

Headline

news from **Head  Office**

April 2011

Hunt saboteur Joe Hashman wins ground-breaking ruling

Southampton tribunal decides the notorious campaigner's beliefs are akin to religion under UK employment law.

Joe Hashman has played an active part in non-violent direct action, sometimes acting outside the law, and covert investigations against those involved in fox and hare hunting since the mere age of 15. His actions have included the undercover filming which helped convict TV Chef Clarissa Dickson-Wright in 2009 of attending hare-coursing, and have put him at odds with many in his community. At one point, Hashman wrote a gardening column for a local paper under a pseudonym because he feared they would not allow him the space under his real name.

Now 42 and a professional gardener, Hashman claims he was sacked from his job as a designer for Orchard Park Garden Centre, Dorset, in September 2009 when his employers discovered he was a hunt saboteur and he has taken Ron and Sheila Clarke, members of the South and West Wiltshire Hunt, to a tribunal seeking damages. He avers this is the third time he has been sacked for his beliefs.

Hashman was taken on by the Garden Centre in Gillingham, Dorset, in March 2009 and on the 2nd September, the day of Dickson-Wright's conviction for hare coursing, he was informed by the garden centre manager, Richard Cumming, that he should not attend the centre, due to a number of issues that had been "thrown up".

He alleges that during a later telephone conversation with Cumming, it was confirmed that his contract had been terminated because the Clarkes and a board member, Lucinda Strokes, who was a joint master of the hunt, were not happy that he was working at Orchard Park because he was an animal rights activist and hunt saboteur.

The father of two said that his previous role as an active anti-hunt campaigner, which he has now given up, has "followed me about". He went on to say "trying to articulate my life's work and actions as a hunt saboteur and advocate for animals has not been easy. At times I have felt exposed and vulnerable. But ultimately I feel vindicated and am proud to have pursued this action."

In a decision which is anticipated to pave the way for animal rights activists nationwide it was ruled Hashman's animal rights beliefs were a "philosophical belief" akin to religion under employment law and Judge Lawrence Guyer went on to rule that Hashman's belief in the sanctity of life "extends to his fervent anti-fox hunting belief" and such beliefs should be protected under 2003 employment regulations.



Lawyers for Ron and Sheila Clarke argued that Hashman's beliefs were "incoherent, inconsistent, politically motivated by class war and that they endorsed violence" so were not worthy of respect. They quoted evidence from a variety of literature ranging from the Hunt Saboteurs Association to the former Prime Minister, Tony Blair's autobiography, in which he said the fox hunting ban caused "inordinate political convulsions" to argue that it was a class-riven issue.

The Judge rejected these submissions and said that Hashman's beliefs about fox-hunting and hare coursing fell within the parameters of his general beliefs. Citing Hashman, he held he believes that "people should live their lives with mindful respect for animals and we all have a moral obligation to live in a way which is kind to each other, our environment and our fellow creatures."

Having established that Hashman holds a philosophical belief under the regulations, the case will now advance to a hearing in relation to the unfair dismissal.

Hashman's solicitor, Shah Qureshi, of Bindmans, said: "the judgement is based on fact and a clear interpretation of the law rather than negative stereotype. It sends a clear signal that employers cannot discriminate against people merely because they disagree with their deeply held beliefs."

The judgment also follows a similar ruling from November 2009. In that case, a judge ruled that climate change campaigner Tim Nicolson's beliefs were so deeply held they were entitled to the same protection as religious beliefs under employment law.

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Teacher loses appeal against dismissal over raunchy novel featuring pupils

Leonora Rustamova, nicknamed Miss Rusty by her students, has lost her appeal against dismissal from her £34,000-a-year job at the highly regarded comprehensive, which serves Mytholmroyd and Hebden Bridge.

The teacher of English for 11 years helped pupils to read by writing them into a raunchy novel. The book aimed to smack with the lifestyle of a small group of students at the West Yorkshire comprehensive by including sexual fantasy, truancy and bad language comparing two of its heroes to “gorgeous Mr Gay UK Finalists”, although the overall plot involved the boys thwarting a drugs plot with the help of the Police.

Head Teacher, Stephen Ball, initially said the book was a “triumph”, with risqué plotlines foreseeable as the pupils slowly warmed to the project and started contributing material of their own. He went on to say the private printing of copies for the pupils’ parents was a “nice gesture” however that the internet publication was a “wholly different situation”.

The two lay members of the Leeds tribunal rejected the teacher’s claim that she was wrongly sacked for gross misconduct after the book appeared on an internet site. Although it was enormously difficult to access and appears to have been downloaded only a handful of times, they agreed with Mr Ball and the governors of Calder High School that the matter merited dismissal.

The judgment also made reference to outings and hospitality for the pupils, arranged by Rustamova and another teacher, as breaching school guidelines and commented: “She repeatedly acknowledged her faults and that in many respects she had failed to meet the high standards that her profession was entitled to require of her.”

Despite losing her appeal on a majority verdict she was robustly backed by the Judge chairing the employment tribunal, who said the Headteacher’s apparent shift in attitude was “troubling” and that there was evidence of a lack of objectivity in the panel of governors who approved disciplinary action against Rustamova.

She is now expected to take her case to a higher tribunal, using the Judge Barton’s minority view as a catalyst.



Keith Lomax, Rustamova’s solicitor, said: “Sadly we didn’t win but it is interesting that the employment judge found in our favour. We are of course considering an appeal and having some support from the employment judge is a start.”

Rustamova remains out of work and relying on benefits to support her daughter because her sacking has “rendered me untouchable”.

If you have any queries relating to any of the articles in this magazine, please contact our legal advisors on 0845 217 8650



2011 Employment Law Changes: 6 things employers need to know



Every year brings a wave of changes for the employer to contend with. Read our guide to the six key updates to ensure you are prepared for the year ahead.

1. Abolition of the default retirement age (DRA)

Although the DRA is being abolished from the 6th April 2011, transitional arrangements affect retirements notified prior to this date.

Throughout the transitional period employers will be unable to issue new notifications of retirement but those already in motion can continue through to completion if:

- the employer issued the notification of retirement prior to 6 April 2011;
- the employee will reach age 65 (or the employer's normal retirement age if that is higher) before 1 October 2011; and
- the requirements of the statutory retirement procedure are met.

2. Changes to maternity and paternity leave provisions

There will be 2 changes to maternity and paternity leave provisions in April.

Fathers of children with an expected week of birth beginning on or after 3 April 2011 will be allowed up to 26 weeks' additional paternity leave in the first year of the child's life if the mother has returned to work from maternity leave.

The rates for statutory maternity, paternity and adoption pay are also set to increase from £124.88 to £128.73 per week.

3. Equal Treatment for agency workers

Agency workers will be entitled to equal treatment on basic employment conditions such as pay and holidays, after they worked in a role for 12 weeks, under the Agency Workers Regulations 2010, from 1 October 2011.

4. Equality Act 2010

Employers will be able to treat individuals with a protected characteristic more favourably during recruitment and promotion processes when faced with two candidates of equal merit from 6 April 2011, if more favourable treatment is intended to address under-representation in the workforce.

5. Bribery Act 2010: corporate offence introduced

The Act making the failure to prevent bribery by people working on behalf of the business a corporate offence was due to come into force in April. The Government has now delayed its implementation and it is not expected to come into force until May 2011, at the earliest.

6. Increase in minimum wage?

From October the national minimum wage will increase to £6.08 for those aged 21 and over, £4.98 for 18 - 20s, £3.68 for 16 - 17 year olds and to £2.60 for apprentices. See our quick guide on the last page.

Andy Gray makes Unfair Dismissal Claim

Mr Gray was dismissed from his job as a football pundit for Sky after making sexist remarks to his co-presenter Richard Keys.

It is believed that Gray now intends to sue Sky for £3 million in compensation for unfair dismissal and also that Richard Keys, who resigned, publicly stating that the “dark forces” at Sky had forced him to, is expected to lodge a claim for constructive dismissal in due course.

While Andy Gray has admitted that his behaviour was improper, employers must always make certain that proper procedures are followed before dismissing employees or accepting resignations.

If any employees in the same sort of predicament as Gray and Keys can determine that their employer not only allowed a culture of sexism to exist in the workplace but have also failed to act in response to complaints in the past, the employee may well be able to effectively claim that they were unfairly targeted.



To avoid this prospect, employers should institute firm guidelines on acceptable behaviour in the workplace from the start, and any complaints made by employees relating to sexist remarks or behaviour should always be investigated and suitable action taken.

Government announces reforms to free business from red tape

Business Secretary Vince Cable has declared a range of measures to reduce the amount of red tape challenging business.

They include revoking the Regulations extending the right to request flexible working to the parents of 17 year olds, and introducing a freeze on new regulation for small businesses. The Government believes the reforms will remove barriers to growth.

In September 2010 the Government announced that the right to request flexible working would be extended to parents of children under 18 years old in April 2011. The Government's recent announcement will result in the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2010 SI 2010/2991 now being retracted and the right to request flexible working will continue to be available only to parents of children aged under 17 and disabled children under 18, and carers of certain adults.

The Government also intends on introducing a moratorium exempting businesses with fewer than ten employees, and genuine start ups, from new domestic regulation for three years. As a consequence, such qualifying businesses will not be liable if the Government does set up a new flexible system of shared parental leave, or extend the right to request flexible working for all employees – measures it anticipates to consult on later this year.

The right to request time off to train will also not now be extended to firms employing fewer than 250 people.

These processes are due to be supplemented by a public audit of almost 22,000 existing statutory instruments. The legislation will be categorised into themes on a dedicated website and businesses



will be asked to give the government their opinion of those regulations and how to improve the system. Any overly arduous or unnecessary regulations will be removed unless Government departments are able to establish there is a good reason for them.

Lisboa v Realpubs Ltd and ors, EAT

Rebranding of gay pub discriminated against gay employee

The EAT has determined that an employer's policy of rebranding a gay pub to extend its clientele was executed in a way that resulted in less favourable treatment of gay customers on the ground of their sexual orientation and therefore amounted to direct discrimination against a gay employee who was uneasy implementing that policy. It also constituted a repudiatory breach of contract, meaning that the employee was entitled to resign and claim constructive dismissal.

R Ltd's business model was to buy deteriorating pubs and reposition them as 'gastropubs'. In September 2008, it purchased one such pub, which previously attracted mainly gay customers. The pub's decline was indicated by the presence of drug dealers and male prostitutes on the premises. R Ltd refurbished and relaunched the pub with a view to repositioning it in the market so that it would attract all members of the public, not just gay people.

In November 2008, L, an openly gay man, was interviewed for an assistant manager post, and during that interview there was a discussion about the character and reputation of the pub. R Ltd explained its aim of transforming it from a gay pub into a gastropub but insisted that it wanted to retain its existing clientele. Following the interview, L was offered the position and commenced employment on 1 December 2008.

A number of procedures were implemented in order to achieve the company's objective of broadening the pub's appeal following its reopening. One of R Ltd's directors, H, wanted to put a notice outside, informing the public that it was no longer a gay pub. L objected to this as being inappropriate and suggested an alternative notice, which was accepted by the company. R Ltd also encouraged staff to seat customers who did not appear to be gay in areas that could be seen from outside the pub. There was also a reorganisation of staff, in keeping with the company's policy to have a more even balance between the sexes. As a result, five male members left within the first month of opening.

L objected to these procedures on the premise that they made the pub less welcoming to gay people and, after just a few weeks of employment, he resigned on 11 January 2009. He brought claims of direct discrimination and constructive dismissal in an employment tribunal. Since he had not completed the one year's continuous service necessary to bring an unfair dismissal claim, his claim was structured as one of unlawful constructive dismissal under Reg 6(2)(d) of the Sexual Orientation Regulations.

The essence of his direct discrimination claim was twofold. First, he complained about comments that he claimed R Ltd had specifically directed at him on the ground of his sexual orientation. Secondly, he alleged that he was put under pressure to work towards and cooperate with a policy of making the pub less welcoming to gay customers than to straight customers. This, he contended amounted to an instruction to discriminate and gave rise to a



'Weathersfield' claim. In line with that case, he claimed that the employer's policy constituted a repudiatory breach of contract, warranting his resignation and claim for constructive dismissal.

The employment tribunal upheld L's direct discrimination claim, finding that H had made comments that were offensive to L as a gay man. These included saying that L was 'gay but another kind of gay'; that another member of staff 'walked too camp'; and referring to some gay customers as 'those queens'. Accordingly, it awarded him £4,500 for injury to feelings in respect of the remarks.

However, it rejected L's Weathersfield claim, finding that nothing was done to make the pub unfriendly to gay customers. R Ltd's aim of increasing the appeal of the pub and broadening the clientele was, in the tribunal's view, a lawful tactic. As a result, procedures taken in pursuance of that objective, such as redressing the gender imbalance among bar staff and 'showcasing' families and mixed-sex groups by seating them prominently in the pub, were also lawful with regard to gay customers (although the tribunal thought that there might have been sex discrimination against male staff who left during that period). The tribunal went on to hold that L's constructive dismissal claim also failed since he had resigned as a result of his mistaken perception that R Ltd was a homophobic organisation that treated gay people unfavourably, rather than in response to the derogatory comments made by H.

L appealed to the EAT against the tribunal's finding that the actions taken by R Ltd to expand the appeal of the pub did not amount to direct discrimination, and against the rejection of his constructive dismissal claim. He argued that the tribunal had taken the wrong approach by failing to take into account the overall effect of the employer's implementation of its repositioning policy on gay employees.

The EAT accepted that the instant case was far more nuanced than Weathersfield, where the employer's policy was unmistakably discriminatory. It went on to hold, however, that the employment tribunal had failed to tackle the key issue: whether, in the process of widening the appeal of the pub, the employer had implemented its rebranding policy in a way that meant the old gay clientele was treated less favourably on the ground of sexual orientation than straight customers. Having found that the rebranding plan was lawful, the tribunal had concluded that varying the staff gender balance and showcasing families at the front of the pub were manifestations of that legitimate policy. This, in the EAT's opinion was an error, since gay customers were 'plainly and unarguably' treated less favourably on the ground of their sexual orientation. It followed that L's Weathersfield claim succeeded.

Having decided that the rebranding policy constituted discrimination against gay customers and also against L, the EAT reversed the finding that this did not give rise to a constructive dismissal claim. Even if L's Weathersfield claim had failed, the EAT commented that it would have permitted the constructive dismissal claim besides. At the very least, the derogatory comments made by H, which amounted to the more conventional discrimination against L, were a contributory factor in L's decision to resign, which, following *Meikle v Nottinghamshire County Council* (Brief 762), is adequate to find a claim of constructive dismissal.

The EAT therefore allowed L's appeal and reversed the tribunal's decision in so far as it had dismissed his Weathersfield and constructive dismissal claims. It also set aside the tribunal's award in respect of injury to feelings and directed that compensation should be reassessed by a fresh tribunal.

This case reveals that while a company's policy may not in itself be discriminatory against a particular group, the way in which that policy is executed could give rise to a claim for unlawful discrimination.

The discriminatory practices at issue here are, as the EAT pointed out, rather nuanced. The judgment raises the issue of the extent to which understated practices – such as recruiting staff who reflect the qualities of the customer that an employer is seeking to attract, or giving a prominent place to those customers who are seen as attractive for representing a brand – are acceptable. The employer here made the notion, based on stereotype, that the family/ heterosexual customer base would not want to see gay people in the pub. Similar assumptions were examined by the employment tribunal in *O'Reilly v BBC* (Brief 918), where former Countryfile presenter Miriam O'Reilly succeeded in her age discrimination claim based on the BBC's supposition that younger viewers would not want to see older presenters. Neither case seeks to suggest that 'rebranding' with regard to protected characteristics is exceptionable under discrimination law, but pandering to the assumed prejudices of an audience or clientele almost always is.

Paula Poolton killer loses Royal Mail unfair dismissal case

Royal Mail worker Roger Kearney from Hampshire who was sacked when he was charged with murdering his married lover has lost his case for unfair dismissal.

Mr Kearney, aged 57, said Royal Mail breached his human rights when he was sacked ahead of his trial.

He was, however, subsequently found guilty of murdering Paula Poolton and jailed for life with a 15 year minimum sentence.

Royal Mail commenced disciplinary proceedings against Roger Kearney after he was arrested and charged with murdering Mrs Poolton, whose body had been found in her car near Swanwick railway station in October 2008.

Kearney had worked with Mrs Poolton when they were stewards at Southampton Football Club and they had been having an affair in the summer of 2008.

The Court was told Kearney stabbed Poolton to death when she started pressurising him to leave his partner. He then invented an alibi to cover his tracks.

Kearney sought £8,225 from Royal Mail for loss of earnings he claimed he should have been paid while on bail.



Royal Mail denied Kearney was unlawfully dismissed in December 2009 and the Tribunal Judge, Raymond Trickey, found he was dismissed because being charged with murder was inconsistent with standards expected.

Useful Information

Family Leave Entitlements (April 2011)

Right	Max Period	Payment
Maternity Leave	52 weeks	See Below
Statutory Maternity Pay (Higher rate)	6 weeks	90% of normal weekly earnings
Statutory Maternity Pay (Basic rate)	33 weeks	£128.73 ¹ per week, 90% weekly earnings if lower
Ordinary Statutory Paternity Leave	1 or 2 weeks	£128.73 per week, 90% weekly earnings if lower
Statutory Adoption leave	52 weeks	See below
Statutory Adoption Pay	39 weeks	£128.73 per week, 90% weekly earnings if lower
Additional Statutory Paternity Leave*	26 weeks	£128.73 per week, 90% weekly earnings if lower

¹ £124.88 per week prior to 03.04.11
 *If their partner has returned to work. Payment will only be made during the remainder of their Partners unclaimed SMP or SAP period.

Sick Pay (SSP)

Right	Max Period	Payment
Statutory Sick Pay	28 ¹ weeks	£81.60* per week

* £79.15 per week prior to 06.04.11
 * following four of more consecutive days absence

Minimum Wage

Age	From Oct 2009	From Oct 2010
Workers 22+	£5.80	£5.93
Workers 18-21	£4.83	£4.92
Workers 16-17	£3.57	£3.64
Apprentices	NA	£2.50
Accommodation Offset	£4.51 Per Day	£4.61 Per Day

Compensation Limits and Awards

	Maximum Award Feb 10 -11	Maximum Award Feb 11 -
Limit on a week's pay	£380	£400
Basic award for unfair dismissal	£11,400	£12,000
Compensatory ward for unfair dismissal	£65,300	£68,400
Additional award 26- 52 weeks' pay	£19,760	£20,800
Redundancy payment	£11,400	£12,000
Refusal of the right to be accompaied	£760	£800
Breach of contract claims in a Tribunal	£25,000	£25,000
Failures in respect of a flexible working requests	£3,040	£3,200
Guaranteed pay per day (5 days in any 3 month period)	£21.20	£22.20
Failure to inform or consult in respect of a redundancy	90 days pay (uncapped)	
Failure to inform / consult in respect of a business transfer	13 weeks pay (uncapped)	

Rest Periods

Period	Right for workers over 18	Right for workers 16-17
4.5 Hours	NA	30 minutes
6 Hours	20 minutes	NA
Between working days	11 Hours	12 Hours
Week	1 Day	2 days
Year	5.6 weeks	5.6 weeks

Working Time Limitations

	NA	8 Hours
Daily	NA	8 Hours
Weekly	48 Hours*	40 hours
Night work	8 Hours in each 24 hour period	Not Allowed

*Employee 18+ can sign an opt out agreement to work longer.

Notice

Period of Continuous Service	Notice (weeks)*
Less than one month	0
Up to two years	1
Between two and three years	2
Between three and four years	3
Between four and five years	4
Between five and six years	5
Between six and seven years	6
Between seven and eight years	7
Between eight and nine years	8
Between nine and ten years	9
Between ten and eleven years	10
Between eleven and twelve years	11
Twelve years and over	12

*Statutory minimum notice always check the employment contract

Employment Tribunal Awards (2009-10)

Claim	Median	Average	Maximum
Unfair Dismissal	£4,903	£9,120	£234,549
Race Discrimination	£5,392	£18,584	£374,922
Sex Discrimination	£6,275	£19,499	£442,366
Disability Discrim	£8,553	£52,087	£728,347
Sexual orienttation	£5,000	£20,384	£163,725
Religious/Belief	£5,000	£4,886	£9,500
Age Discrimination	£5,868	£10,931	£48,710

Source: Employment Tribunal Service, Annual Statistics 2009-2010