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**December 2009 Update**  
**Employment Law**  
**Newsletter**

**Employment Tribunal Compensation Limits**

The Employment Rights (Revision of Limits) Order 2009 (SI 2009 No. 3274)

comes into force on 1 February 2010. Guarantee payments remain unchanged at £21.50 per day. The unfair dismissal compensatory award is reduced from £66,200 to £65,300 and the section 174 TULR(C)A 1992 award for refusing to admit or re-admit an excluded or expelled union member goes down from £7,300 to £7,200.

**The Blacklisting of Trade Unionists**

The Department for Business Innovation and Skills (BIS) has published the Government's response to the public consultation on "The blacklisting of trade unionists: revised draft regulations." This document was published in December 2009 and hard copies can be obtained from the BIS telephone

order line (0845 015 0010) quoting the title and URN 09/1536.

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**Legislation**

**European Union Equal Treatment Law**

As the Equality Bill goes through Parliament the Government has been hit by two "reasoned opinions" from the European Commission which claim that the UK has failed to implement European Union law correctly.

Firstly, in implementing the Equal Treatment Framework Directive No.2000/78 (disability, religion or belief, sexual orientation and age) the UK Government has failed to put in place (i) a clear ban on instructions to discriminate and there are no clear appeals procedures for disabled people, and (ii) the exceptions for religious employers when dealing with sexual orientation are too wide.

Secondly, in implementing the Equal Treatment Directive No.2002/73 (direct and indirect sex discrimination) the (i) definition of indirect discrimination is too narrow because it does not cover potential discrimination, (ii) the exceptions for some jobs are too wide, (iii) the exceptions for political 'office holders' need to be more closely defined, and (iv) the right of organisations to support claimants needs to be clearly set out.

**CASE REPORTS**

**Supreme Court: Race Discrimination**

The new Supreme Court has published its judgment in R v. The Governing Body of JFS and the Admissions Appeal Panel of JFS [2009] UKSC 15. The Court also issued a press summary of the judgment dated 16 December 2009. The JFS (formerly the Jewish Free School) gives priority when admitting pupils to the children of orthodox jews. The child of a jewish non-orthodox mother was rejected because of this policy. The non-orthodox mother claimed that this was (i) direct race discrimination on the grounds of the child's ethnic origins, and (ii) that the policy was indirectly discriminatory. The High Court rejected both claims but the Court of Appeal unanimously reversed the decision of the High Court holding that the JFS had directly discriminated against the child on the ground of his ethnic origin. The Supreme Court dismissed the appeal of the JFS as five Justices found that there was direct discrimination, two found that there was indirect discrimination and two would have allowed the JFS's appeal. This is a fascinating judgment which inevitably has implications for other faiths.

**Court of Appeal: Employment Tribunal Costs**

We all know that although a claimant can usually be unconcerned about the respondent's costs in the ET and EAT the position is radically reversed in the Court of Appeal. Well that is what everyone thought until now. In an extremely short judgment, The Governing Body of St Albans Girls' School and Hertfordshire County Council v. Mr Anthony Neary [2009] EWCA Civ 1214, the CA said that Mr Neary lost in the ET and won in the EAT. The Council appealed to the CA and won. The CA described Mr Neary as impecunious, criticised the instruction of two Counsel by the Council and said that if they had decided to award costs then it would have been for £5,000 inclusive of VAT.

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**Court of Appeal: Territorial Jurisdiction**

In Duncombe v. Secretary of State for Children, Schools and Families [2009] EWCA Civ 1355 the CA has said that the territorial limit on the right to claim unfair dismissal, i.e. Lawson v. Serco Ltd [2006] IRLR 289, HL, should be modified, if appropriate, to ensure a European Union law right. Mr Duncombe had worked wholly in Germany for the then Department for Education and Skills (DfES) under a succession of fixed-term contracts. He claimed unfair and wrongful dismissal and the CA decided that he could bring both claims in the ET. The contract stated that it was covered by English law which meant that the ET could deal with his wrongful dismissal claim. As to unfair dismissal Regulation 8 of the Fixed-term (Prevention of Less Favourable Treatment) Regulations 2002 is an EU derived right to a permanent contract which would be denied if the claimant had no remedy for unfair dismissal.

**Court of Appeal: Religious Discrimination**

In Ladele v. London Borough of Islington [2009] EWCA Civ 1357 the CA has upheld the decision of the EAT that the Appellant, a Registrar, was not subjected to religious discrimination when she was threatened with disciplinary action because she refused to carry out civil partnerships.

**Court of Appeal: Just and Equitable Time Limits**

The CA have stated in the Chief Constable of Lincolnshire Police v. Caston [2009] EWCA Civ 1298 that the application of the just and equitable jurisdiction of the ETs is a matter of judicial discretion. The use of the word 'liberal' to describe this discretion is at best a distraction and at worst it is misleading.

**High Court: Trade Union Injunctions**

On 17 December 2009 the High Court decided in British Airways plc v. Unite the Union that an industrial action ballot was unlawful as the Union had balloted members who had volunteered for redundancy and therefore they would not be taking part in the planned strike. Under section 227 of the TULR(C)A 1992 a union should only ballot members who the union reasonably believes will be induced to take part in the strike or other industrial action. BA obtained an injunction restraining strike action.

**Employment Appeal Tribunal: Compromise Agreements**

The EAT in Industrious Ltd v. Horizon Recruitment Ltd UKEAT/0478/09 has decided that section 203(2) ERA 1996 means that 'agreement' means a valid compromise agreement and that an ET can decide if a compromise agreement is valid. In this case the claimant claimed that she had entered into a compromise agreement having been induced or relied on a material representation. As this agreement could potentially be avoided at common law the ET could decide whether the agreement was valid or invalid. Henessey v. Craigmyle & Company Ltd [1985] ICR 879, CA, was applied.

**Employment Appeal Tribunal: Religious Discrimination**

The EAT applied Ladele in McFarlane v. Relate Avon Ltd UKEAT/0106/09/DA. Mr McFarlane, a Christian, refused to work with same sex couples and was dismissed as he was in breach of Relate's equal opportunities policy. The ET dismissed his claims of direct and indirect religious discrimination and the EAT went on to dismiss his appeal.

**Employment Appeal Tribunal: Age Discrimination**

The EAT has stated in Pulham v. London Borough of Barking and Dagenham UKEAT/0516/08/RN that age discrimination pay protection arrangements are potentially justifiable in contrast to equal pay and sex discrimination pay protection arrangements which are not. The Council could argue that it was justifiable to continue past discrimination by putting in place transitional pay protection arrangements.

Employment Appeal Tribunal cases can be accessed on:-

[www.employmentappeals.gov.uk/](http://www.employmentappeals.gov.uk/)

Court of Appeal, House of Lords and Supreme Court cases can be accessed on:-

[www.bailii.org/uk/cases/](http://www.bailii.org/uk/cases/)

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