

## News

The pace of change is slowing in time for Parliament to take its summer holiday and there is not much new(s) to report this month. However, it hasn't all stopped: the Bribery Act came into force at the beginning of this month and Parliament recently debated a Private Members' Bill which would cap a number of types of Tribunal award at £50,000. Further, an EU draft directive proposes to keep the City on its toes with the threat of imposing mandatory quotas for the number of women sitting on banks' boards.

However, given the overall summer slowdown, we instead offer you four cases to indulge in, not least of which will be a treat for those of you who run educational establishments. This is because the recent trend in case law for teaching staff insisting on legal representation at dismissal/disciplinary hearings seems to have been abruptly halted by our first case.

Our other cases cover a reminder to take care when describing the make-up of termination payments, a fair dismissal for refusing a pay cut and a handy guide to when employers know that an employee is disabled.

## New team members at Menzies Law

We are delighted to welcome the following recent 'new recruits' who have significantly expanded our capacity and are contributing to us being able to provide an even higher quality of service.



### jenni andrews

Jenni Andrews, a senior and experienced solicitor, joins our team of specialist employment lawyers. Jenni has a wealth of experience, with a particular focus on advising directors, senior executives and other employees in employment law matters. Jenni has a particularly calm, friendly manner and our clients are delighted with her. For further details see [our people](#).



### sherrie slater

Sherrie Slater has recently joined us as our first Business Manager, taking responsibility for the finance and administration of the firm. Sherrie's last two roles were as Business Manager for two schools. Having left them ticking like clockwork, she then decided to have a change of scene and chose the legal sector. Lucky us – she has already become utterly indispensable. For further details see [our people](#).

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## rebecca ranauta

Rebecca is a highly experienced employment lawyer turned HR consultant. She brings to her work a rare combination of HR common sense and a detailed, expert knowledge of the law. She is currently responsible for the vast majority of the work in putting together these newsletters. For further details see [our people](#).

### Forthcoming seminars

#### Menzies Law Legal Update Seminars:

An all-you-need-to-know round-up of recent and imminent legal developments.



**28 September 2011**

Eastwood Park Conference Centre  
Falfield, Wotton-under-Edge, Gloucestershire  
GL12 8DA

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**5 October 2011**

Bishopstrow House  
Warminster, Wiltshire BA12 9HH

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Our Legal Update seminars provide a round-up of developments in employment law over the previous 6 months - both case law and legislation - and a review of the forthcoming legislative changes which occur in October and April each year.

### Bribery Act 2010

The Bribery Act 2010 came into force on 1 July 2011. The Act repeals the common law offence of bribery and creates several new offences carrying a maximum penalty of ten years' imprisonment, or an unlimited fine, for which employees, directors and commercial organisations can be liable. Adequate anti-bribery procedures will enable organisations to rely on a statutory defence to a charge of failing to prevent bribery.

To help you comply with the Act we set out answers to the following FAQs:

#### What criminal offences are created by the Bribery Act 2010?

The Act makes it an offence to offer, promise or give a bribe. It is also an offence to request, agree to receive, or accept a bribe.

A bribe is a financial or other advantage that is offered or requested with the intention of inducing or rewarding the *improper performance* of a *relevant function or activity*, or with the knowledge or belief that the acceptance of such an advantage would constitute the improper performance of such a function or activity.

A 'relevant function or activity' is:

- any function of a public nature;

- any activity connected with a business;
- any activity performed in the course of a person's employment; or
- any activity performed by or on behalf of a body of persons,

where the person performing it is expected to perform it in good faith, is expected to perform it impartially, or is in a position of trust by virtue of performing it.

Note, then, that only *improper* performance of the role of the allegedly bribed official qualifies as an illegal act. The briber has to intend to induce the official to act improperly. Genuine 'thank you' gifts with no intention to cause improper actions would not qualify as bribery.

Section 6 of the Act creates a separate offence of bribing a foreign public official with the intention of obtaining or retaining business or an advantage in the conduct of business.

### **How does this effect organisations?**

Clearly, you need to take steps to ensure that your workforce are neither giving bribes nor receiving them.

There is a specific corporate offence (i.e. an offence that the company, rather than one of its directors or employees, can commit) under s.7 of a failure by a commercial organisation to prevent bribery that is intended to obtain or retain business, or an advantage in the conduct of business, for the organisation.

An organisation will have a defence to this corporate offence if it can show that it had in place "adequate procedures" designed to prevent bribery by or of persons associated with the organisation. Employers should therefore implement measures to prevent their employees or agents, or anyone else who provides services on their behalf, from being involved in bribery.

### **What are these "adequate procedures" to prevent bribery?**

The Act does not define "adequate procedures", but the Government has published official guidance (on the Ministry of Justice website) about procedures that commercial organisations can put into place to prevent bribery by persons associated with them. You can access this guidance [here](#). Unusually, it is really quite helpful in many respects in explaining the impact of the legislation.

The guidance is based on six principles:

- *Proportionate procedures*: bribery prevention procedures should be proportionate to the bribery risks the organisation faces and to the nature, scale and complexity of its commercial activities.
- *Top-level commitment*: the top-level management should be committed to preventing bribery and should foster a culture in which bribery is never acceptable.
- *Risk assessment*: the nature and extent of exposure to potential external and internal risks of bribery should be assessed and documented periodically.
- *Due diligence*: due diligence should be carried out in relation to third parties who will perform services on behalf of the organisation.
- *Communication (including training)*: bribery prevention policies and procedures should be embedded and understood throughout the organisation.
- *Monitoring and review*: bribery prevention procedures should be monitored, reviewed and, where necessary, improved.

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Although the principles are intended to be of general application, the guidance stresses that it is not advocating a one-size-fits-all approach. Instead, organisations are encouraged to put in place procedures that are proportionate to the risk of bribery faced by their particular organisation. Thus, procedures that a small or medium-sized organisation adopts are likely to be different to those for a large multinational organisation.

**If you have particular concerns on what procedures may be “adequate” in respect of your organisation, or want more general advice on the Act and its implications, then please do contact Luke Menzies to discuss this further.**

### **More Employment Law reform – or is it? (continued...)**

We told you in our May 2011 newsletter (‘More Employment Law reform – or is it?’) that, amongst other things, the Government was considering capping the amount of compensation that can be awarded in discrimination cases by Tribunals. We also told you that it seemed unlikely that the Government would be able to pursue this idea, given that the EU Directive governing discrimination specifically excludes the fixing of an upper limit (except in relation to job application cases).

However, the Government does not seem to be giving up on this yet. On 17 June 2011 Parliament debated the Tribunals (Maximum Compensation Awards) Bill, a Private Members’ Bill which would cap all awards for unfair dismissal, wrongful dismissal and employment-related discrimination at £50,000. Currently, unfair dismissal compensation is generally capped at a total maximum of £80,400, and wrongful dismissal is capped at £25,000 in the Tribunal, but uncapped in the civil courts. Discrimination compensation is uncapped.

Although it does seem unlikely that the Bill itself will become law, not least because of the EU prohibition on capping discrimination awards, during the debate the Immigration minister, Damian Green, confirmed that the Government has recently consulted over unfair dismissal compensation, and will launch a public consultation on discrimination awards “later in the year”.

The debate was adjourned and is set to resume on 9 September 2011. We will let you know if this develops any further.

### **Gender Politics (the next chapter II)**

In our June 2011 newsletter we mentioned the European Parliament’s Women’s Rights Committee’s resolution to increase women’s participation in company boardrooms (‘Gender politics (the next chapter)’). The consultation closes on this on 22 July. In addition, *The Guardian* has now reported that “a draft directive circulating in the City shows that Michel Barnier, Europe’s internal markets commissioner, wants to impose mandatory quotas to dictate the number of women sitting on bank boards. He believes the change would help prevent the kind of “group think” often blamed for exacerbating the crisis that struck the industry in 2008.” You can access this article [here](#).

If successful, this would again go further than the recommendations made by Lord Davies’ report, ‘Women in the Boardroom’, which did not recommend the introduction of quotas. This report was published in February this year, which we summarized in our March 2011 newsletter (‘Gender politics’).

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## Case update

### Legal representation at disciplinarys – it just got tougher (for employees!)

**Summary:** Those of you who run educational establishments will be interested to note that the recent trend in case law for teaching staff insisting on legal representation at dismissal/disciplinary hearings has been abruptly halted by the following recent case.

In *R (on the application of G) v the Governors of X School* the Supreme Court decided that the school was correct not to allow a music assistant at a primary school legal representation at an internal disciplinary hearing. This overturns the previous decisions of the High Court and Court of Appeal.

**Facts:** The claimant (G), a music assistant at X School, had allegedly formed an inappropriate relationship with a 15-year-old student. He was subject to disciplinary proceedings and sought to be represented by his solicitors at the hearing. The school refused. The disciplinary panel found the allegations proven, which constituted gross misconduct, and dismissed him. The school also informed him that his dismissal would be reported to Independent Safeguarding Authority (ISA) so that the ISA could determine whether to place him on a 'barred list' preventing him from working with children.

The High Court and Court of Appeal ruled that the denial of G's right to legal representation at his dismissal hearing was in breach of his human rights under article 6 of the European Convention on Human Rights (ECHR). They decided that art 6 applies to decisions affecting one's 'civil rights', such as G's right to practise his profession. Although G's fitness to teach would be determined by ISA, rather than the school, and although his dismissal by the school therefore did not, of itself, bar him from teaching, nonetheless given the 'substantial influence or effect' the outcome of the disciplinary hearing would have on influencing the ISA's decision, art 6 should also be applied to the disciplinary hearing. In other words, the ultimate fate of G's ability to teach was, on a practical basis, so heavily influenced by the outcome of the disciplinary hearing (if he was dismissed) that he was therefore entitled, under the ECHR, to legal representation at that school disciplinary hearing.

However, the Supreme Court has overturned this decision. It did not consider that there was a sufficient connection between the disciplinary proceedings and the ISA proceedings for art 6 to apply at the school disciplinary hearing stage. It found that ISA is expected to make its own findings of fact on the basis of all available evidence, and make its own judgment on the seriousness of the conduct, before barring someone. It does not slavishly follow the decision of a school disciplinary panel.

**Implications :** This will make it much more difficult for regulated professional employees, in particular those subject to approval by the ISA, to be able to argue that they are entitled to legal representation at internal disciplinary hearings. Situations where an employee accused of a disciplinary offence will be entitled to legal representation will be limited to those where those proceedings are likely to have a 'substantial influence or effect' on subsequent action taken by the relevant regulator. If the regulator is required to carry out its own investigation into the facts, it is unlikely an employee will be entitled to legal representation at internal disciplinary hearings. No doubt employers will continue to receive requests from employees to be legally represented. However, in the vast majority of cases the employer will now be able more easily to resist.

It will, however, turn on the question of whether and to what extent the outcome of the internal disciplinary process leaves the professional employee unable to practise his or her profession.

### **Termination payments – take care with terminology**

**Summary:** The EAT held in *Publicis Consultants UK Ltd v O'Farrell* that a termination payment described by the employer as "ex gratia" could not be used to meet its obligation to pay damages for breach of contract (in respect of short notice of termination). This decision is an express reminder that employers should take care when drafting termination letters, or should protect themselves with a compromise agreement.

**Facts:** An employee entitled to 3 months' notice was dismissed with 4 days' notice. The letter of dismissal stated that she would receive an "ex gratia" payment equivalent to 3 months' salary. (Note that it did *not* say that she would receive 3 months' pay in lieu of notice: one wonders why on earth not!). She brought a claim for breach of contract for failure to pay her salary for the 3 months' notice period. The employer argued that the ex gratia payment was actually made in respect of the notice pay. However, both the Tribunal and the EAT found that the payment was truly ex gratia and not payment of notice. The EAT said that "the words "ex-gratia" ordinarily import the sense of something being paid by way of gift or favour, and not because the contract of employment obliges the employer to pay that sum: "Nothing in the language used in the letter [of dismissal] suggests or implies that that payment is in fact another form of payment that the company is legally obliged to make i.e. a payment for a period of notice" said the EAT. Therefore the EAT found that the employer was in breach of contract in not having either given notice or made a payment in lieu of notice. The ex gratia payment, although almost the same amount as a payment in lieu would have been, did not discharge the company's duty to give proper notice or pay in lieu. Nor could it be taken to be off-set against the company's duty to give or pay notice.

**Implications :** We doubt any of our clients would make this mistake. It seems an unfortunate error which perhaps resulted from a misunderstanding of what "ex gratia" means and the difference between that and payment of a contractually entitled sum, such as notice pay. The lesson, then, is that employers should only use the term "ex gratia" where the payment is genuinely a "gift" that is in excess of, and above and beyond, any contractual entitlement to notice pay that the employee has. If an employer wishes to indicate that a payment is in lieu of notice, but not made under the terms of the contract (and therefore payable on a tax-free basis) then any letter should make clear that the payment is "compensation for breach of contract for failure to give proper notice". An added precaution would also be to confirm that the payments are collectively intended in full and final settlement of all the employee's entitlements under the contract.

### **Dismissal for refusing pay cut – it can be fair**

**Summary:** The EAT held in *Garside & Laycock v Booth* that, when considering the fairness of a dismissal for a refusal to accept a pay cut, it is the reasonableness of the employer's conduct in deciding to dismiss that is relevant. The EAT remitted the case to a fresh Tribunal to re-hear the case.

**Facts:** The employee, Mr Booth, worked for Garside and Laycock, a company which provides building and maintenance services to the public sector. Following financial difficulties in 2009, the employer asked all employees to take a 5% pay cut. It held a number of meetings with employees to inform them of the business position followed by a ballot in which a substantial majority voted to accept the change.

In the end, Mr Booth was the only employee who refused to accept the pay cut. Several meetings were held with him at which various options were put forward including a review of his pay after 6 months. He continued to hold out against the pay cut and eventually he was dismissed.

The Tribunal accepted that his dismissal was for the potentially fair reason of "some other substantial reason" but held it was unreasonable to expect him to take the pay cut and therefore his dismissal was unfair. The employer appealed.

The EAT held that the Tribunal had made a number of errors when assessing the question of reasonableness in the case:

- First, it was not necessary (as the Tribunal had assumed) for the employer's situation to be so desperate that the only way of saving the business was to propose stringent reductions in pay and conditions.
- Secondly, it was not a question of whether it was reasonable for the *employee* to accept the pay cut, but rather whether it was reasonable for the *employer* to dismiss, for the employee's failure to accept the new terms (in other words, the Tribunal had focused on the wrong party).
- Finally, the Tribunal had failed to appreciate the significance for the employer of having just one person on a different pay

The EAT also gave some guidelines for the Tribunal that would re-hear the case. It pointed out that the question of reasonableness also requires a consideration of whether the dismissal was "in accordance with equity". The EAT said that it will be highly relevant to consider upon whom pay cuts would fall. For example, if management proposes a pay cut for the rest of the workforce but not itself then a Tribunal will have to consider whether this was fair. Further it would be relevant to consider whether other costs saving measures had been explored by the employer.

**Implications:** This decision is helpful in that it a fresh re-confirmation of the already established view that a dismissal for failing to accept a pay cut is potentially fair for "some other substantial reason" and sets out the correct approach which Tribunals should take in such cases.

However, the case also makes it clear that employers will need to be careful to establish that they acted reasonably in dismissing in such cases. Enforcing pay cuts on the wider workforce, without similar sacrifices at a more senior level, could mean that the dismissal is not reasonable. We find it unlikely that any decent employer would expect the rest of their workforce to take a greater hit than their management team, but this case expressly indicates that this would be a risky move when imposing an across-the-board pay reduction.

## **Disability discrimination – what constitutes knowledge?**

**Summary:** The EAT in *Wilcox v Birmingham CAB Services Ltd* has held that the duty to make reasonable adjustments under the Disability Discrimination Act 1995 (and now Equality Rights Act 2010) only applies where an employee knew, or could reasonably have been expected to know, **both** that the employee in question was disabled **and** that s/he was likely to be substantially disadvantaged by that disability. In this particular case the employer did not know, and could not have reasonably been expected to know, that the Claimant was disabled until it received a consultant's report which had been jointly commissioned at the direction of the Tribunal during the process of the Tribunal claim itself.

**Facts :** The employee worked as a debt advisor for the employer, the CAB, and asked if she could work at a bureau closer to her home because travelling made her anxious, which prevented her from using public transport. She had not investigated whether she had an underlying medical condition. The CAB did not grant the request and the employee was signed off with work-related stress. In mid-2007, the CAB commenced its attendance management procedure and the employee brought a grievance. Initially, she said nothing about travel-related anxiety and tried to delay the CAB's attempts to obtain a medical report. However, she eventually agreed that her cognitive behavioural therapist could provide one. In late 2007 he advised that the employee suffered from anxiety in relation to travel and heights and recommended that she take a relatively short and straightforward car journey to work.

By early 2008, the employee was willing to return to work, but only at a particular bureau. The CAB was not prepared to guarantee that she could do this, as her services might be needed elsewhere. In June 2008, the employee met the CAB to discuss the possible termination of her employment on capability grounds. The CAB wanted to obtain its own medical advice but the employee refused to visit its occupational health consultants (OH) because of the position of their offices on an upper floor. Therefore OH produced a report based only on her medical notes, suggesting that there were no medical grounds for her protracted absence or for alternative travel arrangements to be made. The CAB provided Ms Wilcox with copies of its letters instructing the medical advisers. She suggested that these portrayed her as an unconscientious, selfish, lazy and thoughtless employee as well as a liar. She resigned and issued Tribunal proceedings for disability discrimination.

The Tribunal ordered the parties to jointly commission a report from a consultant psychiatrist on the issue of whether Ms Wilcox was suffering from a disability at the material times. In that consultant's opinion, Ms Wilcox had suffered from agoraphobia since December 2005, which had a serious impact on her mobility. In the light of this, the CAB conceded that Ms Wilcox had been a disabled person at all material times. Nevertheless, the Tribunal dismissed her claim, holding that the CAB did not know, and could not reasonably have been expected to know, that Ms Wilcox suffered from agoraphobia, or any disability, until it received the consultant's report as a result of the Tribunal process.

The EAT upheld the Tribunal's decision and confirmed that the duty to make reasonable adjustments applies only where the employer knew (or could reasonably be expected to know) both that the employee in question was disabled and likely to be substantially disadvantaged by that disability.

**Implications:** The above case has clarified what amounts to 'knowledge of disability' for reasonable adjustment purposes (following some confusion in earlier cases): the duty only applies where an employee knew, or could reasonably have been expected to know, **both** that the employee in question was disabled **and** likely to be substantially disadvantaged by that disability.

It is also interesting to note that, despite ongoing deliberations between employer and employee and the commissioning of medical advice, the Tribunal found that the employer did not know (and could not reasonably have been expected to have known) that the employee was suffering from an impairment amounting to a disability. While the EAT stressed the fact-specific nature of the Tribunal's particular decision, it appears that employees who fail to provide information and delay their employers' obtaining medical advice might have difficulty asserting that their employers had any knowledge of the disability, especially where the employers deal reasonably with the information which is provided to them and take some steps independently to inform themselves of the position.

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