

## Welcome to the July edition of Know-How: Employment Law

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Welcome to this month's Know How.

As ever, I hope you find the combination of brief updates and longer articles helpful.

We welcome all employment law enquiries, so please do not hesitate to contact me or one of the Team.

Also, please let us know if you would like further information about Praesidium, our latest new service.

**Jon**



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## IN BRIEF

### Immigration Cap

Immigration was a big issue in the election and Theresa May, the new Home Secretary, has just announced that there will be a 12 week consultation to decide on a permanent annual limit on the number of non-EU nationals entering the UK. Many employers have raised concerns about how a cap could hurt British businesses as it could prevent the most talented foreign workers from entering Britain. There is also concern that our universities could suffer as they attract a large pool of talent from abroad.

We still have no idea what the cap will be but during the general election campaign, David Cameron said that net immigration to the UK would be reduced to “tens of thousands” instead of the hundreds of thousands as it has been in recent years. The consultation period will see businesses, universities and think tanks consulted on their views. One idea already suggested is that employers set up and fund private healthcare schemes for migrant workers to reduce the burden on the NHS.

There is a real concern that the cap will reduce the competitiveness of the UK market place. The Chartered Institute of Personnel and Development has already commented that “employers will not look on this favourably as they will be wary of any measures that make it difficult and more costly to hire the staff that they need”.

Know How will keep you updated with the progress of the consultation but please do contact us if you have any comments or need any immigration advice.

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## QUICK CASE LAW UPDATE ....

### What amounts to a disability?

The question of what amounts to a disability is always a difficult one to answer. Whilst the legal definition is clear, “a long-term impairment which has a substantial adverse effect on the employee’s day to day abilities”, the practical application of the test is still difficult to determine.

The most widely claimed disability is stress/depression. The EAT this month had to consider how far the definition of disability extends to cover depression which is not clinically recognised. The case is also interesting because the claim was not brought by an employee, but by a potential employee who alleged she was discriminated against in the recruitment process.

The employee in the case was a qualified Barrister with a history of depression. She applied for a job at DLA Piper UK LLP and was offered a position, subject to her completing a medical questionnaire. In the questionnaire, the employee informed DLA Piper of her history of depression. A few days later the offer of employment was withdrawn on the basis that there was a recruitment freeze.

The employee brought a claim on the basis that the withdrawal of the offer was contrary to the Disability Discrimination Act 1995. At first instance, the Tribunal did not accept that the employee was disabled. In coming to this view, the Tribunal discounted evidence of the employee’s GP on the basis that the GP was not a specialist. The employee appealed against the decision.

The EAT considered that there should not be a rigid test for determining disability. As a starting point, a Tribunal should determine whether an employee’s day to day activities were adversely affected. If they were, the Tribunal should then move on to consider whether the adverse effect was caused by the impairment claimed.

In taking this approach, the Tribunal would be able to look behind the vague labels that are given to many mental illnesses (i.e. anxiety, stress or depression), to determine whether the impairment amounted to a disability or simply derived from, in the EAT’s words, “a medicalisation of work problems”.

The EAT also reconsidered the evidence of the Claimant's GP. The EAT concluded that it was wrong to discount this evidence on the basis that the GP was not a specialist. Whilst the evidence of a GP would have less weight than that of a specialist, a GP's evidence should not be ignored if the evidence of a specialist is unavailable or inconclusive.

The case was therefore submitted to a tribunal for a re-hearing.

#### **Our view:**

This case introduces a new practical approach to determining disability. It will assist employers and Tribunals in determining whether an employee genuinely suffers from a disability without getting bogged down in difficult medical questions where there is no precise diagnosis.

It also makes it clear that GP's reports should be taken into consideration when determining the question of disability. Employers should therefore ensure that any information provided by the GP is properly considered and, where it is disputed, that specialist evidence is secured.

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### **Inflating redundancy score of employee on maternity leave was sex discrimination against male colleague**

In the case of [De Belin v Eversheds Legal Services Limited](#), the Employment Tribunal decided that Eversheds had discriminated against its male employee, Mr de Belin, on the grounds of his sex when, in a redundancy exercise, it inflated the score of his female colleague who was on maternity leave. It also decided that the discrimination made his dismissal unfair.

Mr de Belin was employed as a property lawyer at Eversheds, a city law firm. In July 2008 he was told that he was at risk of redundancy. He was scored against five criteria, as was his colleague on maternity leave. They were the only two employees in the pool.

One of the criteria was financial performance. Specifically, the length of time between being instructed to carry out work and being paid for the work. Mr de Belin's performance was measured in the 12 months preceding 31 July 2008. He scored 0.5 points, the lowest possible score out of a top score of 2. His colleague, who was on maternity leave, was awarded a notional score of 2 as she had not been at work for some of the period under review. This put her 0.5 points ahead of Mr de Belin overall in the redundancy process. Mr de Belin was subsequently made redundant. He brought a claim for sex discrimination and unfair dismissal.

At the hearing, Eversheds argued that the reason it had given the employee on maternity leave a notional score of 2 was to comply with the Sex Discrimination Act 1975 (SDA). The SDA provides that although the principle of equal treatment applies equally to both men and women, special treatment can be afforded to women in connection with pregnancy or childbirth.

The Employment Tribunal rejected this argument and decided that Mr de Belin had been discriminated against on the grounds of his sex and that he had been unfairly dismissed. It said that the application of financial performance criteria was unreasonable and also constituted less favourable treatment on the grounds of sex. It said that Eversheds should have found a fairer way to measure financial performance without simply awarding the female employee a high notional score.

#### **Our view:**

This case explores the tension within the SDA between the principle of equal treatment on the one hand and the special treatment to be afforded to pregnant women on the other. The Tribunal felt that, in this instance, there were other ways of measuring the female employee's financial performance, such as looking at the year before she went on maternity leave. It was this which was the decisive feature in this case.

The important lesson is that employers should not assume that automatically favouring employees on maternity leave is the safest option as it can leave you open to claims from aggrieved male colleagues.

## IN DETAIL

### Cutting It – a look at the 2010 emergency budget

We were all prepared for George Osborne's first budget to be painful but the initial reaction from economists has been very positive. Yes, the budget is mainly about cuts but there is also a message that the coalition Government wants to encourage growth with the introduction of several business-friendly measures. One of the most interesting messages is the clampdown on public sector spending. This article takes a look at the key measures from the emergency budget, with particular focus on the employment related aspects.

#### Headlines

The headline changes are as follows:

- VAT to go up to 20% from 17.5% as of 4 January 2011;
- Capital Gains Tax for higher-rate taxpayers to rise to 28%;
- Child Benefit to be frozen for next three years;
- a two-year pay freeze for public sector workers;
- the Basic State Pension to be linked to earnings once again as from April next year; and
- no new tax increases on alcohol, tobacco or fuel.

#### Public Sector

The perception of public sector jobs is changing. In the past, a civil servant role generally meant a job for life with fewer hours, more holidays and an excellent pension but the trade-off of low pay. Recent research indicates that public sector workers now receive far more benefits than those in the private sector, including higher pay. The new Government recognises that there is a need to redress the balance and plans the following measures:

- two-year pay freeze for all public sector workers, but public servants who earn less than £21,000, will receive a flat pay rise of £250 in both these years.
- an independent commission will be producing a report into public sector pensions. The results will be published before the 2011 Budget so that measures can be taken to address the looming pension crisis.

#### Benefit Reform

Many people expected there to be significant cuts but the Government does not want to be too unpopular. The changes that have been made are listed below and we expect there will be more changes in the next Budget.

- Basic State Pension linked to earnings from April 2011.
- The majority of benefits (including maternity pay, sick pay, etc) will be set in line with the Consumer Price Index, rather than the Retail Price Index. It is predicted that this could save over £6 billion a year by the end of the current Parliament.
- Tax Credits reduced for families earning more than £40,000.

## Retirement

There will be a consultation on how to phase out the Default Retirement Age. For the time being, it does seem almost certain that the Default Retirement Age will be increased to 66.

The only things certain in life are death and taxes....

...but the positive news is that the tax increases are not as bad as many of us expected:

- the personal allowance (below which no Income Tax is payable) will be raised by £1,000 to £7,475 in April 2011. We think that this is a step towards the Liberal Democrat pledge of increasing this to £10,000;
- the threshold at which employers start to pay National Insurance will rise by £21 per week above indexation from April 2011.

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## Meet the Employment Team



**Jon Loney**  
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Jon is a specialist employment lawyer described by the Legal 500 as a 'highly competent professional'. Jon has a successful track record representing commercial clients in Employment Tribunals and the Central Arbitration Committee. His experience in acting for employers facing claims for trade union recognition in the Central Arbitration Committee is second to none.

An in depth knowledge of the law coupled with a user friendly pragmatic approach enables Jon to provide clients with solutions to the whole range of issues that employers face from the everyday to the unusual and complex. Jon is also in demand as a trainer providing employers with courses that are designed to make managers at all levels more effective when dealing with their staff.



**Simon Rhodes**  
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Simon is the firm's Managing Partner and is responsible for the day-to-day management and strategic development of the firm.

Alongside his Managing Partner duties, Simon is a highly experienced employment lawyer and actively looks after a number of clients' employment & HR requirements. He specialises in advising employers on transfers of undertakings (TUPE), restrictive covenants, redundancy programmes, discrimination issues and trade union recognition. He holds a proven track record as an advocate at Employment Tribunal, one large client recently described him as "better than a barrister". He is also at ease advising clients in face-to-face meetings or over the telephone.

Simon has a wealth of experience across all market sectors and acts for a wide range of employer clients including multi-nationals and plcs. His reputation is acknowledged in the key independent guide to the legal profession, Chambers and also the Legal 500. Simon's pragmatic approach to law has seen him described in Chambers as "a pro-active business savvy lawyer" and someone "who doesn't come up with a lawyer's solution all of the time".



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James is a rounded employment lawyer with a breadth of experience which goes far beyond his specialist areas of employment and immigration law. He joined Trethowans in 1981 shortly before he qualified.

James has experience of taking and defending claims in the Employment Tribunal, the Employment Appeal Tribunal and the Courts. In these arenas he has particular expertise in unfair dismissal, discrimination, restraint of trade, work-related stress, internet & e-mail abuse, TUPE, redundancy and employed vs. self-employed status.

James is a skilled advisor and works closely with HR professionals who value his support as a specialist fire fighter, a trainer and a draughtsman of contracts, manuals and policies. One long standing client described him as her "right arm".

Alongside his skills as an employment lawyer James has developed a specialised knowledge of immigration law and practice. He has worked with businesses and individuals to steer a course through this minefield and, while you won't need his help every day, it's valuable to have this expertise available under the Trethowans banner.

James is a member of the Law Society, the Employment Lawyers Association & the Immigration Law Practitioners Association. He's also a CEDR accredited mediator and therefore well qualified to advise on the merits of mediation over litigation and to work with ACAS where indicated.



**Holly Cudbill**  
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Holly has specialised in Employment Law since qualifying in 2003 and joined Trethowans as an Associate in the Employment Team in July 2008.

Holly has extensive experience in advising on all aspects of contentious and non-contentious employment law, including Employment Tribunal litigation, unfair dismissal, diversity and discrimination, HR policies, employment contracts and compromise agreements. She has particular expertise in acting for national and regional newspaper organisations providing employment law advice on all aspects of grievance and disciplinary issues, managing sickness absence, equal opportunities, and redundancy advice.

Holly also advises on Employment Tribunal claims from the start of proceedings through to the Hearing, at which she conducts her own advocacy.

Holly is a member of the Employment Lawyers Association.



**Matthew Irvine**  
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Matthew is an experienced employment lawyer and advocate.

He qualified as a solicitor in 2001 and cut his teeth in a large, regional firm before joining Trethowans in 2007.

He is a seasoned litigator with an impressive track record of success in the Employment Tribunal acting for both employers and employees. Matthew acts for global companies and a variety of employers ranging from the media to the NHS. He has successfully defended numerous clients against discrimination, "whistle-blowing" and unfair dismissal claims.

He provides clear, commercial and practical advice on the full complement of employment issues from TUPE and restrictive covenants to handling redundancy situations, disciplinarys and grievances.

Matthew is a member of the Employment Lawyers Association.



**Ian Grimshaw**  
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Ian is a solicitor in the Employment Team, he qualified in 2006 and joined Trethowans in 2008.

Ian is an experienced adviser in both contentious and non-contentious employment law and has advised in respect of many Employment Tribunal claims including those involving dismissal, discrimination, collective consultation and TUPE.

Ian also provides guidance on day-to-day matters for commercial clients including employment contracts, workplace policies, disciplinarys and dismissals, and compromise agreements.

Ian is a Member of the Employment Lawyers Association.



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Carly joined Trethowans as a Trainee Solicitor in 2005 and qualified into the Employment Team as a Solicitor in 2007.

Carly actively looks after employment and HR requirements for a wide variety of clients. She handles all aspects of employment law, advising on Employment Tribunal claims ranging from unfair dismissal to discrimination and TUPE. Carly also provides general advisory work for clients and is experienced in drafting Employment Contracts, Service Agreements, Handbooks and Policies.

Carly is a Member of Junior Chamber International, a former Chair of Southampton Junior Lawyers Division and a guest speaker for various organisations. Carly also regularly undertakes pro bono work at the Southampton Citizens Advice Bureau.



**Kate Smith**  
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Kate is a Solicitor in the Employment Team having trained at Trethowans. She qualified in November 2009.

Kate is a committee member for the South Hampshire Junior Lawyers Division (JLD). The JLD is a division of The Law Society, which represents student members of the Law Society enrolled through the Solicitors Regulation Authority (SRA), trainee solicitors and solicitors that have been qualified for up to five years. The JLD helps junior lawyers to establish their career in the legal profession by offering a mix of networking events, career development initiatives and training events as part of continuing professional development (CPD) requirements.

Kate is also a volunteer on the JLD Helpline, which is a confidential free phone advisory and referral service for junior lawyers across the country. This involves listening to and helping callers with anything from difficulties finding a training contract to stress at work.



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Laura is a Solicitor in the Employment Department. Laura started her training contract with Trethowans in November 2007 and qualified as a Solicitor in November 2009.

Throughout her time at Trethowans Laura has spent time working in Employment, Corporate and Commercial Litigation under the supervision of senior solicitors and partners. She has now returned to build on her knowledge and expertise in the employment department.

Laura is the Chairperson of the South Hampshire Junior Lawyers Division (JLD). The JLD is a division of The Law Society, which represents student members of the Law Society enrolled through the Solicitors Regulation Authority (SRA), trainee solicitors and solicitors that have been qualified for up to five years. The JLD helps junior lawyers to establish their career in the legal profession by offering a mix of networking events, career development initiatives and training events as part of continuing professional development (CPD) requirements.



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Rhiannon is the Employment Team's Trainee Solicitor. She provides a supporting role to the Team and helps us offer additional value for our clients.