

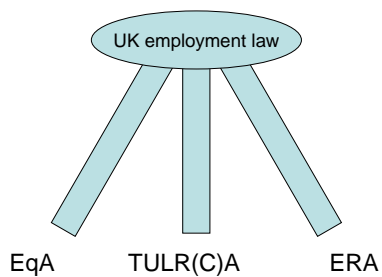
21 OCTOBER 2009

# EMPLOYMENT LAW UPDATE AND TRIBUNAL WORKSHOP



## The Equality Bill

The future third leg of the UK's  
employment law framework



## Equality Bill - Progress

- 500+ pages – new trial format
- Completed the Parliamentary Committee Stage in July 2009
- Awaiting Report stage and third reading
- House of Lords stage expected to be completed and to receive Royal Assent in 2010
- Likely to be effective from April 2011
- Consultation just closed on the Public Sector Equality Duty



## Equality Bill - Coverage

Combines all existing definitions into nine “protected characteristics”:-

- Age
- Disability
- Gender reassignment
- Marriage and Civil Partnership
- Pregnancy and maternity
- Sex
- Sexual Orientation
- Race; including colour, nationality, ethnic or national origin
- Religion or Belief

Redefines victimisation, harassment and disability discrimination



## Equality Bill Victimisation and harassment

- Victimisation for doing a protected act (e.g. making a tribunal complaint) no longer needs a comparator to be cited
- Harassment will be easier to prove under “related to” [characteristic] definition. (not “because” of **a person’s** characteristic)
- Also more scope to claim discrimination by association under “*because of* [characteristic]” definition
- Third party harassment will apply to all characteristics, not just sex



## Equality Act - Disability

### MAIN CHANGES

- Removes the need for a comparator to be cited in cases of discrimination *arising from* a disability
- Detriment arising from a disability can be justified only if a proportionate means of achieving a legitimate aim
- Removes the criteria (e.g. mobility, learning difficulty, etc.) required to show an impairment
- Three prongs to requirement to make reasonable adjustments:
  - Provision, criterion or practice (PCP)
  - Premises and equipment/materials etc.
  - Physical aids



## Equality Act Indirect Disability Discrimination

- Tackles the *Malcolm* problem
- Adopts the mainstream definition of indirect discrimination →
- May not go far enough
- Further amendments expected in the Report stage.

### A PCP is discriminatory if:-

- a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- c) it puts, or would put, B at that disadvantage, and
- d) A cannot show it to be a proportionate means of achieving a legitimate aim.



## Equality Bill – new elements

- Dual discrimination claims (direct only) on any 2 of 7 strands excluding marriage/civil partnership and maternity/pregnancy
- Bans pay secrecy clauses and encourages employers to publish pay data. Protects employees' 'pay discussions'
- Extends positive action protection (voluntary) to allow for under-representation of disadvantaged groups when selecting between two equally qualified candidates
- Allows tribunals to make wider recommendations about employers' practices such as recruitment, selection etc.
- Creates powers to introduce compulsory pay equality reporting for employers of more than 250 people (not before 2013)
- Action on socio-economic disadvantage introduced into Public Sector duties
- Bans age discrimination in the supply of goods and services
- Bans discrimination in private associations and political parties
- Bans any discrimination for breast-feeding in public



## Equality Bill

### The Public Sector Equality Duty

- “General” and “Specific” Duties already apply to Race, Gender and Disability
- “General” duty will be extended to all 9 protected characteristics
- General Duties include assessment of impacts on different groups of:
  - spending decisions;
  - employment practices and;
  - services



## Equality Bill

### The Public Sector Equality Duty

New Specific Duties:-

- Annual reporting of progress against equality objectives
- Consult employees, service users and interest groups
- Demonstrate action and impacts on equality in key service areas
- Publish gender pay gap data
- Publish employment rates for black, ethnic minority and disabled persons (if >50 staff)
- Consider using procurement tactics to encourage action on equality issues among suppliers

The duties will be contained in subsidiary legislation to follow the Equality Act's introduction in April 2011.



## The Equality Bill - implications

- More people could be defined as disabled
- Mental impairments in particular will be easier to show
- Increased protection for carers of disabled people
- *Associative* and *perceptive* discrimination claims will increase
- More surveillance of customer/public interfaces may be required to detect and prevent harassment
- Expect interference in HR systems such as advertising, recruitment, selection, appraisal, training etc. from tribunals
- Interesting to see where tribunals will draw the line over the definition of a 'relevant pay discussion' between employees
- Expect more 'trickle down' of reporting requirements in public sector tenders and contracts



## Employment Law Update

Jeanette Wheeler



## Key Legislative Changes in 2009

- Disciplinary and grievance procedures (6 April 2009) –
  - Repeal of the Statutory Dispute Resolution Regulations
  - Introduction of the new statutory ACAS Code of Practice and accompanying guidance.
- Immigration rules (November 2008 & March 2009) –
  - Bringing into force provisions relating to skilled migrants filling gap in UK labour market (Tier 2), those travelling temporarily to the UK primarily for non-economic reasons (Tier 5) and certain students (Tier 4).



## Key Legislative Changes in 2009

- Flexible working (6 April 2009) –
  - Extending the right to request flexible working to parents of children aged 16 or under.
- Working Time –
  - Statutory annual leave increased from 24 days to 28 days (1 April 2009)
  - Average weekly working time limits for doctors in training reduced to 48 hours (1 August 2009).



## Holiday and Sick Leave

### Stringer and Others v HMRC

- Workers continue to be entitled to four weeks' minimum annual leave while on sick leave.

#### What does this mean?

- Employees on long term sick leave must be allowed to take their holiday while on sick leave, carry it forward? or be paid for it in lieu on termination.

#### Issues?

- WTR do not provide for carry forward
- ECJ concerned with 4 weeks' annual leave - in the UK WTR provide for an additional 8 days supplemental leave – is this caught?



## Holiday Sick Leave

### Pereda v Madrid Movilidad SA [2009] ECJ

- Where a worker does not wish to take annual leave during a period of sick leave, annual leave must be granted to him or her for a different period.

#### What does this mean?

- There is a risk that tribunals will reinterpret the Working Time Regulations to give effect to European law. Public sector employers bound by the decision.
- Workers who fall ill during their annual leave may be able to insist on having their leave reclassified as sick leave and their annual leave 'reinstated' to be taken at a different time.



## Age Discrimination

### Heyday

ECJ judgement delivered.

ECJ found – a national rule which permits employers to dismiss employees aged 65 or over for retirement can, in principle, be justified as a “legitimate aim” and the means of achieving that aim are “appropriate and necessary”.

The case returned to the High Court (July 2009) to decide whether the UK compulsory retirement age of 65 is, in fact, justified.

Decision handed down 25 September 2009.

High Court dismissed the challenge holding that the default retirement age was implemented to pursue legitimate social policy objectives concerning the labour market and was proportionate. BUT, noted the Government’s review is being brought forward to 2010 and said that any attempt to retain the age at 65 is unlikely to be justifiable.



## Race Discrimination

### Leeds City Council v Woodhouse [2009] EAT

Employers can be liable for discriminatory actions by their employees against third parties who they do not employ.

- This may be relevant to clients or end-users in tri-partite arrangements, such as outsourcing or agency work. Avoid through the use of clear policies, training and effective line management.



## Equal Pay

### *Coventry City Council v Nicholls [2009] EAT*

Where there is a group of employees that is predominantly male, and another that is predominantly female, there will need to be genuine material factors, not related to sex, if they are paid different amounts.

### *McAvoy and others v South Tyneside [2009] EAT*

A male claimant can pursue a “piggyback” equal pay claim by comparing himself to a woman engaged on like work, work rated as equivalent or work of equal value where that woman has succeeded in an equal pay claim with a higher paid male comparator.



## TUPE

### *Alemo-Herron v Parkwood Leisure Ltd [2009] EAT*

It is possible for transferred employees to be entitled to changes to a collective agreement that take place *after* they have transferred.

### *Tapere v S London & Maudsley NHS Trust [2009] EAT*

A mobility clause that allowed the transferor to move an employee within its area transferred but did not apply to the transferee’s area of work.



## Effective Date of Termination

### *Gisda Cyf v Barratt [2009] CA*

The Effective Date of Termination (EDT) is the date on which the employee has actual knowledge of the dismissal, here, the date the employee read the letter from her employer informing her that she had been dismissed.

- Employers should take care how they inform employees that they have been dismissed.
- There may be difficulties in proving when an employee had knowledge of the dismissal where normal post is relied on to inform them, consider 'special delivery' or hand delivery.



## Legal Representation

### *Kulkarni v Milton Keynes Hospital NHS Foundation Trust [2009] CA*

The Court of Appeal held that a doctor was contractually entitled to be represented at an internal disciplinary hearing by a lawyer instructed by the Medical Protection Society.

The Court of Appeal held that an express term of his contract did entitle him to be represented at an internal disciplinary hearing by a lawyer instructed by the Medical Protection Society. They arrived at this decision by construing the relevant section of the MHPS.

The Court of Appeal also suggested that had it been required to do so, it would have held that Article 6 of the ECHR was applied and that in circumstances such as this case (where the employee was facing what was in effect a criminal charge), it implied a right to legal representation in internal proceedings.



## Compromise Agreements

### *Gibb v Maidstone & Tunbridge Wells NHS Trust [2009] HC*

High Court held that a Compromise Agreement between the Trust and its then Chief Executive was unenforceable because the Trust had acted outside its powers in agreeing an “irrationally generous” compensation payment.



## Workplace Mediation



## What is Mediation?

- An impartial third party helps disputants to resolve a disagreement
- The disputants agree the solution
- New ACAS Code encourages mediation



## What is Mediation?

- Focus is on the future
- Hard process applied with soft skills
- Confidential
- Voluntary



## Investigations

- Establishing the facts
- Identifying if a complaint is justified
- Apportioning blame

## Mediation

- Focus on future
- Identifying a solution
- Not concerned with who is “right”



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## When to Mediate?

### Pre Litigation

- Before people get lawyered up!
- Before a formal grievance/disciplinary is lodged
- After a formal process has been completed



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## When to Mediate?

### Post Litigation

- Before you have racked up too many costs
- When the claimant is still employed
- When you are facing a lengthy hearing



## When not to mediate?

- In cases of gross misconduct
- Where a manager has failed to manage the employee
- If the employee is not medically fit



## Types of Mediation

- Evaluative
- Facilitative
- Judicial



## Who should mediate?

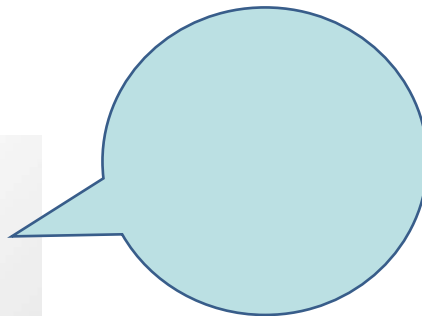
- Impartiality
- External v Internal?
- Training



## What are they thinking?



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### Process

		
Individual meetings		Individual meetings
	Joint Meeting	
	Agree Issues	
	Discuss Issues	
	AGREEMENT	

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## Mediation Outcomes

- Partial agreement
- Full agreement
- Managed disagreement
- Employee stops complaining and gets on with their job
- Managed exits
- Full agreement
- Managed disagreement
- Employee stops complaining and gets on with their job



## Mediations with a successful outcome...

- Regional Manager and Store Manager
- Operating Theatre Team
- Manager and “Employee From Hell”
- Squabbling reception staff
- The HR team that fell out in Birmingham



## Those that didn't work ...

- Where poor performance was not managed
- Where one party was “toxic”
- Where mediation was rushed



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## Final Thoughts

- Most cases start off as a hopeless case
- Mediation nearly always moves the situation forward
- Don't use mediation as an alternative to managing people
- Toxic employees need to leave the organisation



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Tribunal Workshop

# Jeanette Wheeler and Tom Wagstaff



## Agenda

1. Story so far
2. Notice of Orders
3. Document Disclosure
4. Tribunal Rules
5. Inspection
6. Bundle Preparation
7. Further and Better Particulars
8. Schedule of Loss
9. CMD Vs PHR
10. Food!
11. Notice of Hearing
12. Amending the ET3
13. Postponement
14. Statements
15. Settlement

...and a few surprises along the way



## Story so far

- Bright Ideas Ltd
- Iona Lamp, Max Power, Hal Ogen
- Failed promotion, change to sales territories, requirement to attend HQ
- Compromise Agreement
- Resignation
- New job
- ET1 & ET3
- What's next for the claimant?



## Notice of Orders

- Sent by Tribunal to all parties after ET3 filed
- Example Orders in pack
- Deadlines for:
  - Disclosure of documents
  - Inspection of documents
  - Agreeing the bundle
  - Exchange of witness statements
- Penalties for non compliance:
  - Fine
  - Part/all of claim/response struck out



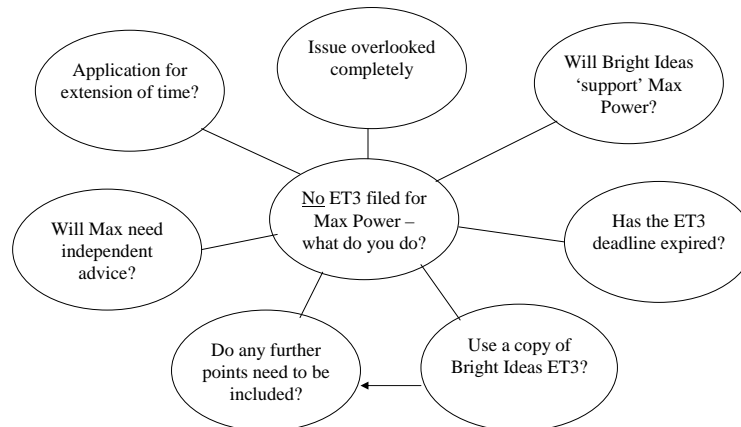
## Notice of Orders



- Specific date for disclosure of documents
  - Bundle deadline
  - Statements deadline
- } calculated by reference to the hearing date
- Note: hearing date may not have been fixed by date of receipt of Notice of Orders
  - Hearing time – important to decide how much time should be allocated to the hearing to avoid the risk of the hearing being part-heard

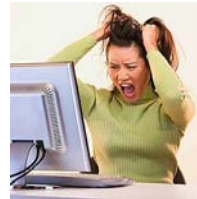


PANIC



## Consequences of No ET3 for Max

- Max not allowed to defend claim against him personally
- More likely to be held liable for discrimination?
- May affect Bright Ideas' case
- File 2<sup>nd</sup> ET3 (if time) or apply for extension



## Document Disclosure

- All parties required to prepare a list of documents relevant to the issues in dispute
- Must disclose all relevant documents, whether they support or undermine your case
- Think carefully about all potential sources of documents
- E-mails
  - Inboxes
  - Deleted mail
  - E-mails between witnesses/colleagues
- Documents must not be destroyed



## Document Disclosure

- Contract of Employment
- Policies
- Handbook
- Intranet pages
- Notice board announcements
- Health & Safety rules
- E-mails
- Letters
- Disciplinary documents
- Grievance Documents
- Warnings
- Payroll information
- Organograms
- Board minutes
- IT logs
- Financial information



## Document Disclosure

Iona has failed to disclose any information relating to her new job. She has also not produced a schedule of loss. The Tribunal's deadline for disclosure expired last week.

What steps should you take in order to obtain these documents?



## Document Disclosure



- Polite request to Iona's representative
- Firm request to Iona's representative referring to the consequences of non compliance (quote the Tribunal's order)
- Application to an Employment Judge for an “unless” order
- Consult Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004




## Tribunal Rules



- Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004
- Rules set out in Schedule 1
- Rule 10 – examples of issues on which orders may be sought
- Rule 11 – how to make an application for an order
- Always quote the relevant rule when making an application to the Tribunal
- Remember the Tribunal's overriding objective
- Regulations Vs Rules





Tribunal  
Chairman



Employment  
Judge



 **PANIC!** 

- You check all relevant e-mail accounts for any documents that should be disclosed.
- You discover the following e-mail exchange between Max and Hal.

**From:** Max Power  
**Sent:** 1 March 2009 11:40  
**To:** Hal Ogen  
**Subject:** Unbelievable!

Max

Can't believe what Iona has done! Why has she brought a claim against us?

**From:** Hal Ogen  
**Sent:** 1 March 2009 11:57  
**To:** Max Power  
**Subject:** RE: Unbelievable!

Dunno mate! It was the right decision not to promote. She's always been a pain and none of the boys would stand for her being in charge.



## Disclosure

What should you do with this correspondence?



## Inspection of Documents

- Disclosure ≠ Inspection
- Careful comparison of your list Vs opponent's list
- Request copies of any documents on opponent's list that you do not possess
- Supply copies of documents that are requested from you
- Remember deadline for inspection (normally 14 days from date of request)



## Bundle preparation

- After inspection, each party decides which documents it wishes to include in the bundle.
- Normally, the Respondent is ordered to prepare the bundle. Ask for cost to be shared.
- Compile the bundle in a sensible order
  - Part 1: Pleadings/Further and Better Particulars/Amendments
  - Part 2: Correspondence with the Tribunal
  - Part 3: Contract/policies/procedures
  - Part 4: Correspondence between the parties
  - Part 5: Miscellaneous



## Claim of Age Discrimination

Q

What is the basis of Iona's claim for age discrimination?

A

We don't know!



## Request for Further and Better Particulars (1)

- Ask the claimant for further details in relation to her age discrimination claim
- Apply to the Tribunal for an order for further and better particulars – Rule 10(2)(b)
- You need to be specific in your request and explain why the additional information is necessary
  - Who allegedly discriminated?
  - What form did the discrimination take?
  - When did the alleged acts of discrimination take place?
  - Did Iona raise a complaint about the alleged discrimination?



## Request for Further and Better Particulars (2)

- What issues are raised in response to the request for Further and Better Particulars?
- How should these issues be addressed?
  - Amendments to ET3?
  - Deal with points in witness statements?



## Schedule of Loss



- Important to scrutinise schedule of loss carefully
- Often useful to prepare a counter schedule of loss
- Schedule often used as the basis for settlement negotiations
- Identify which items can be legitimately claimed for, and which cannot



## Schedule of Loss

- 1 week's notice pay ✗
- Unpaid bonus ✗
- £250 – loss of statutory rights ✓
- Holiday pay ✓
- Cost of train far to/from new job ✓
- Future loss of earning after expiry of FT contract ✓
- Injury to feelings (sex) ✓
- Injury to feelings (age) ✓
- 25% uplift ✗
- Loss of employer pension contributions ✓
- Inability to pay employee pension contributions ✗
- Aggravated damages (sex) ✗
- Loss of BUPA cover ✓
- Loss of car allowance ✓
- Loss of private mileage ✓
- Difference in earning between old and new jobs ✓
- Life assurance cover ✗



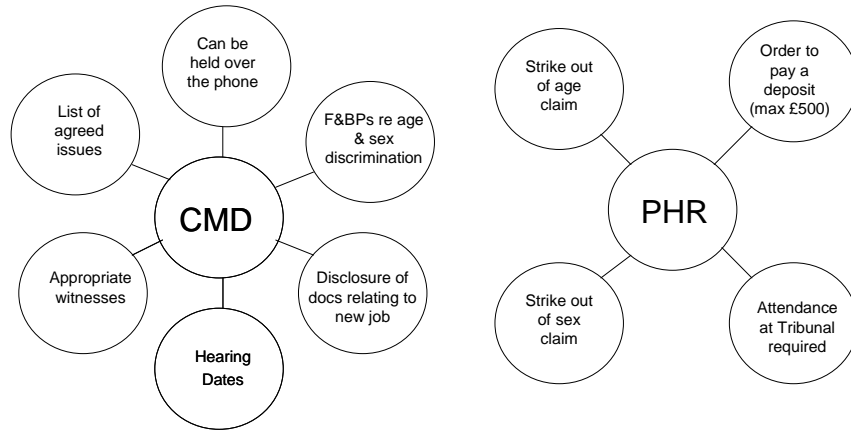
## CMD Vs PHR

CMD = Discussion between all parties to agree points in dispute and all aspects of case preparation including deadlines

PHR = A 'mini' hearing. An opportunity for a Judge to strike out part or all of a claim



## CMD Vs PHR



# FOOD



## Notice of Hearing

- ET will write to both parties proposing a hearing date
- Only has to give 14 days' notice of hearing – normally a lot more
- Have enough days been allocated to the hearing?
- Can all your witnesses attend on the suggested date(s)?
- Will you be using Counsel?
- How many witnesses will both parties bring?
- Consider a request for postponement/additional days
- Normally only have 7 days to object



## Amending the ET3

You discuss your case with an 'eagle-eyed' employment lawyer. You are advised that the ET3 should have included the defence that Iona's claim for sex discrimination is out of time

- Why is the claim for sex discrimination potentially out of time?
- What steps should you take to correct your oversight?



## Application to amend the ET3

- Apply in writing to the Tribunal for leave to amend the ET3
- Enclose proposed amended wording
- Give good reasons why leave to amend should be granted e.g. to assist with Tribunal's overriding objective
- Regulation 3 – overriding objective
  - Ensuring that parties are on an equal footing
  - Dealing with the case in a proportionate way to its complexity
  - Ensuring the case is dealt with expeditiously and fairly
  - Saving expense
- If amendment not accepted, unlikely that a Judge will allow you to raise this point at the merits hearing



## Hearing Date

The hearing has been listed for 2 days in January 2010. You originally accepted these dates. However, Max Power has just informed you that his sister will be getting married in Switzerland in the New Year and he can't now make the hearing dates.

What steps should you take to try to secure a postponement of the hearing?



## Postponement of Hearing Date

- Explain the problem to Iona and ask if she is happy to postpone
- Apply to the Tribunal for a postponement
  - Explain reasons for application
  - Explain how the respondent's case will suffer if not postponed
  - Attach copies of travel bookings
  - Confirm if consent given by Iona
  - Provide availability over Jan/Feb/March/April 2010



## Witness statements



- What are the issues in dispute?
- Who is best placed to address these points?
- All witnesses must prepare a written statement of the evidence they wish to give.
- Must use cross-referencing
- All witnesses will be expected to attend the hearing
- Little weight attributed to written statements which are not backed up by oral evidence at the hearing
- Witnesses will be expected to read out their statement word for word under oath at the hearing
- Crucial that statements are 100% accurate
- Credibility, credibility, creditability



## Witness statements

- Statements are exchanged
- Iona's statement includes a large number of new allegations all relating to sexist derogatory comments that Hal is alleged to have made over a period of 6 weeks.
- You know that these allegations are untrue- Hal was off sick for most of this period.
- Max says.....



“Can’t we threaten her  
with costs or something”



## Costs

- Rule 40 – where a costs or expenses order may be made
- Application where a party had acted “vexatiously, abusively, disruptively or otherwise unreasonably”
- Threaten to make a costs application at hearing
- Use as leverage for settlement



## Settlement

- ACAS officer automatically appointed on receipt of ET1
- Settlement can be discussed at any stage
- Without prejudice discussions
- What leverage do you have to negotiate a deal?
- How strong is your defence?
- Cost of hearing Vs cost of settlement
- Consider terms of settlement as well as quantum

