping settle some long-standing High Court proceedings.
- **Chris Camp** has successfully argued that adult volunteers in the army cadet force do not have employment rights, however many orders they have to obey.
- **David Lewis** has achieved a very satisfactory result in a mediation concerning a healthcare professional who had been attacked by a patient and then went on long-term sick leave.
- **Simon Hale** and **Sarah Malik** are training the HR division and in-house legal division of an international plc on redundancy, best practice and procedure.

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## Legislation catch-up

The Equality Act has been sent off for Royal Assent (all 251 pages of it) and is due to come into force in October 2010.

Amongst the myriad changes brought in by this massive harmonising statute, which goes far beyond the employment sphere into the realms of social change, is the abolition of a husband's duty to support his wife. Breast-feeding becomes a protected characteristic and religious organisations are exempt from an obligation to host civil partnerships.

Here are some glimmers of what is to come:

1. A **new public sector duty** to consider reducing socioeconomic inequalities;
2. A new integrated **Equality Duty** on public bodies;
3. **Age discrimination** outside the workplace to be outlawed;
4. A new duty to publish data on **gender pay** and employment equality;
5. **Positive action** can include "proportionate" action;
6. **Carers** receive express protection from discrimination;
7. **Private members' clubs** now have a duty not to discriminate;
8. **Dual discrimination** - direct discrimination because of a combination of **two protected characteristics** – is expressly outlawed.

If you would welcome a round-table seminar or training on the new Act, please contact our Marketing Manager Louise Poppelwell on [louise.poppelwell@hardwicke.co.uk](mailto:louise.poppelwell@hardwicke.co.uk) or 020 7242 2523.

## Cases that caught our eye recently

- In *Samuel Smith Old Brewery v Marshall* the EAT confirmed that there is no authority for the proposition that an employer must complete an entire grievance procedure before it can hold a disciplinary hearing. Only in the rarest of cases would it be outside the range of reasonable responses for an employer to proceed with a disciplinary process *before* hearing a grievance appeal, at least in the absence of clear evidence of unfairness, or uncompensatable prejudice.
- Continuing on the disciplinary theme, two recent rulings show that, once an employer has decided to categorise an employee's error or wrongdoing as minor, or as an isolated error by an otherwise capable employee, to resort to the disciplinary process and/ or dismissal becomes unlawful and actionable;

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- *Gillian Mezey v South West London & St George's NHS Trust* concerns a psychiatrist who had granted a mental patient unescorted leave. He absconded and murdered a member of the public. An internal inquiry concluded that although the psychiatrist's decision to grant unescorted leave was inappropriate, it did not amount to serious professional incompetence: she was a conscientious and capable practitioner, who would not put the public or patients at risk. The Trust then attempted to hold a disciplinary hearing, to consider the findings of the report, although it indicated that at most she would be facing a reprimand. She sought an injunction to restrain the Trust, successfully. The Court of Appeal agreed that the Trust had acted in breach of contract by trying to move on to disciplinary proceedings.
- *Sarkar v West London Mental Health Trust* concerns another psychiatrist, whose colleagues complained about his treatment of them. His employer took him to task under its Fair Blame Policy (FBP), designed for fairly low level breaches of conduct. Under FBP a written warning was the severest sanction. The FBP procedure broke down between the parties at a meeting at which *W's* medical director informed *S* that she would have to send a report to the General Medical Council about his behaviour. The employer convened a disciplinary panel which made findings of gross misconduct and summarily dismissed the psychiatrist. A tribunal upheld his unfair dismissal claim. It concluded that the Trust's medical director had frustrated the FBP process, and the decision to dismiss *S* fell outside the range of reasonable responses. The Court of Appeal agreed.
- In *BP plc v Elstone & Petrotechnics*, the EAT held that a claimant could allege victimisation discrimination in respect of protected disclosures made when he was employed by someone else. *E* used to work for *BP*, and then went to work for *P*. Whilst at *P*, he told some senior *BP* staff about safety concerns he had with *P*, who dismissed him for breach of confidence. He went to work for *BP* again, but later *BP* decided not to renew his contract because of his previous dismissal by *P*.

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*Langstaff J* observed: “It is difficult to see any reason why an employer who was totally removed from the subject of a disclosure should wish to take action because of it.”

- In *Bijlani v Stewart and others*, an Employment Tribunal sitting at Central London dismissed claims of discrimination by a Barrister against the Head and former Heads of her Chambers and the Senior Clerk. The decision is 191 pages.

**This newsletter was edited by Barbara Hewson. For more information on Hardwicke and Employment Law please visit [www.hardwicke.co.uk](http://www.hardwicke.co.uk).**

Nigel Jones QC	1976 (1999)
Ken Craig	1975
Stephen Lennard	1976
Barbara Hewson	1985
Peter (PJ) Kirby	1989
Colm Nugent	1992
Christopher Camp	1996
David Lewis	1997
Zeeshan Dhar	1999
Sarah Malik	1999
David Lawson	2000
Morayo Fagborun-Bennett	2004
Simon Hale	2006

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