

# Hotel and Leisure Lawyers

## hospitality news

January 2010

### Top 10 Employment Cases for July to December 2009

#### A review of 2009

**2009 has been another interesting year for employment lawyers and HR practitioners alike. Whilst HR practitioners have been busy managing restructuring, redundancy and delicate talent management programmes in response to the credit crunch and recession, the Courts have been churning out some important decisions which will impact on the hospitality sector. Adam Grant and Fiona Rushforth from the Wedlake Bell Hotel Client Services Team share their thoughts on the top 10 employment cases in the last six months.**

The case of Lillian Ladele v London Borough of Islington continued to make the headlines in 2009 and is worthy of mention. Many of us will agree that the issue of conflict of rights particularly between the right to hold a religious belief at work and the right not to be discriminated on grounds of sexual orientation by fellow colleagues is indeed a very sensitive issue for employers to balance and manage.

Ms Ladele, a Christian registrar employed by Islington Council, refused to perform civil partnerships because in her view, it was against her orthodox Christian beliefs. She claimed that her employer's treatment of her was religious discrimination and also that she was harassed by her gay colleagues who accused her of being homophobic. Although she won her Employment Tribunal claim, the decision was overturned by the EAT in December 2008 and she appealed against that decision.

On 19 December 2009, the Court found that as a public authority the Council had been entitled to require all registrars to perform all their duties in a non-discriminatory way and that Ms Ladele could not choose only to do those that fitted with her religious beliefs, particularly as those views involved discrimination against service users on the grounds of sexual orientation. Ms Ladele remained free however to hold her beliefs and to worship as she wished. To put it simply, the Court held that you have a right to hold your religious belief in the work place but that does not entitle you to manifest it in such a way which is discriminatory to others who do not share the same belief as you.

Everyone at work has the right to be treated with mutual respect and dignity. How will the Ladele decision affect diversity issues in the hospitality sector? Can a Director of Events refuse to host civil partnerships at the hotel? Can banqueting staff refuse to serve guests at a civil partnership reception? It would be very difficult to justify such actions as the Equality Bill (anticipated to become law in 2010) will outlaw sexual orientation discrimination in the provision of goods and services. Perhaps it's time to revisit your diversity policy and equal opportunities training programme in the light of the Ladele judgement and Equality Bill.

I hope you enjoy this special edition as 2009 draws to a close and we embrace more ground breaking decisions in 2010.

Happy New Year.



Partner  
Head of Hotel & Leisure Group  
[jyew@wedlakebell.com](mailto:jyew@wedlakebell.com)

# 1. Employing casual workers in hotels and restaurants

In *Clarkson v Pensher Security Doors*, the Tribunal and the EAT had to decide whether an individual, Mr Clarkson, was an employee, a worker, or a self-employed contractor carrying on a business undertaking.

Mr Clarkson undertook all of the electrical work that was required by Pensher over a period of two years, with the exception of some specialist work beyond his skill-set. He was supplied with some tools and materials but provided his own hand tools. He was paid an hourly rate and had to clock in and out of work. However, he was permitted to work for other entities, and did so.

Mr Clarkson brought a claim to enforce certain rights as an employee and as a worker. The Tribunal held that he was neither an employee nor a worker, but instead was operating a business undertaking. The Tribunal reached this decision even though it held that there was mutuality of obligation, an obligation to perform work personally, and some degree of control – the three main factors that establish an employment/worker relationship.

On appeal, the EAT held that the ET had carried out a full analysis of the circumstances and had been entitled to decide that the contract was **predominantly** of the nature of a business undertaking providing services, not a worker.

*HR TIP: Tribunals adopt a multi-factorial test when deciding the employment status of an individual. Both the ET and EAT acknowledged that the case was on the borderline: in a similar case, an individual might be granted worker or even employee status. When engaging casual workers for housekeeping or stewarding to supplement your workforce, hotels and restaurants should ensure that there are appropriate contractual arrangements in place to minimise the risk of an employer-employee relationship arising. Casual workers should, for example, not be subject to disciplinary and grievance procedures which ordinarily apply to your employees. If you are engaging casuals using an “umbrella contract” for a series of ad-hoc work, you should ensure that such a contract does not exceed 50 weeks at any one time and that there is sufficient break between one “umbrella contract” to another.*



**Fiona Rushforth**

Solicitor

[frushforth@wedlakebell.com](mailto:frushforth@wedlakebell.com)

## 2. Changing outsourced service providers

**In *OCS Group UK Limited v Jones and another*, Ms Jones was employed as a chef supervisor by OCS Group, which provided hot and cold meals to BMW. Ms Jones role principally involved preparing hot food. BMW then terminated OCS's contract and awarded a catering contract to a new provider, MIS. However, MIS only provided pre-packed sandwiches and salads, and there was no requirement for hot food preparation.**

Ms Jones and others brought tribunal claims, arguing that their employment should have transferred to OCS. They argued that the termination and re-award of the contract was a "service provision change" under TUPE 2006. However, the Tribunal held that the new contract provided a 'substantially reduced service' which was 'materially different' to that offered by OCS. It stated that the MIS operation had changed from the provision of a full service canteen, where Jones was a chef, to becoming a sales assistant in the kiosk. On appeal, the EAT upheld this decision. It held that the correct approach in determining whether there has been a service provision change is to ask if the activities carried out by the new contractor are "fundamentally or essentially the same" as those carried on by the outgoing contractor.

***HR TIP: Hotel operators sometimes outsource their staff canteen to catering companies. One of the challenges under TUPE is that the incoming contractor has to inherit the hotel's employees and to replicate their existing terms and conditions of employment. Subsequent problems arise if the hotel operator is seeking to insource the canteen function or appoint a second generation contractor to run the staff canteen. This case helpfully demonstrates that, where the new services are sufficiently different from the old, the effects of TUPE may be avoided. Where TUPE cannot be avoided, always seek legal advice to ensure that there are appropriate indemnities in place to deal with any employment exit costs associated with any service provision change.***

### 3. When should hotel owners start redundancy consultation?

In *Akavan Erityisalojen Keskusliitto AEK ry and others v Fujitsu Siemens Computer Oy*, a Dutch parent company made a proposal to close its Finnish plant. After two months of consultations with the staff in Finland, the Board decided to close down operations in Finland, and commenced making redundancies. Some staff brought claims, on the basis that there had been no proper consultation because the decision to make redundancies had in fact been taken by the parent company at the “proposal” stage two months previously.

The ECJ clarified the meaning of an employer ‘contemplating collective redundancies’ which triggers the obligation to consult. They held that, within a group of companies, the obligation would be triggered by strategic decisions being taken which compelled the employer to contemplate, or to plan for, collective redundancies.

It also held that the obligation to consult always falls on the subsidiary which employs the employees, and that the obligation is triggered once the company within which the redundancies may be made has been identified. The subsidiary employer will be held responsible for any failure to consult, even if the failure is due to the parent company failing to inform it of the decision.

**HR TIP:** *The case is particularly relevant to hotel and restaurant owners and operators with a global group structure. If the parent company is planning to restructure the Group’s business in response to difficult trading conditions which will put UK jobs at risk of redundancy, the parent company must not make definitive decisions about collective redundancies until the UK entity has had a chance to properly consult its staff under local labour laws. The effect of this case is that all board level decisions should be expressed as proposals, minuted as such and communicated to the UK subsidiaries before redundancy dismissals are effected. Otherwise, the UK employer could be liable for a protective award of up to 90 days contracted pay per affected employee.*

## 4. Employees will find it easier to bring disability discrimination claims

In *SCA Packaging Limited v Boyle*, Mrs Boyle brought a claim for disability discrimination against her former employer, SCA Packaging. She suffered from a weakness in her throat caused by vocal nodes which she managed by resting her voice and sipping water.

For an illness to count as a disability, it must have a “substantial” effect. In addition, the effects must usually continue, or be likely to continue, for at least 12 months. Certain illnesses may come and go, allowing the employee period of remission where they suffer no ill effects. In such cases, the illness counts as “continuing” if it is “likely to recur”. The previous test of whether an illness was “likely” to recur was whether it was “more probable than not”. However, the Northern Irish Court of Appeal used an easier test, saying that “likely” meant “*could well happen*”. This new test was upheld by the House of Lords.

**HR TIP:** *Successful treatment of an impairment, such as Mrs Boyle’s management regime, can mask an underlying disability. The effects of any medication taken by the employee are also disregarded when the Tribunals are called upon to decide if an employee is disabled. Be aware that, under the new definition of “likely to recur”, it is now easier for employees to establish a disability. If an employee has intermittent or persistent sickness absence or raises a grievance about their working conditions, employers may be deemed to have constructive knowledge of their employee’s disability. When in doubt, HR should refer employees to occupational health or the Company’s doctor to establish if they are suffering from a disability so that the employer’s statutory obligations to make reasonable adjustments are discharged.*

## 5. Communicating notice for termination of employment

In *Gisda Cyf v Barratt*, after a disciplinary meeting, Ms Barratt's employer posted a letter dismissing her summarily on 29 November, by recorded delivery. The letter was signed for the next day by a family member, but Ms Barratt herself had already left to visit her sister in London. Although she did phone home while in London, Barratt did not ask about the letter, only doing so on her return on Monday 4 December, when she read the contents.

She claimed unfair dismissal and sex discrimination. If the effective date of termination (EDT) had been when she read the letter, on 4 December, the claim would have to have been lodged within the normal three-month time limit. But, if the EDT was earlier – for example, the date on which the letter had been sent – the date it had been delivered or even (as the employer argued) on a date by which she should have inquired about its delivery, then it would have been out of time.

The Court of Appeal upheld the decision of the Tribunal and the EAT that the letter of dismissal must actually have been read by the employee in order to become effective, or at least the employee must have had a reasonable opportunity to have read it. It might have been different if Ms Barratt had gone away from home deliberately to avoid receiving the letter of dismissal, or if she had avoided opening it. The court also agreed that Ms Barratt did not have a reasonable opportunity of reading the letter earlier than Monday 4 December. Although she had phoned home, she was not obliged to ask about the contents of the letter.

**HR TIP:** *Exiting an employee who is close to accruing one year's continuous service to prevent them from bringing an unfair dismissal claim is a scenario familiar to many HR practitioners. To avoid the kind of uncertainty illustrated by the Gisda case, a termination meeting with the employee should always be held. Where this is not possible, the decision to terminate should be communicated orally to the employee and then confirming to them in writing. Email correspondence is another option as it is also possible to check if an email sent to an employee has been read by them. To avoid any disputes on whether the termination was effective, always check your contract to ensure that the rules on communicating notice for termination give you the flexibility that you need.*

## 6. Delay in paying Tribunal award amounts to victimisation

In *Rank Nemo (DS) Ltd and others v Coutinho*, Mr Coutinho was made redundant just before his employer, Vision, sold its business to Rank in July 2004. As the sale was caught by TUPE, Coutinho brought claims against both companies for race discrimination and automatic unfair dismissal. His claims were upheld and he was awarded £72,000. The liability transferred to Rank under TUPE but Rank refused to pay the award, even after Coutinho obtained a County Court Judgment to enforce it in 2006.

In 2008, Coutinho issued a new claim against Rank for victimisation for its failure to pay the award. The basis of the claim was that he was treated less favourably for making a “protected act”, which in this instance was for having brought a discrimination claim.

The Tribunal initially refused to hear the claim on the basis that it did not have jurisdiction to handle enforcement issues. Coutinho appealed to the EAT which determined that the case should be heard. Rank appealed to the Court of Appeal.

The Court of Appeal supported Coutinho’s argument that the claim should be heard by the Tribunal. It held that it was necessary for the Tribunal to investigate why Rank had not paid the award. If the non-payment of the award was a continuation of the less favourable treatment as a result of the earlier discrimination proceedings, then there could be a possible link to the employment relationship, despite the fact that the employment relationship had terminated several years earlier.

**HR TIP:** *To be successful in a victimisation claim, the employee must show a causal link between the subsequent treatment he received and any earlier discriminatory acts he had suffered. The victimisation claim above was remitted to the Tribunal for this point to be determined. As this was a sale of a business, the Buyer would ordinarily have been made aware of any potential or pending Tribunal claims against Vision as part of the due diligence exercise. The usual practice would be to negotiate an indemnity from the Seller to cover the risk of the Tribunal claim succeeding, liability of which would transfer to the Buyer under TUPE so that the new employer is not out of pocket. So long as a causal link for the treatment is established, mere lapse of time will not exonerate the former employer. Employers should resist any temptation to seek retribution or to treat former employees differently, for example, by refusing to satisfy a Tribunal Award without good reason.*



**Adam Grant**  
Solicitor

[agrant@wedlakebell.com](mailto:agrant@wedlakebell.com)

## 7. Effective termination date and without prejudice discussions

In *Kirklees Metropolitan Council v Radecki*, Mr Radecki was employed by Kirklees Metropolitan Council. On 21 October 2005, shortly after his employment started, he was suspended pending disciplinary investigations.

The parties entered into without prejudice negotiations between August and October 2006 with the aim of achieving a termination date of 31 October 2006. Negotiations stalled. The council stopped paying Radecki on 31 October 2006 and communicated this to his representative. Radecki did not complain about this at the time.

In January 2007, Radecki expressed dissatisfaction with the terms of a proposed compromise agreement. Radecki phoned the council in February 2007, rejecting its proposals and querying why he had not been paid since 31 October 2006. On 5 March 2007, the council wrote to Radecki advising that he had been terminated on its payroll system on 31 October 2006 and that his employment had ended on that date. A P45 was also issued, showing the Effective Date of Termination (EDT) as 31 October 2006.

The Tribunal found that Radecki's employment had been terminated by consent on 31 October 2006 and therefore his unfair dismissal claim was time barred. The EAT reversed the decision finding that the EDT could not be effective as it was agreed as part of without prejudice negotiations. The EDT had occurred when there had been an unequivocal statement from the council on 5 March 2007 that the employment was at an end. This resulted in the unfair dismissal claim being in time. The council appealed. The Court of Appeal agreed that the employer's non-payment of salary illustrated a clear intention to terminate the contract of employment.

**HR TIP:** *Exit management strategies often involve a combination of open discussions and without prejudice (WP) discussions between the employer and employee. WP discussions can however become protracted and extend beyond the employee's proposed termination date. Until a compromise agreement has been signed by the employee, it is inadvisable for the employer to stop paying the employee or proceed with issuing a P45 as such actions are not protected by without prejudice privilege. If exit negotiations protract beyond the original termination date, thought should be given to resuming the termination procedure on an open basis quickly to manage the employee's expectations and to imposing a rigid timeline for acceptance of the employer's WP offer. As communications can sometimes become muddled in exit processes, any discussions with an employee on a WP basis should also be marked clearly as such to avoid future dispute as to whether they are protected by privilege.*

## 8. Employees who believe in green issues are protected by law

In *T W Nicholson v Grainger Plc and others*, Mr Nicholson, who had been head of sustainability, was made redundant by Grainger Plc and brought a number of claims, including unfair dismissal and discrimination on the grounds of religion or belief under the Employment Equality (Religion or Belief) Regulations.

The discrimination claim was on the grounds that Nicholson had “a strongly held philosophical belief about climate change and the environment”. He believed in man-made climate change and felt that he had a moral duty to live in a way that mitigated or avoided the impact. He argued that his beliefs were not merely an opinion, but a philosophical belief which affected how he lived his life including his choice of home, travel, what he bought, ate and drank, and what he did with his waste.

The Tribunal held that Nicholson’s beliefs about climate change and the environment were capable of being a belief for the purposes of the Regulations. Grainger appealed.

The EAT upheld the Tribunal decision but noted that there must be some form of limitation on what is a philosophical belief. The belief must be genuine and not an opinion or viewpoint based on the present state of information available; the belief must affect a weighty and substantial aspect of human life and behaviour; it must attain a certain level of cogency, seriousness and importance and must not be incompatible with human dignity nor conflict with the fundamental rights of others. The EAT ordered that the case be remitted.

**HR TIP:** *This case is potentially ground breaking as it is the first reported case where a claimant has successfully argued a belief not similar to a religious belief may be protected under the regulations. The decision could potentially impact on senior employees such as development directors for international hotel groups who have environmental and sustainability concerns in relation to construction projects to junior employees such as banqueting staff who refuse to serve meat because they are vegetarians. To ensure that your work place practices do not indirectly discriminate against employees with certain held beliefs, they must be objectively justified. Where possible, employers should try and accommodate an employee’s beliefs, for example by assigning the employee to different duties. It should also be remembered that employees are protected against dismissal and suffering a detriment (falling short of dismissal) because they have exercised their right under the regulations. The above case has been remitted to the Tribunal to determine if the employee was genuinely made redundant or dismissed because of his beliefs.*

## 9. Managing disciplinary issues during the notice period can be tricky

In *Cook v MSHK Limited, MSHK Limited* – formerly Ministry of Sound Holdings – Mr Cook resigned with six months' notice to join a competitor. In his resignation letter, he informed the MSHK that he would not undertake any activities that competed with it. Afterwards there was some dispute as to whether or not he would be competing or not. Following an argument at which he was shouted at, Cook went off sick with stress.

When he returned to work after a lengthy absence, disciplinary proceedings were commenced against him and he was summarily dismissed. MSHK said Cook's conduct had breached trust and confidence as well as fiduciary duties on the basis that (i) he had lied when he said his new employment would not be competitive and (ii) he had accepted a £100,000 company loan after handing in his resignation which had breached his fiduciary duties. Cook's appeal against his dismissal was rejected.

MSHK issued proceedings in the High Court seeking a declaration of the lawfulness of Cook's dismissal (to protect its position) and damages.

The High Court found partially in MSHK's favour. Cook appealed against that decision, arguing that MSHK had affirmed the contract and so could not rely on the alleged breaches to summarily dismiss him.

The Court of Appeal allowed Cook's appeal in part. It found that MSHK had given no indication during his absence that it intended to commence disciplinary proceedings against Cook in respect of the first allegation and in fact, during his absence, MSHK had tried to smooth things over, expressing a hope that he would return to work soon.

In respect of the second allegation, the Court of Appeal found that MSHK had protected its position by writing to Cook and reserving its legal position.

*HR TIP: Notice periods are often tricky to manage as the relationship and dynamics between the employer and employee has changed which is why garden leave is popular for senior employees. If an employee commits a fundamental breach of contract during the notice period, this should be addressed straight away. Where it is not possible to take immediate disciplinary action, for example due to the employee's absence for stress, the employer should reserve its position and should not take steps which could be deemed as an affirmation of the contract (or waiver of the employee's breach).*

# 10. Is refusing to serve guests at a civil partnership event hosted by the hotel illegal?

In *McFarlane v Relate Avon Ltd*, Mr McFarlane was employed by Relate as a relationship Counsellor. Mr McFarlane was a Christian who believed that same-sex sexual activity is sinful and that he did not wish to endorse it. When he joined Relate, he agreed to adhere to its equal opportunities policy which is committed to the equal treatment of staff and client regardless of among other things, sexual orientation. He was also bound by an industry code which prohibits discrimination against clients.

McFarlane trained in psycho-sexual therapy (PST) but asked to be excused from working with same sex-couples where specific sexual issues were involved. Relate refused and asked McFarlane to confirm in writing his commitment to working with same sex-couples. He initially refused but then relented. However, Relate still had concerns and eventually terminated his contract for gross misconduct.

McFarlane brought a Tribunal claim for direct discrimination, indirect discrimination and harassment on the ground of religion or belief as well as unfair and wrongful dismissal. The Tribunal rejected all claims bar wrongful dismissal which Relate conceded.

The EAT upheld the decision. There was no direct discrimination, as McFarlane had not been dismissed because he was a Christian but because he had manifested his beliefs in a way that was contrary to his employer's principles. Further, there was no indirect discrimination, as Relate was justified in requiring its employees to commit to following its policy of providing services in a non-discriminatory manner. Where an employee refuses to comply with his employer's fundamental principles, the employer does not have to compromise in order to show justification.

**HR TIP:** *This case confirms an employee's right to religion or to hold a belief is protected but not their right to manifest that religion or belief as they choose. It reflects the recent Court of Appeal's decision in Lillian Ladele v London Borough of Islington where it was held that the Council did not discriminate against a Christian registrar when she refused to carry out civil partnerships, which was part of her job.*

*The issue of conflict of rights particularly between religion or belief and sexual orientation has troubled the Courts for a while. The cases above confirm that whilst employees have the right to hold their religious beliefs at work, they cannot practise those beliefs which will breach another person's right not to be discriminated. Therefore, if because of their religious belief, an event/wedding co-ordinator or Director of Catering refuses to organise civil partnerships for the hotel or if banqueting staff refuse to serve guests at a civil partnership dinner reception which is offensive to other gay employees working at the hotel, this would breach the employer's equal opportunities policy which may enable disciplinary action to be taken. As this is a sensitive area of employment law, where it possible to accommodate an employee's belief, some form of flexibility should be considered while upholding the general policy.*

### Our Hotel and Leisure Group Team



**Julian Yew**

Head of Hotel and Leisure Group Team

Tel: 020 7406 1684  
Email: [jyew@wedlakebell.com](mailto:jyew@wedlakebell.com)



**Robin Dabydeen**

Partner, Corporate Tax

Tel: 020 7395 3008  
Email: [rdabydeen@wedlakebell.com](mailto:rdabydeen@wedlakebell.com)



**Peter Day**

Partner, Commercial Property

Tel: 020 7395 3115  
Email: [pday@wedlakebell.com](mailto:pday@wedlakebell.com)



**John Fluker**

Partner, Commercial Property

Tel: 020 7395 3106  
Email: [jfluker@wedlakebell.com](mailto:jfluker@wedlakebell.com)



**David Israel**

Partner, Employment

Tel: 020 7395 3037  
Email: [disrael@wedlakebell.com](mailto:disrael@wedlakebell.com)



**Hilary Platt**

Partner, Banking

Tel: 020 7395 3158  
Email: [hplatt@wedlakebell.com](mailto:hplatt@wedlakebell.com)



**Suzanne Reeves**

Partner, Construction

Tel: 020 7395 3168  
Email: [sreeves@wedlakebell.com](mailto:sreeves@wedlakebell.com)



**Suzanne Blakey**

Consultant, Commercial Property

Tel: 020 7395 3173  
Email: [sblakey@wedlakebell.com](mailto:sblakey@wedlakebell.com)



**David Carr**

Consultant, Commercial Property

Tel: 020 7406 1602  
Email: [dcarr@wedlakebell.com](mailto:dcarr@wedlakebell.com)



**Aisha Dickson**

Solicitor, IP & Commercial

Tel: 020 7395 3161  
Email: [adickson@wedlakebell.com](mailto:adickson@wedlakebell.com)



**Sarah Elliott**

Solicitor, Construction

Tel: 020 7395 3192  
Email: [selliott@wedlakebell.com](mailto:selliott@wedlakebell.com)



**Daniel Jankes**

Solicitor, Corporate

Tel: 020 7406 1603  
Email: [djankes@wedlakebell.com](mailto:djankes@wedlakebell.com)



**Christoff Pienaar**

Partner, IP & Commercial

Tel: 020 7406 1601  
Email: [cpienaar@wedlakebell.com](mailto:cpienaar@wedlakebell.com)

#### Hotel and Leisure services

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#### For more information, contact:

**Julian Yew**, Head of Hotel and Leisure Group  
[jyew@wedlakebell.com](mailto:jyew@wedlakebell.com) | 020 7406 1684

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52 Bedford Row London WC1R 4LR | Tel 020 7395 3000 | Fax 020 7395 3100  
DX 166 London Chancery Lane | [www.wedlakebell.com](http://www.wedlakebell.com)