REVIEW OF DEVELOPMENTS IN EMPLOYMENT LAW 2008-09

PATRICIA MAXWELL
SENIOR LECTURER IN LAW
UNIVERSITY OF ULSTER

CONTENTS

(ii) Introduction of compulsory identity cards for foreign nationals
(iii) New penalty system
6(b) HSE Migrant worker advice

7. Corporate Manslaughter
Implementation of the Act

8. Information and Consultation
8 (a) Application to smaller firms
8 (b) DELNI Guidance

9. Criminal Records
The new system in Northern Ireland

10. Trade Union Law
10(a) ASLEF consultation
10(b) Impact of *Viking; Laval; Ruffert* – primacy of economic rights over social rights

11. Some Key Cases
Malcolm (comparator in disability cases)
Coleman (associative discrimination)
Heyday (mandatory retirement age)
Allen v GMB (equal pay)

12. Discipline and Grievance
The future of the statutory procedures

13. Time to Train
Proposed new right to time-off work

14. European Measures
14(a) Working-time
14(b) Works Councils
14(c) Discrimination Directive

15. Pension Reform
Pensions Act 2008

16. Equality Bill (GB)
Single Equality Legislation - the state of play in Great Britain

REVIEW OF DEVELOPMENTS IN EMPLOYMENT LAW 2008 - 2009

Introduction

The aim of this paper is to highlight key developments in employment legislation in Northern Ireland during the period from 1st January 2008 to 6th March 2009. It also seeks to identify a few (of many) significant case decisions from the appellate courts which may prove important for Tribunals throughout the United Kingdom. Finally, it seeks to highlight some likely future developments at both domestic and European level.

One of the themes of the paper is the extent to which an employment law deficit is being allowed to build up in Northern Ireland. In Great Britain the Employment Act 2008 will bring about the repeal of the much-reviled statutory discipline and grievance procedures in April 2009. In Northern Ireland we have not yet reached formal public consultation. In terms of single equality legislation Northern Ireland once led the debate. That process has stalled, while an Equality Bill promised in the Queen's Speech of December 2008 will ensure harmonisation and modernisation of equality laws in the other parts of the United Kingdom, but not here. In relation to other initiatives – such as the reform of trade union law, the extension of the right to request flexible working, the further strengthening of controls on employment agencies, the "time to train" initiative – implementation in Great Britain is either imminent or well on its way. What is happening in Northern Ireland? Rumours of an Employment Bill for Northern Ireland during Spring 2009 were rife but no confirmation has been forthcoming.

In spite of this deficit there is much to report. The employment rights of agency workers and whether a worker can accrue annual holidays while on sick leave are practical, everyday questions for many organisations. The new rules on sex discrimination and harassment; on maternity rights; on employing migrant workers; on informing and consulting staff; and on checking the criminal records of people applying for jobs are all discussed in this review. Important European Directives on agency workers and on works councils have been adopted while negotiations on the future of the working-time opt-out are at an extremely delicate stage. Of one thing we can all be sure – employment law never stands still – even in Northern Ireland.

6th March 2009

Patricia Maxwell
Senior Lecturer in Law
University of Ulster

PART 1: LOOKING BACK AT 2008

1. AGENCY WORKERS

1(a) Statutory Sick Pay for Agency Workers

From 27 October 2008, all agency workers, regardless of their length of contract, are entitled to receive Statutory Sick Pay, following an amendment to Regulation 18(1) of the **Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002.** This follows on from the Court of Appeal ruling, in July 2007, in the case *HMRC –v- Thorn Baker,* that agency workers engaged for a period of less than three months were not eligible to claim statutory sick pay (SSP). The case followed the refusal of Thorn Baker, an employment business, to pay SSP to two agency workers, Mr. Paradise and Mr. Middleton who had worked for them for one month and two months respectively before falling ill and claiming sick pay. The HMRC challenge was based on the wording of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 which purported to change the law relating to eligibility for all workers to claim SSP under the Social Security Contributions and Benefits Act 1992. The problem was that at the same time the Fixed Term Regulations specifically excluded agency workers,

The case turned on a point of construction of the 2002 Regulations. The Court of Appeal held that the wording of the Regulations had the effect of excluding agency workers from any of the legal rights introduced by the 2002 Regulations, including the consequential right to claim SSP from day one of their employment. The effect of the judgment was that agency workers were only eligible for SSP after working for a period of 3 months for their employment business.

In order to restore the original policy intention of treating all workers the same way in relation to statutory payments regardless of the length of their contract, the 2002 Regulations required a minor technical amendment. The amending legislation, the **Fixed-term Employees (Prevention of Less Favourable Treatment) (Amendment) (No. 2) Regulations (Northern Ireland) 2008** (2008 No. 326) make a minor change to the wording of Reg.18(1) and came into operation on 27 October 2008.

1(b) Regulation of employment agencies

(i) 2008 Changes

The **Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations (Northern Ireland) 2008** (2008 No. 76) came into operation on the 6th April 2008. These Regulations amend the Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 ("the 2005 Regulations"). They are intended to give vulnerable agency workers more protection. In particular, they make further provision for the

proper conduct of employment agencies and employment businesses; they increase protection for work-seekers, reduce certain regulatory burdens on employment businesses and also make minor clarifications to the 2005 Regulations.

Regulation 3 amends regulation 5 so that an agency or employment business must ensure that a work-seeker who takes up additional services, such as accommodation and transport, will be able to give notice to cancel or withdraw from those services without incurring any detriment or penalty. Regulation 4 amends regulation 13 so as to require an agency or employment business to give a work-seeker a statement of his right to cancel or withdraw from additional services.

Regulation 5 amends regulation 21 to provide that an employment business intending to send a work-seeker to a hirer on a short assignment (fewer than 5 days) is absolved of the requirement to provide written information to a hirer and work-seeker.

(ii) Proposed future changes

On 2 June 2008, DEL launched two public consultations on proposed changes to employment law. The first consultation related to employment agencies and contains proposals to further strengthen enforcement powers relating to the regulations on how agencies conduct their businesses. DEL is responsible for ensuring compliance with employment agency law. Following the introduction of new entry and inspection powers in January 2006, the Department carries out routine inspections of NI-based employment agencies, and is also responsible for investigating complaints. As this enforcement role develops, it is considered necessary to have access to enhanced powers of investigation and prosecution in order to strengthen DEL's ability to deal with serious abuses. The new powers, which correspond to provisions currently in the Employment Act 2008l (GB) will include:

- Certain offences to be triable either summarily or on indictment
- Unlimited fines in the Crown Court for more serious breaches
- Enhanced inspection powers relating to requiring production of documents and copying records

These consultations have been agreed with the Executive and ultimately, if it is decided to proceed with the some or all of the proposals, they should be implemented via primary legislation in the Assembly in 2008/09 by way of an Employment Bill for Northern Ireland. The closing date for responses to the consultations was 30 September 2008.

(iii) DELNI Guide

DELNI Guide to the Conduct of Employment Agencies

As noted above the legislation designed to protect work-seekers and employers using the services provided by an employment agency or business continues to

proliferate. All employment agencies and businesses must comply with the provisions in the legislation. The Department for Employment and Learning, which is the responsible enforcement authority in respect of the legislation, may prosecute offenders who breach the legislation and in more serious cases apply to an industrial tribunal for an order prohibiting a person from operating as an employment agency or business for up to 10 years. A detailed guide to the law was published by the Department in April 2008 and is to be found at: http://www.delni.gov.uk/08final_detailed_guide_conduct_regs.pdf
Further guidance on the changes introduced in 2008 should be read in conjunction with this and is available at:
http://www.delni.gov.uk/niguidance_on_conduct_regulations_amendment.pdf

1(c) Temporary (Agency) Workers Directive 2008
The European Commission originally proposed a directive on Temporary Agency Work in 2002. Finally, on 21 October 2008 the European Parliament voted to support such a Directive. EU Member States are now required to incorporate the provisions of the Directive into their national law and ensure that it comes into effect within 3 years, that is by 21st October 2011 at the latest.

Commission proposals for the Directive had stalled since 2002 due to a failure to reach agreement in the Council of Ministers. The UK had led a blocking minority of Member States but opposition was dropped following negotiations between the UK social partners. An agreement reached in May between the Government, the TUC and the CBI paved the way for progress. Under the terms of this agreement, after 12 weeks in work, agency workers will qualify for the same pro-rata pay and conditions as directly recruited workers. This reflects a compromise between the unions, who wanted full rights from day one, and the CBI, who wanted equal treatment delayed for six months or a year. However, agency workers will not qualify for other in-work benefits, like sick pay and pensions, after the 12-week period.

At the EU Employment and Social Affairs Council meeting in June 2008 UK opposition to the Temporary (Agency) Workers Directive was withdrawn and the Member States reached agreement on a proposal which enshrined the principle of equal treatment for agency workers but permitted derogations. The retention of the Working Time Opt-Out in the Working Time Directive, a key issue for UK business, was agreed at the same meeting – and there is little doubt that the two issues were linked. The re-cast Working Time Directive compromise has since been blocked by the Parliament as discussed below. However agreement was secured in relation to agency workers. The Council formally adopted a common position on the Temporary (Agency) Workers Directive on 15th September 2008. This was supported by the Commission and the European social partners and approved without amendment by the Parliament.

The date for implementation in the United Kingdom is not yet clear. During the UK Social Partner negotiations in May the Government indicated that they

intended to move as quickly as possible on implementation of the Directive in the UK. Many people had anticipated an announcement in the Queen's speech in December 2008 with implementing legislation going through Parliament during 2009, but this did not happen. The BERR website continues to say: "*The Government hopes to introduce the necessary legislation in the current Parliamentary session. This will be preceded by a full consultation with interested parties on the options for implementation and, in the light of responses, a date for entry into force of the regulations"*.

It is possible that UK legislation could come into force by April 2010, though this is looking increasingly unlikely. On 26th February 2009 the CIPD called for a delay in implementation of the Directive. The main arguments centred on the amount of work remaining to be done to clarify exactly what the Directive requires and fears about increasing the cost of employing agency workers. However, the need for protection for this vulnerable group of workers was highlighted during the same month, when car manufacturer BMW took the decision to dismiss 850 agency workers with 1 day's notice, because of a decline in sales.

The first public consultation on the implementation of the Directive is expected before Easter 2009.

What does the Directive say?
The main points of agreement in the Temporary Agency Workers Directive are as follows:

- Article 5.1 of the proposed Directive sets out the principle of equal treatment for agency workers. It provides that for the duration of their assignment at a user undertaking, the basic working and employment conditions of temporary agency workers shall be *'at least those that would apply if they had been recruited directly by that undertaking to occupy the same job'.*
- "*Basic working and employment conditions*" are defined as working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and / or other binding general provisions in force in the end-user relating to "*the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays: and pay*" (article 3(1))
- Article 5.2 provides for an exemption in relation to pay for temporary agency workers who have a permanent contract with their agency and who continue to be paid between assignments
- Article 5.4 allows derogation from the equal treatment principle set out in Art 5.1, where the social partners have been consulted at *national* level and reached an agreement to derogate. This derogation may include a qualifying period (such as the 12 weeks agreed in the UK). It is also for Member States to determine and specify whether occupational social security schemes including pension, sick pay or financial participation schemes are included in the basic working and employment conditions in

Article 5.1. (The UK agreement specifically excludes this). Article 5.4 only applies in Member States where there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area. Although the text now contains a reference to 'local agreements' in the context of derogations under Article 5.4, these agreements cannot be any less favourable than what is agreed at national social partner level. (So in the UK context, local or regional agreements cannot undermine what the TUC and CBI have agreed nationally).

- Temporary agency workers must be told of vacancies with the end-user to give them the opportunity to find permanent employment (article 6(1))
- End-users must provide temporary agency workers with access to collective amenities and facilities (such as child care facilities, transport services, or canteens) on the same basis as their own workers, unless the difference in treatment can be objectively justified.
- Agencies will not be allowed to charge workers fees for arranging for them to be recruited by the end-user.

Some ambiguities may arise in relation to:
(a)Article 3(1)"basic working and employment conditions" – there are many workforces where there are no collective agreements in force, or "other binding general provisions". It is unclear what terms and conditions might be covered in these workplaces
(b) It is not clear exactly what is meant by "pay". Will the definition extend to bonuses or discretionary benefits?
(c) The wording of article 5 seems to preclude the need for a comparator, in contrast to the Fixed term Work Directive and the Part-time Work Directive which require an actual comparator. The comparison in this Directive is with the terms that would have applied to the worker in question had they been recruited directly. This may be easy to determine if there is a worker doing the same job, but in smaller firms and where an agency worker is recruited for a one-off project, there may be no obvious permanent position from which to determine which terms and conditions "would have applied".
(d) Normally agencies rather then end-users are responsible for paying agency workers and providing them with terms and conditions of employment. It seems likely that the primary liability for compliance will therefore rest with the agency. The agency will thus need full information about the pay and the terms and conditions that the end-user provides (or would provide) to comparable directly-recruited staff. End-users may be reluctant to furnish this information and an issue then arises as to who should be liable for breach of the Directive.

It is clear that a number of important issues need to be clarified by the implementing legislation. In the meantime the legal status of agency workers continues to be governed by the common law. Tribunals and courts have seen

much activity on this vexed issue over recent years. In 2008 a decisive steer was given by the Court of Appeal in England and Wales.

1(d) *James v London Borough of Greenwich (2008) EWCA*
Following the decision of the Court of Appeal in *Brook Street Bureau v Dacas [2004]IRLR 358 CA* a series of cases (from 2005 to 2007) appeared to show an increased willingness by courts and tribunals to imply contracts of employment into existence – some would say at the drop of a hat! This became a source of concern for many organisations which had used the services of an agency for the express purpose of avoiding employment law liability.

Early in 2008 the Court of Appeal gave its views on the issue. In *James v Greenwich Council* [2008] EWCA Civ 35 the court confirmed that the passage of time is not of itself enough to imply into existence a contract of employment between an agency temp and an end-user, even where the contract continues for longer than originally intended. This often happens simply because it is convenient for everybody concerned and does not automatically mean that the nature of the relationship has changed. Nor does it mean that an agency is legally obliged to supply this particular worker to this particular end-user. If the agency worker sought to assert employee status then it was incumbent upon her to demonstrate how mutuality of obligation had evolved. There must be some words or conduct which would enable a tribunal to conclude that the agency arrangements no longer dictated or adequately reflected how the work was actually being performed and that the reality of the relationship was only consistent with the implication of the contract between the worker and the end user. Lord Justice Mummery commented:

"In conclusion, the question whether an "agency worker" is an employee of an end user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements. Just as it is wrong to regard all "agency workers" as self-employed temporary workers outside the protection of the 1996 Act, the recent authorities do not entitle all "agency workers" to argue successfully that they should all be treated as employees in disguise. As illustrated in the authorities there is a wide spectrum of factual situations. Labels are not a substitute for legal analysis of the evidence. In many cases agency workers will fall outside the scope of the protection of the 1996 Act because neither the workers nor the end users were in any kind of express contractual relationship with each other and it is not necessary to imply one in order to explain the work undertaken by the worker for the end user." (para 51)

In the view of the court the issue was principally a matter of interpretation of the facts by the tribunal and an appeal body would not normally interfere with that conclusion. In the case of Ms. James, the Court of Appeal refused to interfere with the Tribunal's decision that there was no employment contract between her and the Council, even though she had worked for them for over three years as a

Housing Support Worker. The Court has made it clear that it will only imply a contract where it is "necessary" to do so. In this case, the relationship was fully explained by the express contracts between the worker and the agency and the agency and the Council and so there was no need to imply a contract between the agency worker and the Council. It is now beyond any doubt that that a contract will only be implied in the most exceptional circumstances, only where it is necessary to do so in order to explain the work undertaken by the agency worker for the end-user. This does not depend upon the length of the relationship, or upon the degree to which the worker has integrated into the workforce. A contract of service is likely to be implied only where the agency relationship itself can be regarded as a sham, or perhaps where there have been direct negotiations on terms and conditions between the agency worker and the end-user. This means that very few agency workers will have unfair dismissal and other employment law rights against the end-user until Parliament moves to implement the Directive.

Decision in full:
http://www.bailii.org./ew/cases/EWCA/Civ/2008/35.html

1(e) The status of *James* in Northern Ireland?
Fitzpatrick; Ambrose and Hetherington –v- DOE (1103/06,1106/06,1107/06)

Northern Irish tribunals are not (in strict legal theory) bound to follow decisions of the English and Welsh Court of Appeal. However, the decisions of the Court have a highly persuasive authority and are usually followed in practice. The opportunity to rule on the application of *James* arose directly in the case of *Fitzpatrick; Ambrose and Hetherington –v- DOE* (2008).The legal question at issue was whether the Claimants were employees of the Respondent and therefore entitled to the protection of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002. It was the Claimants' case that they had been less favourably treated by their employer as compared with a comparable directly-recruited employee in respect of training, contrary to the Regulations

The DOE's procurement service had a contract with Grafton Recruitment to provide staff for receptionist services at Environment Heritage Services properties. The Claimants registered with Grafton Recruitment Agency and were appointed to carry out duties at Scrabo Country Park. The contract with Grafton was subject to tendering and Lynn Recruitment took over the contract with the result that the Claimants were required to register with Lynn Recruitment.

Lynn Recruitment was replaced by Select Recruitment and thereafter by Diamond Recruitment and on each occasion the Claimants were required to register with the relevant agency to continue in their posts. All the claimants worked at EHS properties for considerable periods of time without any break in service and at all times had a contract with the relevant agency with which the

DOE had a contract to supply such staff. One of the claimants had been in the position since 1996.

Each of the Claimants wished to assert the benefit of the Fixed-Term Employees Regulations. However, to do so, they had to be "employees" for the purposes of the legislation. A Pre-hearing Review (in which the Chairman sat alone) dealt with the issue and reviewed at length the various legal authorities on this point, and in particular, the recent Court of Appeal decision in *James*.

Each contract signed by the Claimants over the years stated that they were not employees of the agency or the DOE in this case. The Tribunal was satisfied that if a claimant had decided that she did not like a particular manager she could "walk away" and look to the recruitment agency to obtain her other work.

If the EHS had been dissatisfied with the work of any of the Claimants at any time it could have requested the agency to replace her. Paperwork in relation to hours of work was sent to the Agency for payment. Annual leave requests were sent to the agency.

Day to day the Claimant's carried out their duties at the EHS property, co-operated with EHS management and accepted relevant supervision, direction and control from the EHS. The EHS trained the claimants although there was a distinction between training given to agency staff and employees of the EHS.

Based on these considerations and the case of *James –v- Greenwich Borough Council* the Tribunal decided that the Claimants were not employees of the DOE. In accepting this, the tribunal stated that "parties are entitled to arrange their relationship so as to exclude the creation of any contract of employment" and confirmed that "the length of time for which the worker has worked to the end-user was not determinative of the issue". The Tribunal accepted that the Court of Appeal decision was not binding in Northern Ireland but felt that it was appropriate for the Tribunal to follow the guidance set out in that decision, making it clear that *James* will be applied by Industrial Tribunals here.

Thus, until eventual implementation of the Temporary (Agency) Workers Directive 2008, the restrictive decision in *James* will effectively determine questions concerning the legal rights of agency workers throughout the United Kingdom.

2. COMPENSATION RATES

The **Employment Rights (Increase of Limits) Order (Northern Ireland) 2009** (SR 2009 No. 45) came into force on 15th February 2009. The limits on awards that can be made by the Industrial Tribunal in unfair dismissal and redundancy payments cases have been raised. These are the annual increases which, since 1999, have been index linked. The cap on a week's pay, for the purposes of

calculating statutory redundancy payments and the basic award for unfair dismissal, has risen this year from £330 to £350. The maximum compensatory award has risen from £63,000 to £66,200. The amount of guarantee payment, payable to an employee in respect of any one workless day (normally due to a lay-off), has risen from £20.40 to £21.50.

The new rates apply wherever the relevant date falls after15th February 2009. In the case of an unfair dismissal action the "relevant date" means the effective date of termination of the employment contract as defined by Article 129 of the Employment Rights (Northern Ireland) Order 1996. In relation to a guarantee payment it means the day in respect of which the payment is due.

From April 2008 the standard rate of Statutory Maternity Pay, Statutory Paternity Pay and Statutory Adoption Pay rose to £117.18 per week. The standard rate of Statutory Sick Pay increased to £75.40 per week.

For payment weeks starting on or after Sunday 5th April 2009 new rates will apply. The standard rate of Statutory Maternity Pay, Statutory Paternity Pay and Statutory Adoption Pay will be £123.06. The standard rate of Statutory Sick Pay will rise to £79.15. The lower earnings limit for 2009-2010 is: weekly £95 and monthly £412.

3. NATIONAL MINIMUM WAGE

3(a) New rates

The rates for National Minimum Wage rose from 1st October 2008, following the recommendations of the Low Pay Commission. For workers aged 22 and over the new rate is £5.73 an hour, up from £5.52. The development (or youth) rate, which applies to workers aged 18-21 inclusive, is now £4.77, formerly £4.60. The rate for 16 and 17 year olds also rose, to £3.53, formerly £3.40 an hour.

The Low Pay Commission normally makes recommendations for NMW annual increases around the end of February. However, this year their report has been delayed until 1st May 2009, at the request of the Commission. Commenting on the extension, Professor Sir George Bain, Chairman of the Commission, said:

> *"The Low Pay Commission has always based its recommendations on research, evidence and analysis of economic data. This year, the National Minimum Wage faces up to its first recession. By delaying its report until 1 May, the Commission will have access to two month's additional data, including the Bank of England's next Inflation Report, employee jobs figures for December 2008, GDP figures for the fourth quarter of 2008 and updates on average earnings. The delay will not have an impact on the planned date for implementation of the new rates, 1 October 2009."*

3(b) BERR Guide

A new National Minimum Wage Guide was published in September 2008 by the Department for Business Enterprise and Regulatory Reform. At 116 pages long

the Guide is detailed and filled with practical examples. The guide's aim is to help employers ensure that they pay their workers at least the national minimum wage, and to help workers establish whether they are getting what they are entitled to. It reflects the legal position as at July 2008. It is available at: http://www.berr.gov.uk/files/file47736.pdf

3(c) Proposed Future Changes In NMW
(i) Enforcement (April 2009)
The Government is proposing changes to the National Minimum Wage Act to create a clearer deterrent against non compliance and to provide a fairer way of dealing with arrears of NMW. The changes are being taken forward in sections 8-14 of the Employment Act 2008 which completed its Parliamentary passage in November. These sections apply directly in Northern Ireland. The majority of the NMW provisions will come into force on 6 April 2009.
The changes will introduce:

- A method of calculating arrears for workers who have been underpaid which is based on current levels of NMW rather than those pertaining at the time of the infringement;
- A simplified penalty payment system (£100 - £5,000 per worker) for employers who do not pay NMW in which a single "underpayment notice" replaces the previous "enforcement notice" and "penalty notice".
- New inspection powers for NMW compliance officers; and
- A strengthening of the criminal regime for NMW offences including the introduction of unlimited fines in place of the former maximum of £5,000.

This means that a worker will be repaid any underpayment of NMW by his employer at a higher rate if the NMW rate has increased since he was underpaid. The formula for this calculation is set out in the Act and this provision ensures that the calculation of arrears takes into account the length of time that arrears have been outstanding. The new method of calculating arrears will apply to any arrears of NMW that are outstanding on or after the date the Act comes into force. This includes arrears resulting from underpayments of NMW made before that date.

The Act gives further powers to HMRC officers in obtaining NMW information from employers, and allows them to take information away from the employer's premises in order to copy it. These enhanced enforcement powers will be introduced in January 2009. The Act also makes changes to the way the criminal offences existing under the NMW Act are investigated and enforced: in particular, for the most serious cases, offences will be triable in the Crown Court.

(ii) Tips and Gratuities
Currently tips, service charges, gratuities and cover charges only count towards NMW pay if they are paid to the worker by the employer via the employer's

payroll. They should be shown on the pay slip issued by the employer. If they are not paid to the worker through the payroll the employer cannot count them towards satisfying his or her requirement to pay NMW.

On 31st July 2008 the Government announced plans to amend regulations so that tips can no longer count towards payment of the National Minimum Wage. The changes will end the practice of employers using gratuities and service charges processed through the payroll to 'top up' staff wages to meet National Minimum Wage. The Government also revealed proposals for making tipping practices fairer and emphasised the importance of improving transparency for both staff and customers. A consultation on implementing the Government's recommendations was launched at the end of November 2008. In the foreword to the Consultation Paper – "Service Charges, Tips, Gratuities and Cover Charges : A Consultation" - Peter Mandelson stated "Our view is that tips should be paid to the worker on top of their pay and not be used to make up the national minimum wage". Guidance for both workers and employers will be issued following the consultation to ensure a smooth transition when the regulations are changed, which is anticipated to be 2009.

(iii) Under Review.

The Low Pay Commission has been asked to conduct a wide-ranging review of the operation of the National Minimum Wage and in particular to:

- Monitor, evaluate and review the NMW and its impact, with particular reference to the effect on pay, employment and competitiveness in the low paying sectors and small firms; the effect on different groups of workers, including different age groups, ethnic minorities, women and people with disabilities and migrant workers and the effect on pay structures.
- Review the levels of each of the different minimum wage rates and make recommendations for October 2009. The Commission is also asked to make provisional rate recommendations as appropriate for October 2010
- Review the current apprentice exemptions and advise whether they are still appropriate. The Commission is asked to bear in mind the Government's ambition to increase the number of apprentices to 500,000 and the need to ensure that sufficient employed places are available when the education participation age is raised in 2013.

The Commission is to report to the Prime Minister and Secretary of State for Business Enterprise and Regulatory Reform by 1st May 2009.

4. ANNUAL LEAVE

4(a) Increase in Annual Leave

Statutory annual leave is being increased by 8 days (for a full-time worker) in two phases. The **Working Time (Amendment) Regulations (Northern Ireland) 2007** (SR 2007 No 340**)** amended the 1998 Regulations by inserting a new Regulation 13 A to extend workers' minimum statutory annual leave entitlement from 4 weeks to 5.6 weeks. This means an increase of 8 days per year for a full-

time (five-day-a-week) worker and a pro rata increase for part-time workers. On 1st October 2007the first (4-day) increase took effect, while the second will come in on 1st April 2009.

The transitional arrangements for payments in lieu of the additional statutory days will also come to an end on that date. Thereafter, the extended leave may not be replaced by a payment in lieu except where the worker's employment is terminated. Although the extended statutory leave entitlement cannot, from 1 April 2009, be “cashed in” for a payment in lieu, the additional (8 extra days’) entitlement can be carried over into the following leave year. This can be done by means of a “relevant agreement”. Thus, specific provision for carrying over up to eight days' statutory annual leave will have to be made individually between a worker and his or her employer or on the worker's behalf by a trade union or other workforce representative. Although the carrying forward of the additional leave is permitted under the Regulations, it is not a right on which workers can insist. Any carrying-forward arrangements must be agreed between the worker and the employer by way of a relevant agreement, It is therefore open to an employer to refuse to allow workers to carry forward any annual leave and rather insist that the full 28 days' leave is taken in any leave year.

4(b) *Stringer v HMRC* – Annual Leave And Sick Leave

Is an employee entitled to claim the four weeks’ paid annual leave guaranteed by the Working Time Directive while they are on long term sickness absence from work? This vexed question has troubled employers and their advisers since the introduction of the Working Time Regulations in 1998. Do workers continue to accrue entitlement to paid holidays whilst on long term sick leave? Are they entitled to be paid for annual leave, even where the entitlement to either contractual or statutory sick pay has expired? One view is that entitlement should be denied on the basis that the right is a right to a break from work which does not apply to an individual already on leave, albeit sick leave. The opposite view is that the Directive provides the right to annual leave irrespective of the circumstances of the worker.

In *Stringer v* HMRC *[2005] IRLR 465* the Court of Appeal ruled that there was no statutory entitlement to holiday pay for time off work during long term sick leave, which in this case had lasted for a full year. Unfortunately the Court did not give an opinion on the position where an employee has been absent for only part of the leave year. The case was appealed to the House of Lords which referred it to Europe. The Advocate General gave an opinion in January 2008, in which she agreed that a worker cannot take paid holiday leave during sick leave, but suggested that it continues to accrue during sick leave, and can be taken when the worker returns to work or on termination of the contract. Where a worker cannot take their leave entitlement before the end of the leave year due to sickness, they should be allowed to carry leave over to the following year. Individual states should fix the circumstances in which carry-over would be

permitted. In the months that followed there was much speculation over whether the ECJ would or would not follow the opinion of the Advocate General.

Finally, on the 20th January 2009, the long-awaited ECJ decision was issued. The Court has confirmed that there is nothing to stop Member States introducing a rule that annual leave cannot actually be taken during a period of sick leave. However, leave will continue to accrue during long-term sick leave and the worker must be allowed to take the leave when they return to work, even if the leave year or any carry-forward period has expired. This will require some amendment to the British Regulations which currently do not permit any carry-over of the original 4-week period of leave. If the contract is terminated, said the ECJ, the worker is entitled to be paid for their accrued leave.

Leave over and above the statutory minimum provided for in the Working Time Directive (20 days) is not subject to the ruling in *Stringer*. It is open to organisations to ensure in their contracts that any leave over and above the 20 days does not accrue during sickness absence and also that where leave is taken, Working Time minimum leave is deemed to be taken before other leave. Having said this, the Government may legislate to extend the ruling to cover the full 24 (soon to be 28) days of "additional statutory leave".

The case of *Stringer* will now be referred back to the House of Lords, and many private sector employers in particular are thought to be awaiting the decision of their Lordships before taking action. The *Stringer* saga is not over yet.

5. WORK AND FAMILIES

5(a) Sex Discrimination and Maternity Changes

There have been a number of important changes to the rules on sex discrimination and maternity rights over the period of this review. In the main, the changes follow on from a challenge in Great Britain by the then Equal Opportunities Commission, which argued that the Employment Equality (Sex Discrimination) Regulations 2005 did not fully implement the provisions of the Equal Treatment Directive in relation to sexual harassment and pregnancy discrimination. The case resulted in a High Court judgement that existing legislation should be revised - *EOC v Secretary of State for Trade and Industry 2007* IRLR 327. Northern Irish laws for working parents are the same as those in Great Britain and also required revision.

Changes to the Sex Discrimination (Northern Ireland) Order 1976 took effect on 6th April 2008, introduced by the **Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2008.**

The changes included a strengthening of the definition of "sex harassment" in order to prohibit unwanted conduct that is 'related to' a woman's sex or that of another person. Previously there had been a requirement that the harassment be "on the grounds of" her sex. Under the new provision a woman is no longer

required to prove that the treatment took place BECAUSE she was a woman. Connection or association with her sex (or that of another person) will suffice. An example is given in the Explanatory Memorandum. Male employees dislike a female colleague. They place equipment on a high shelf beyond her reach. This treatment is not BECAUSE she is a woman – it is because the men dislike her. Is the treatment "related to" the woman's sex? Women are on average shorter than men. The men were still able to reach the equipment; the woman was not. Arguably this would amount to sex harassment under the revised definition.

The Regulations also make changes in relation to third party harassment. This can be a particular problem in jobs where staff come into daily contact with customers, clients or suppliers, such as the retail and hospitality sectors and the professional services sectors, including teaching and parts of the public and voluntary sectors. The Regulations make it clear that employers must take reasonably practicable steps to protect their employees from harassment by third parties. There are two conditions of liability:

1. There must have been two prior incidents of harassment (not necessarily perpetrated by the same person); and
2. The employer must know that the two prior incidents have taken place.

For example, an employee working in a bar might notify her employer that she has been subjected to offensive sex harassment by two different customers on two separate occasions. If the employer takes no or insufficient action to prevent further sex-related conduct by customers and the employee suffers a further incident, the employer would be held liable in any tribunal claim, including liability for injury to feeling. However, a one-off incident of harassment by a customer would not be sufficient to ground liability on the employer.

The legislation does not set out what amounts to "reasonably practicable steps". Employers in bars, clubs, restaurants and reception areas may need to make it clear to customers that subjecting staff to offensive or unwanted conduct will not be tolerated and that appropriate measures will be taken. This could include displaying signs in prominent locations and ensuring that supervisors are available in places where sex-based harassment is likely to happen. The next step might be to speak to the person concerned and make them aware that their behaviour is causing offence. The practical difficulty is often in knowing where to draw the line between harmless banter and offensive language or acts. To take draconian action runs the risk of alienating customers and harming the business: to fail to take "reasonable steps" to protect employees from offensive conduct carries the risk of liability at tribunal.

The regulations also make changes relating to pregnancy and maternity leave. They remove the need for a comparator in such cases. Now a woman need only show that less favourable treatment is by reason of her pregnancy or exercising her right to maternity leave. The Explanatory Memorandum gives as an example the situation where a pregnant woman's employer refuses to allow her additional toilet breaks while pregnant. A further illustration is the pregnant woman whose

job requires heavy lifting which she is unable to do but which she is still told to do. Such women may now have a claim under the new regulations without having to compare themselves with anyone.

The Regulations also make changes to an employee's entitlement to certain benefits of her terms and conditions of employment, whilst on compulsory and additional maternity leave. These changes apply wherever a woman's expected week of childbirth began on or after 5th October 2008. They were implemented by the **Maternity and Parental Leave (Amendment) Regulations (Northern Ireland) 2008 and the Paternity and Adoption Leave (Amendment) Regulations (Northern Ireland) 2008**.The key change is that women expecting a baby, or employees expecting a child to be placed with them for adoption, will be able to benefit from their normal terms and conditions of employment, apart from pay, throughout their maternity or adoption leave. These terms and conditions can include access to a company car; provision of private medical cover and annual leave accrual. Before this change in the law, entitlement existed only during the first 26 weeks of leave ('ordinary' maternity leave) with more limited terms and conditions during the second 26 weeks ('additional' maternity leave). The system has become more straightforward and more beneficial for those caring for children. If company policies currently make a distinction between the non-pay benefits available to a new mother or adopter during their ordinary and additional leave, these need to be removed. Otherwise, the employer may face a claim of unlawful sex discrimination.

A further change relates to the non-payment of discretionary bonuses during the period of compulsory maternity leave (normally two weeks) following the birth of the baby. This will now amount to discrimination under the SDO Amendment Regulations.

Revised guidance on maternity leave can be found in the Department for Employment and Learning's booklet, 'Maternity Rights: A guide for employers and employees (ER 16)'. Revised guidance on adoption leave can be found in the Department's booklet 'Adoptive Parents: A guide for employers and employees (ER 35)'. Booklets are available for download from www.delni.gov.uk/erbooklets

The **Sex Discrimination (Amendment of Legislation) Regulations (Northern Ireland) (2008)** make important changes in relation to sex discrimination in the provision of goods, facilities and services.

5(b) Further Implementation of the 2006 Work and Families Order

The **Work and Families (NI) Order 2006** introduced a series of important changes including enhanced maternity rights and the extension of flexible working. Outstanding matters under the Order include the introduction of Additional Paternity Leave and Pay ("APL&P") and the further Extension of the Statutory Maternity Pay ("SMP") Period

The Department for Employment and Learning has held a number of public consultation exercises on the new APL&P scheme. The scheme will provide eligible fathers with a right to take up to 26 weeks off work to care for their new-born baby during the second six months of the child's life, provided the mother has returned to work. This will be in addition to the current entitlement to two weeks' paid paternity leave after the birth, which was introduced in April 2003. APL&P will also be available to partners and civil partners of mothers and members of adopting couples who are employed and where there is an entitlement to Statutory Adoption Leave and Pay.

The Government intends to bring in APL&P alongside the extension SMP, Maternity Allowance (MA) and Statutory Adoption Pay (SAP) from 39 weeks to 52 weeks. The implementation date has not yet been finally decided but April 2010 was widely anticipated. The Government has consistently affirmed a commitment to introduce the changes by the end of this Parliament. However, there are some indications that implementation may be delayed in order to help firms cope with the economic downturn.

The last consultation, which closed on 5th October 2007, looked at the administration of APL&P. The Department is proposing that the father and mother should self-certify to the father's employer that the father is eligible for APL&P. There would be no need for the mother's employer or HMRC to be involved in the process. The consultation set out how the process would work in practice, identifying what is required of the father, the mother and the father's employer.

5(c) Flexible Working Changes

An extra 4.5 million parents in Britain will gain the right to request flexible working, following the publication of the government's independent review. (Former) Business Secretary John Hutton accepted the recommendations made by Imelda Walsh, the HR director of Sainsbury's, to extend the right to request flexible working to parents of children up to age 16. Despite press reports in October 2008 that the new Business Secretary, Lord Mandelson, favoured delaying implementation in view of the economic crisis, the government is now moving towards implementation in Great Britain in April 2009.

The Walsh Review also found:

- Any change should be implemented at once, rather than a staged introduction, to avoid creating confusion for business and employees.
- Small businesses generally had a better record on accepting flexible working requests than larger ones.
- Business would benefit from increased information and guidance about dealing with flexible working requests.
- Flexible working should not be considered a 'women's issue', with 14 million employees currently working flexibly, and the latest figures

showing men make up 45% of this figure. The increasing earning power of women also suggests that flexible working now, and in the future, is far from being an issue that affects only women.

- More work should be done to raise awareness of the right to request flexible working, both among employees and employers.

According to a survey by Price Waterhouse Coopers (published in March 2008) three-quarters of Northern Irish companies employ staff on a flexible working arrangement, with two-fifths having more than 10% of their staff on a flexible working arrangement. In the 5 years since the introduction of the right to request flexible working here there have been relatively few claims to tribunal. There is evidence that some firms are promoting flexible working as an alternative to having to consider possible redundancies. The extension of the statutory right to request flexible working will not come into being in Northern Ireland in April 2009. DEL's promised consultation had not commenced at the time of writing this review (1st March 2009). No legislative timetable is available.

6. MIGRANT WORKERS

6(a) Changes in the rules

2008 saw significant changes in immigration rules which have had an impact upon employment law. The Government regards employers as having a major responsibility in preventing illegal migrant working in the UK and all employers need to understand their obligations or else face tough new civil penalties and criminal sanctions. The three main changes in 2008 were:

6(a)(i) Introduction of the new points-based system.

A new points-based system for immigration is being gradually rolled-out. The new system, based on the Australian model, is the biggest shake-up of the immigration system for 45 years. It will replace over 80 previous routes to work and study in the United Kingdom with five tiers. The system aims to allow British businesses to recruit the skills they need from abroad while providing assurances to the British public that only those migrants who are needed will be able to come to the United Kingdom.

Who does the system apply to?

The points-based system only covers migrants from outside the European Economic Area ("EEA") and Switzerland. Permission is not needed to employ or teach an EEA or Swiss national. There are some restrictions on nationals of countries that joined the EEA more recently.

What are the tiers?

The points-based system consists of five tiers. These are:

- tier 1 - highly skilled workers, for example scientists and entrepreneurs;
- tier 2 - skilled workers with a job offer, for example teachers and nurses;
- tier 3 - low skilled workers filling specific temporary labour shortages, for example construction workers for a particular project;

- tier 4 - students;
- tier 5 - youth mobility and temporary workers for example musicians coming to play in a concert.

Status
Tier 1 is now fully open. However, from 1st April 2009 the Government intends to tighten the criteria against which highly-skilled migrant workers are judged, by raising the qualifications and salary required for tier 1 to possession of a Master's degree and a minimum current salary of £20,000.

Tier 3 is currently suspended, which means that no foreign national from outside the EEA can come to the United Kingdom and work in a low-skilled job.

Tier 2, relating to skilled workers, replaces the current work permit scheme. Tier 5 covers temporary workers entering the United Kingdom for a short period. These tiers "went live" on 27 November 2008. From that date, an employer wishing to bring non-EEA migrants to the United Kingdom under tiers 2 and 5 needs to be a licensed sponsor. Sponsors will be responsible for issuing certificates of sponsorship to migrants and ensuring that their sponsor obligations are fulfilled. Migrants can then use the certificate of sponsorship to apply for entry clearance. From 1st April 2009, employers must advertise Tier 2 jobs to resident workers through Jobcentre Plus before they can bring in a worker from outside the EEA.

Tier 4 relates to students, and a new policy on Tier 4 is due to be published on 9th March 2009, in relation to students applying to study in the United Kingdom after 31st March 2009. Under the proposals a Tier 4 applicant must have a 'visa letter', issued by a licensed sponsor, before making an application. The sponsor is an education provider offering the applicant a place on a course of study in the United Kingdom. The visa letter is a formal offer by the sponsor to the applicant for the course of study he/she wants to do. This obligation applies in relation to new students and any students already here who need to extend their stay.

How the system works
Under the new system, migrants will need to pass a points-based assessment before they are given permission to enter or remain in the United Kingdom. The system will consist of five tiers. Each tier has different points requirements. The number of points the migrant needs and the way the points are awarded will depend on the tier they are applying under. Points will be awarded to reflect the migrant's ability, experience, and age and the level of need within the sector where the migrant will be working.

The role of the sponsor
Migrants applying under any tier except tier 1 will need to be sponsored in order for their application to be successful. If a United Kingdom organisation wishes to recruit a migrant under tiers 2, 4 or tier 5 they will have to apply for a sponsor

licence. Under tiers 2 and 5 (Temporary Workers category) the sponsor will need to be a United Kingdom based employer. Migrants wishing to come to the United Kingdom under Tier 5 (Youth Mobility category) do not require a United Kingdom based employer. Under tier 4, the sponsor will need to be a United Kingdom based educational institution.

6(a)(ii) Introduction of Compulsory Identity cards for foreign nationals
New biometric identity cards began to be issued to some categories of foreign nationals from 25th November 2008. Identity cards for foreign nationals are a form of residence permit, and will replace the vignettes (or stickers) previously placed in passports. They will be phased in for all foreign nationals from outside the EEA and Switzerland over the next three years. From 25 November 2008, compulsory identity cards will be issued to those who apply for an extension of their permission to stay in the United Kingdom as students or as the husbands, wives or partners of permanent residents. Other applicants will continue to receive a sticker (vignette) in their passport, and the two systems will run alongside each other for a few years. More immigration categories will switch from vignettes to cards at a later date.

All applicants aged six or over will be required to give biometrics. These will be scans of all 10 fingerprints and a digital photo. Applicants who are under six will not be required to provide fingerprints. There will be no endorsement in the passport. The grant of leave to stay in the United Kingdom will be issued as a standalone card.

The card will be evidence of the holder's nationality, identity and status in the United Kingdom. It will give information on what the migrant is entitled to and his/her right to work or study here. Sponsors are expected to look at the card carefully. It will show the person's entitlement to work, study or access public funds.

The introduction of identity cards does not mean that employers must change the checks they currently make on foreign nationals' right to be in the United Kingdom. Gradually, they will simply replace existing vignettes (stickers) and other immigration status documents with a card that is more secure.

6(a)(iii) New Penalty System
Civil Penalties for employers
A civil penalty system for employers who employ illegal workers was introduced on 29th February 2008. Sections 15–25 of the Immigration, Asylum and Nationality Act 2006 (the '2006 Act') set out the relevant law. They replace the previous offence under section 8 of the Asylum and Immigration Act 1996.

An employer who employs someone subject to immigration control aged over 16 who is not entitled to undertake the work in question will be liable to pay a civil penalty of up to £10,000 per illegal worker. Employers found to be using illegal

migrant workers will be served with a notification of potential liability (NOPL) by immigration staff carrying out enforcement and compliance visits. The Illegal Working Civil Penalty Unit will then consider evidence provided by the visiting officer or team and decide whether to issue the employer with a notification of liability (NOL) and a civil penalty of up to £10,000 for each illegal worker.

If a notice of liability is issued and civil penalty imposed against an employer found to be using illegal migrant workers, the employer must, within 28 days:

- pay the civil penalty in full; or
- submit a request to the Illegal Working Appeals and Finance Section to pay the civil penalty in a series of monthly instalments; or
- submit an objection against the service of the civil penalty to the UK Border Agency; or
- lodge an appeal against the service of the civil penalty to the County Court

The penalty system operates on a sliding scale of amounts, based on the type of eligibility checks employers have made on their workers, the number of occasions on which a warning has been issued or civil penalty imposed, and the extent to which the employer has co-operated with us. A Code of Practice has been produced to provide further information. Details of employers who have been found to be liable for the payment of a civil penalty for employing illegal migrant workers are published on the website of the UK Border Agency. A number of Northern Irish employers currently feature on the site!

Section 15 of the 2006 Act also enables employers to establish an excuse against liability for payment of a civil penalty for employing an illegal migrant. An employer can establish the excuse by checking and copying certain original documents **before** the person starts work. If the person provides a document, or documents, from **List A**, this will establish an excuse for the duration of their employment. A document or documents from **List B** that indicate that they only have limited leave to be in the UK, then the checks should be repeated on that employee at least once every 12 months or until they provide documents indicating that they can remain permanently.

New Criminal Offence

The new penalty scheme sits alongside a tough new criminal offence of knowingly employing an illegal migrant worker (section 21 of the 2006 Act). This will be used in the more serious cases where rogue employers knowingly and deliberately use illegal migrant workers, often for personal financial gain. On summary conviction, the maximum penalty an employer may be given will be a fine of no more than the statutory maximum for each person employed illegally, and/or imprisonment for up to 6 months. Following conviction on indictment, there is no upper limit to the level of fine that can be imposed, and the employer may also be subject to imprisonment for up to two years.

Guidance and Codes of Practice are available on the Border and Immigration Agency's website - http://www.bia.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/guidancefrom290208/

6(b) HSE MIGRANT WORKER ADVICE

A new guide published by the HSE in June gives essential guidance to employers, employment agencies, employment businesses, gangmasters and other labour providers on their responsibilities under health and safety law towards workers from overseas (migrant workers). Topics include:

- Who is responsible for the health and safety of migrant workers?
- What are the main responsibilities?
- What do labour providers and users have to do?
- What is the role in risk assessment?
- What about information, instruction, training and supervision?
- Do I need to keep records?
- Can I get help with language issues?
- What else do I need to do?

http://www.hse.gov.uk/migrantworkers/employer.htm?ebul=hsegen/23-jun-2008&cr=5

7. CORPORATE MANSLAUGHTER

The Corporate Manslaughter and Corporate Homicide Act 2007 received Royal Assent on 26 July 2007and almost all of its provisions came into effect in April 2008. The Act applies to private limited companies; many public bodies including local councils and NHS bodies; limited liability partnerships and all other partnerships that are employers; Crown bodies such as Government departments; and the police. The legislation was introduced because of the difficulties of finding a “controlling mind” in larger organisations, a pre-requisite for liability for manslaughter.

The Act does not create new safety duties as such – these are already owed in the civil law of negligence - and the new offence is based on the common duty of care. A duty of care exists for example in respect of the systems of work and equipment used by employees, the condition of worksites and other premises occupied by an organisation and in relation to products or services supplied to customers. The new Act has been criticized for failing to place new, specific, health and safety duties on company directors and other senior managers.

An organisation is guilty of the new offence of corporate manslaughter if the way in which its activities are managed or organised causes a death and this amounts to a gross breach of a relevant duty of care to the deceased. A substantial part of the breach must have been in the way activities were managed by senior management. This means that the people who make significant decisions about the organisation or substantial parts of it (including both centralised, headquarters functions as well as those in operational management roles) must

have been involved. The offence is aimed at cases where management failures lie across an organisation and it is the organisation itself (rather than individuals) that will face prosecution.

An organisation guilty of the offence will be liable to an unlimited fine. As these are criminal fines they are not insurable. Final sentencing guidelines have not yet been issued but a consultation by the Sentencing Guidelines Council suggested a fine of 5% of gross annual turnover might be appropriate in an "average" case or 10% of gross annual turnover in a particularly serious one. Firms are also liable to a remedial order, which will require a company or organisation to take steps to remedy any management failure that led to a death. The court can also impose an order requiring the company or organisation to publicise that it has been convicted of the offence, giving the details, the amount of any fine imposed and the terms of any remedial order made.

The organisation's conduct must have fallen far below what could have been reasonably expected. Juries will have to take into account any health and safety breaches by the organisation – and how serious and dangerous those failures were. The government estimates that there could be in the region of a dozen prosecutions each year.

Relevant duties of care are set out in section 2 of the Act and include, for example, employer and occupier duties; duties connected with the supply of goods or services, commercial activities or construction and maintenance work; and duties related to holding a person in custody. The majority of the Act was implemented on 6 April 2008, with two minor exceptions:

- section 2(1)(d) which deals with duties owed to people detained in custody,
- section 10 on publicity orders (a court order requiring the organisation to publicise details of its conviction and fine) where we await guidelines to be issued by the Sentencing Guidelines Council later this year.

In Great Britain Baroness Ashton confirmed in the House of Lords on 23 July 2007 that the Government would work to implement Section 2(1)(d) within three years from commencement of the Act, but she added that a five-year lead in time might be necessary for certain custody providers.

The decision when to bring section 2(1)(d) into force in Northern Ireland currently lies with the Secretary of State for Northern Ireland, in the absence of devolution of policing and justice to the Northern Ireland Executive. In Northern Ireland, duties related to holding patients in detention (under the Mental Health (Northern Ireland) Order 1986) and accommodating young people in secure care (under the Children (Northern Ireland) Order 1995) fall primarily upon the local Health and Social Care Boards and Trusts. These bodies are the responsibility of the Northern Ireland Minister for Health, Social Services and Public Safety, Michael McGimpsey. In considering when to bring into force these provisions on mental

health and secure accommodation, the Secretary of State for Northern Ireland is liaising closely with the Minister.

What does it mean in practice?
The new legislation places the onus on businesses and other organisations to ensure that health and safety is given a high priority at senior management level. It is their responsibility to ensure that guidelines are followed and that the relevant policy documents are in place. The mere existence of a safety handbook, however, will not be a sufficient defence in law. Companies will have to demonstrate that their policies are enforced and be able to produce appropriate evidence of compliance. There are particular concerns where employees are working remotely, including working at home. Organisations need to carry out risk assessments on the premises to identify potential hazards, and ensure that homeworkers are trained to use any equipment and that it is maintained correctly.

Remote workers who use their own cars for business are also covered by the Act. Organisations will need to implement robust policies to check, for example, that such staff hold valid driving licences and report any accidents, and use vehicles that are well maintained, insured for business use and have valid MOT certificates. Technology – such as alarms, online monitors and other tracking devices that enable managers to determine the exact location of mobile staff – can be a great help in supporting staff and demonstrating effective corporate compliance.

All organisations should review their health and safety policies in the light of the new Act. Any business that fails to address health and safety performance issues could find itself facing very serious charges.

Key points to remember:
- make health and safety a priority and a central part of your company culture
- ensure senior managers are aware of the implications of the new legislation and understand how it applies in particular to homeworkers and those using their own vehicles for business
- conduct a thorough audit of safety management systems.
- ensure remote workers are trained to use work equipment and that it is well maintained
- make use of technology in protecting the health, safety and welfare of staff
- identify areas for risk relating to your remote workforce and address them
- check your health and safety policies are up-to-date, regularly reviewed and, most important, enforced

The Sentencing Guidelines Council is currently working on sentencing guidelines for the offence of corporate manslaughter. Such guidelines had been expected in Autumn 2008 but have now been delayed until 2009.

The Institute of Directors and the Health and Safety Commission have jointly published guidance, which sets out an agenda for the effective leadership of health and safety. It is designed for use by all directors, governors, trustees, officers and their equivalents in the private, public and third sectors. It applies to organisations of all sizes. It is entitled: "Leading Health and Safety at Work - Leadership Actions for Directors and Board Members" and is available at: http://www.hse.gov.uk/pubns/indg417.pdf

8. INFORMATION AND CONSULTATION

8(a) Application to Smaller Firms – 50+ employees

From 6th April 2008 the **Information and Consultation of Employees Regulations (Northern Ireland) 2005** apply to businesses with 50 or more employees. This is the final stage in the gradual application of the Regulations, which are designed to implement the EU Information and Consultation Directive (2002/14/EC). The Regulations will have no application to firms with fewer than 50 employees. In general the regulations have been slow to have an impact, perhaps because they involved no great cultural change for larger employers. Commentators predict that there may be proportionately more cases now that smaller employers are involved, because these organisations are likely to be less sophisticated. They may not handle requests appropriately, and they may not have a consultation culture – they are less likely to have trade unions, or any other staff bodies, for example.

The regulations establish a right to minimum standards of workplace communication and involvement. Employees are entitled to receive information and to be consulted. Before these regulations were introduced, such rights were limited to consultation about collective redundancies, transfers of undertakings and health and safety, and, in large multi-national companies, consultation through European Works Councils. The "ICE" Directive gives employees rights to be informed about the business's economic situation, informed and consulted about employment prospects and informed and consulted about situations likely to lead to substantial changes in work organisation or contractual relations, including redundancies and transfers. The ICE regulations were initially restricted to businesses with 150 or more employees and in 2007 were extended to businesses employing 100 or more.

What is "an undertaking"?

From April 2008 the legislation applies to "undertakings" situated in Northern Ireland that carry out an economic activity and have 50 or more employees. DEL guidance on the ICE Regulations states that an "undertaking" in the case of a company, means a separately incorporated legal entity with its own unique registration number at Companies Registry. Let us consider an organisation which consists of four separate companies each employing fewer than 50 employees. The companies are part of a group, but each has distinct legal

personality. The regulations would seem to have no application. In contrast, a single company, split into divisions which are not legal entities in their own right, employing in total more than 50 employees, would have to comply with the legislation.

In relation to the "trigger" request, where each establishment is a separate legal entity an employee request must be made by 10% of the employees in the specific undertaking (i.e. one of the companies in the group). Where the undertaking is one single entity but consisting of several separate establishments or business units, the request must be made by 10% of the employees in the undertaking as a whole, not 10% of those in one of the establishments or business units. It is possible to set up arrangements that cover more than one undertaking, and to have different arrangements in different parts of the business, for example, at different establishments (sites), in different business units, or covering different sections of the workforce.

The "trigger" request

The requirement to inform and consult employees does not operate automatically. It is triggered either by a formal request from employees for an Information and Consultation agreement, or by employers choosing to start the process themselves. An obligation to set up information and consultation arrangements will only arise if a request is made in writing by at least 10% of the workforce (subject to a minimum number of 15 employees and a maximum of 2,500). The minimum figure means that a very small number of employees in smaller firms would not be able to start the process; the maximum figure means that a very large number in bigger firms would not be required.

Where employees make a request, or employers start the process themselves, there would normally be a period for drawing up and agreeing the on-going Information and Consultation arrangements to be put in place. Employers and employees are free to agree arrangements and structures tailored to their individual circumstances. Where no agreement is reached certain "standard" provisions apply requiring the employer to inform and consult in the way set out in regulation 20.

Pre-existing agreements

There is an important exception for pre-existing agreements. Where the employer already has arrangements in place that have been agreed with employees prior to an employee request for new arrangements, under the Regulations, the employer may ballot the workforce to determine whether it endorses the employee request, or whether it is happy with what it has. Only if the employee request gains the endorsement of at least 40% of those affected (either making the request or in a subsequent ballot) will the employer have to commence negotiations with employee representatives, within 3 months, to try to reach a negotiated agreement. Where this is not achieved within 6 months (or a longer period, if agreed) or if a negotiated agreement is not approved by at least 50% of

employees in writing or voting in a ballot then the employer must set up an information and consultation committee according to Standard Information and Consultation Provisions (the default scheme). If an employer **wrongly** believes that a request is not valid or has been made by too few employees, and fails to act on it, the standard provisions would apply automatically after 6 months.

If the employee request is not endorsed as above, then the pre-existing agreement continues to apply. There will be a three-year moratorium on future employee requests. Pre-existing agreements must be in writing, state how employees or their representatives will be informed and consulted, and cover all the employees in the undertaking.

Rights of ICE representatives
Employees who act as negotiating representatives or Information and Consultation representatives are entitled to take reasonable time off during working hours to perform their functions as representatives, and to be paid for this time. This right applies to employees who are elected or appointed as negotiating representatives or as Information and Consultation representatives (whether under a negotiated agreement or because the employer is subject to the standard Information and Consultation provisions).

Employees may complain to an Industrial Tribunal if their employer unreasonably refuses to let them take time off, or fails to pay them for it. Complaints must be brought within 3 months of the time taken off, or when it should have been taken off.

Information may be given to employee representatives on a confidential basis to protect the interests of the undertaking, or withheld altogether where disclosure would seriously harm or prejudice the undertaking. There are provisions to protect employees who seek to exercise their legal rights. Employees are protected against unfair dismissal or detriment by their employer when acting as representatives of employees under a negotiated agreement or under the standard Information and Consultation provisions. They are also protected when standing as candidates for election, or when seeking to enjoy rights given to them by the Regulations, and in certain other circumstances.

Failure to agree
There are no fewer than 14 different types of dispute which can be referred to the Industrial Court under the Regulations. The Industrial Court can refer the case to the Labour Relations Agency for conciliation. Employers may be liable to a financial penalty (a fine of up to £75,000) if they fail to inform and consult as required. The enforcement provisions do not apply to pre-existing agreements.

The first ICE complaint - under Regulation 22(1) of the Information and Consultation of Employees Regulations (NI) 2005 - was decided by the Court on the 13th February 2008. The case of *Sheridan and Montupet UK Ltd* involved a

claim that the company had failed to comply with its ICE agreement when it engaged directly with the workforce, presenting its Business Plan for 2007 at a series of briefings, rather than leaving communication of the plans to the ICE representatives. Conciliation attempts by the Labour Relations Agency came to nothing. The Court was satisfied that the employer had not acted in breach of the ICE agreement. The employer did not obstruct consultations between the ICE representatives and the workforce but rather went out of its way to facilitate them. The employer was repeating previous practice and had invited ICE representatives to attend the briefing sessions. The employer reminded the Court that the preamble to the Directive states: "*This Directive is without prejudice to those systems which provide for the direct involvement of employees..*"
Hand in glove with the widening scope of the ICE regulations are the Occupational and Personal Pension Schemes (Consultation by Employers) Regulations 2006. They will apply to organisations of 50 or more employees from April. The legislation requires employers to consult employees over changes to pension schemes at least 60 days before the change is introduced. Like the ICE regulations, the legislation is designed to promote better communication between employers and their workforces

8(b)DELNI Guidance
We noted above that the coverage of the Information and Consultation of Employees Regulations (NI) 2005 has been extended. From 6 April 2008 the Regulations affect businesses with 50 or more employees. The Department for Employment and Learning has up-dated the booklet which gives general guidance on the Information and Consultation Regulations. It provides detailed explanations of when the duty to set up information and consultation arrangements arises; the process involved; the rights and protections for ICE representatives; how to deal with confidential or price-sensitive information; how to resolve disputes and gives suggestions for the contents of ICE agreements.
http://www.delni.gov.uk/information_and_consultation_april30_2008.pdf

9. Criminal Records
Checking a person's criminal record can be a vital if highly sensitive part of the recruitment process. A person's criminal history is particularly important where the proposed employment involves working with or in the proximity of children or vulnerable adults. The system for lawfully accessing and checking a person's criminal record was changed in Northern Ireland in 2008.

From 1st April 2008 Part V of the Police Act 1997 has applied in Northern Ireland – see **The Police Act 1997 (Commencement No. 10) Order 2007** (SR 2007 No. 3342). This provides a new statutory-based framework whereby the criminal history of a potential employee or volunteer can be provided to employers and other organisations. The previous system of obtaining information directly from the Police has ceased. AccessNI is the new body responsible for releasing the information and is part of the Northern Ireland Office

The system is the same as that operated by the Criminal Records Bureau in GB. There are three levels of Disclosure, each representing a different level of check - Basic, Standard and Enhanced:

- The Basic Disclosure Certificate will show details of all convictions considered to be unspent under the Rehabilitation of Offenders (Northern Ireland) Order 1978, or state that no such convictions were found. Any individual can apply for a Basic Disclosure Certificate.
- The Standard Disclosure Certificate shows details of spent and unspent convictions and cautions. It does not show details of cases pending. A standard disclosure is likely to be needed where the position is included within the scope of the Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979
- An Enhanced Disclosure contains all of the information in the Standard Disclosure plus other relevant information held in police records. This can include information about attempted prosecutions that were unsuccessful or behaviour that might be indicative of criminal activity. Enhanced Disclosures are used mainly for positions that involve contact with children or vulnerable adults. The type of work may involve for example, regularly caring for, supervising, training or being in sole charge of young people; or regular contact with residents of care homes or providing services to unwell, infirm or disabled people in their own home. Enhanced Disclosures are also issued for certain statutory purposes or specific posts such as judicial appointments and appointments by or under the Crown.

Part V of the 1997 Act does not create any new general obligation on employers to seek disclosures from AccessNI. Obligations already exist in some sectors (such as working with children) to consider the contents of a Disclosure Certificate as part of the assessment of suitability before making an appointment. Standard Disclosures will normally be sufficient for anyone with access to children or vulnerable groups in the normal course of employment. A check for "regulated" or "care" positions under the Protection of Children and Vulnerable Adults (NI) Order 2003 will require an Enhanced Disclosure. These are positions where someone is regularly caring for, training, supervising or being in sole charge of children or vulnerable adults.

Information on criminal records is clearly "sensitive personal data" for the purposes of the Data Protection Act. This means that employers must comply with the Eight Data Protection Principles listed in Schedule 1 of the Data Protection Act. These principles constitute the ground rules for obtaining, holding, securing, transferring and destroying sensitive personal data

AccessNI came under some criticism for allowing a backlog to develop and failing to meet its target times. Extra staff and resources were put in. In early October 2008 Minister of State Paul Goggins confirmed that AccessNI had reduced its backlog and remained committed to return to the four week target set for processing enhanced disclosures by the end of the year,

A range of useful materials is available on-line at:
http://www.accessni.gov.uk/

10. TRADE UNION LAW

10(a)ASLEF Consultation

The second DELNI consultation of June 2008 put forward a proposal to address the decision of the European Court of Human Rights in the case of **ASLEF v The United Kingdom** (Application no 11002/05) which had concluded that trade unions should have more autonomy to decide their membership. Could trade unions, which historically in Britain have been to the Left of the political spectrum, lawfully expel members who belong to the British National Party ("the BNP") or other Right-wing parties? Under British trade union law this was very difficult. If a union expelled or excluded someone because of his or her membership of a political party, that person could complain to a Tribunal and obtain compensation, of between £6,600 and £69,900 - even higher than the maximum compensatory award for unfair dismissal. It is no wonder that some political groups on the extreme Right encouraged their members to make use of these provisions and to join unions in the cynical expectation of being expelled, once their party political affiliation became known. The BNP was particularly creative in litigation on behalf of members and brought a series of challenges to union expulsion decisions in 2002-03.

Following a Tribunal ruling in one such case, ASLEF applied directly to the ECtHR. Referring to the European Convention on Human Rights (the Convention") the ECtHR stated:

> "*Article 11 cannot be interpreted as imposing an obligation on associations or organisations to admit whosoever wishes to join. Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership.*"

The ECtHR concluded that the relevant part of British law violated Article 11 of the Convention. The Government has recognised that trade union law should be amended to ensure compatibility with the Convention and hence DEL has engaged in a consultation exercise. The consultation document also contained several other minor miscellaneous amendments, the most significant of which are changes concerning legal representation for parties appearing before the Industrial Court. Views were also requested on two areas of NI trade union law which differ from the GB position in relation to the procedure for making donations to trade union political funds and the right not to be excluded from a trade union. In GB members have the right to opt-out of the political fund, whereas members in Northern Ireland must opt-in. In GB the legislation covers both expulsions and exclusions from membership whereas in Northern Ireland only expulsions are currently covered. The closing date for responses to the consultation was 30th September 2008.

The Employment Act 2008 contains the corresponding amendments to GB trade union law in relation to the ASLEF decision. Its passage through the Lords proved contentious as a number of Government amendments were proposed but rejected by the trade union movement. The amendments reflect a concern that there must be safeguards to protect the individual who wishes to join a trade union in order to avoid human rights challenges to expulsions or exclusions. It has proved difficult to strike the right balance between implementing the ASLEF judgement; protecting union autonomy and securing the rights of the individual who wishes to join the trade union of his or her choice.

The proposed amendments which were ultimately enacted in section 19 state that an exclusion or expulsion would be unlawful where:
"(a) the decision to exclude or expel is taken otherwise than in accordance with the union's rules;
(b) the decision to exclude or expel is taken unfairly;
(c) the individual would lose his livelihood or suffer other exceptional hardship by reason of not being, or ceasing to be, a member of the union."

They also provide that:
"a decision to exclude or expel an individual is taken unfairly if (and only if)—
(a) before the decision is taken the individual is not given—
(i) notice of the proposal to exclude or expel him and the reasons for that proposal, and
(ii) a fair opportunity to make representations in respect of that proposal, or representations made by the individual in respect of that proposal are not considered fairly."

Union objections centred on the fact that their rule books would be subject to frequent amendment as they engage in a cat and mouse game with groups who change their name frequently (eg "BNP08"; "BNP09") in an effort to keep one step ahead. Unions would have preferred to remove the specific statutory protections and leave the matter to the common law.

10(b) IMPACT OF *VIKING*; *LAVAL*; *RUFFERT*
International Transport Workers Federation v Viking [2008] IRLR 143
Laval v Svenska Byggnadsarbetareforbundet [2008] IRLR 160 ECJ
Ruffert v Landniedesachsen [2008] IRLR 467 ECJ

This trio of decisions from the European Court of Justice has proved controversial. Some commentators have condemned them as reasserting the primacy of economic rights over social rights and undermining the freedom of unions to protect the terms and conditions of workers. They assert that both the right to strike and the right to bargain collectively have been fatally undermined by the ECJ. Others believe that freedom to establish a business anywhere in the

EU together with free movement of labour are essential pillars of community law whose observance is vital to maximise opportunities for trade.

In 2003 the Finnish ferry company *Viking* Line re-flagged its vessels and employed an Estonian crew, cutting its wage costs by 60%, prompting industrial action among its Finnish workers. The ECJ (for the first time) recognized that the right to strike was a "fundamental right which forms an integral part of the general principles of Community law", which was necessary to protect the public interest in the protection of workers. Nevertheless, it said, the right to strike had to be balanced against another fundamental right in European law, the freedom of establishment. This right is protected by Article 43 of the EC Treaty and applies (for example) whenever a business wishes to re-locate to another Member State. As freedom of establishment was not just a "general principle" of Community law but was "horizontally binding", the ECJ said, businesses could rely upon it directly to bring injunction proceedings in their national courts. The national court must grant the injunction sought unless the strike was a proportionate means of achieving a legitimate aim. The proportionality requirement meant that the union would have to show that it had exhausted all less disruptive means of achieving the legitimate aim, before calling the strike. This case undoubtedly introduces an additional level of judicial scrutiny to strike action, on top of the myriad of existing restrictions on industrial action, whenever an Article 43 dimension exists.

In 2004 a Latvian company, *Laval*, sent workers to building sites in Sweden. The Swedish construction union asked the company to agree to the existing collective agreement within the building sector. It refused, operating instead under the Latvian agreement - including lower pay that undercut the Swedish workers' wages. A strike ensued. Again, the ECJ ruled in the company's favour. The European legislation on posted workers only requires the posting employer to apply the minimum labour standards of the host state, which Laval had done. The strike impinged upon the employer's freedom to provide services in Sweden and, as it sought to hold the employer to a higher standard than the applicable legislation, the ECJ held that it could not be said that the strike pursued a legitimate aim.

In *Ruffert*, a German authority awarded a contract to build a prison to a German contractor on terms which required it to ensure that wages were at least the level of the minimum provided for in a collective agreement which applied in the sector. The contractor engaged a Polish sub-contractor who paid his workers from Poland at a lower rate. The inclusion of the contract compliance conditions in the public procurement contracts was held by the ECJ to infringe the right to provide services set out in Article 49 of the EC Treaty. The case presents a set-back for the inclusion of fair wages and other fair employment clauses in public procurement contracting.

The overall tenor of all three judgements is to place greater weight on securing economic freedoms within the internal market rather than the protection of social

rights. They usher in a new set of legal restrictions which operate whenever there is a transnational dimension to a contract or a dispute. Commentators on the left have described this as “the EU race to the bottom” and have highlighted the need for greater regulation to end low pay, low skill and casualised labour; the need to defend strong trade unions and to promote the creation of new forms of economic citizenship, particularly during difficult economic conditions.

Similar problems were highlighted in the United Kingdom at the end of January 2009. In a series of strikes across the country (including Northern Ireland) more than 3,000 oil and gas workers walked out in protest against construction jobs at a Lincolnshire power station going to workers from Portugal and Italy. The wildcat action began after the Italian company IREM won a £200m construction contract and supplied its own permanent workforce, with 100 Italian and Portuguese workers already on site and 300 more expected in the following days and weeks. Union leaders complained that British workers had not been given a chance to compete for local jobs. The TUC claimed the refinery owner, Total, had made an "apparent attempt to undercut the wages, conditions and union representation of existing staff". Total argued that the practice was permitted by the Posted Workers Directive.
After 3 days of talks facilitated by ACAS a compromise was reached whereby IREM agreed that half of the future jobs would go to British workers and agreed to greater transparency over the terms and conditions of the foreign workers. ACAS is to investigate the original tendering process to see if it fact complied with European rules. It is not altogether clear whether the compromise agreement itself complies with European law.

During the current recession it seems inevitable that similar disputes will become increasingly common with obvious flashpoints such as the major construction projects arising from the London Olympics. It seems inevitable that the *Viking, Laval* and *Ruffert* trinity will be revisited by the European Court of Justice before too long.

11. SOME KEY CASES

Comparator in cases of “disability-related” discrimination

London Borough of Lewisham v Malcolm 2008 UKHL

Although not an employment case, *Malcolm* is highly significant for employment law. The House of Lords has indicated that the Disability Discrimination Act must be interpreted consistently across the different fields to which it applies.

Mr. Malcolm had a mental illness which was controlled by medication. He was a council tenant who sub-let his flat in breach of his tenancy agreement at a time when he was not taking his medication. The council moved to repossess the flat (as it did in all cases of sub-letting) and continued to seek his eviction, even after he moved back in and was taking his medication. There was evidence that he would not have sub-let his flat if he had been taking his medication.

In his defence to the repossession proceedings Mr. Malcolm alleged that he was being discriminated against contrary to section 22 of the Disability Discrimination Act 1995. He contended that he was a disabled person and that the Council was taking action "on account of his disability". His defence failed in the County Court but was successful in the Court of Appeal, which set aside the repossession order. The Council appealed to the House of Lords, which found against Mr. Malcolm (Baroness Hale dissenting).

There were two key issues. Firstly, who is the correct comparator in a disability-related discrimination case? The House of Lords ruled that the correct comparator was other non-disabled tenants who had sub-let. Given that the Council would also have sought repossession against them, it followed that Mr. Malcolm did not suffer "less favourable treatment". Their Lordships ruled that the Court of Appeal had wrongly decided the earlier case of *Clark v Novacold* which had taken the view that the comparator in a disability-related case did not need to be in the same or not materially different circumstances. Following this line of argument, Mr. Malcolm's counsel had argued that the correct comparator was a non-disabled tenant who had not sub-let. This was rejected by their Lordships.

Like for like comparisons may be appropriate for other forms of discrimination (sex, race, religion, etc) where the objective is to secure even-handed treatment for all. However, many people believe that they are inappropriate in disability cases because the nature and effect of the disability requires a specific response. As Baroness Hale said, "…if the object of disability discrimination legislation is to "level the playing field" to enable disabled people to do things that they otherwise would not be able to do, then simply ignoring their disability and asking that they be treated in exactly the same way as non-disabled people will not do."

The second key issue was the question whether the respondent must know about the disability in order to be liable. The House of Lords ruled that in order for the respondent's "reason" to "relate to the disability" it is necessary that the discriminator knows of the disability or ought to know of it. Unless the alleged discriminator has knowledge (actual or constructive) of the disability there can be no discrimination. In this case the Council did not know of Mr. Malcolm's disability at the time they took the decision to seek repossession of his flat. Their decision was a pure housing management decision which had nothing to do with his disability.

Commentators have expressed the view that the decision in Malcolm will drastically weaken disability-related discrimination as a ground of complaint. The Government has undertaken to reverse the effect of the decision in Great Britain by way of the Equality Bill. The concept of "disability-related discrimination" will be abolished and replaced by a new definition of indirect disability discrimination.

These proposals do not extend to Northern Ireland.

Associative discrimination – does disability discrimination protect carers?
Coleman v Attridge Law 2008 ECJ C-303/06
Ms Coleman worked as a legal secretary for a large firm of London solicitors, Attridge Law. She claimed she had been subjected to discriminatory treatment by her employers. She had a severely disabled son. When she wanted time off to care for him she was described as lazy. When she was late for work due to problems with child care she was told she would be sacked. She was not allowed to work from home even though other employees were. After she made a formal request for flexible working she was placed in a pool of staff liable to be selected for redundancy. She brought a claim for Disability Discrimination and constructive dismissal. As she herself was not disabled she could not bring her claim within the Disability Discrimination Act 1995 ("the DDA"). However the Equal Treatment Framework Directive 2000/78/EC prohibits discrimination "on the grounds of" disability – but doesn't specify whose disability. The essence of Ms. Coleman's claim was that she was discriminated against on the basis that she was the principal carer for her son, who was a disabled person.

The Employment Tribunal referred the case to the ECJ. At issue were the questions whether the Directive's prohibition of discrimination on grounds of disability only protects from direct discrimination and harassment persons who are themselves disabled, and, if not, whether it extends protection to employees who are treated less favourably or harassed on the ground of their association with a disabled person.

The ECJ ruled that the protection afforded by the Directive was not restricted to people who are themselves disabled. If the less favourable treatment was based on the disability of the child for whom she was the principal carer then that treatment was contrary to the prohibition of direct discrimination laid down by Art 2(2) of the Directive.

Clearly this judgement has important implications for those who care for disabled people, providing protection against direct discrimination and harassment on grounds of their association with a disabled person. It is clear that in this respect the Directive is much more generous than the domestic DDA. The judgement does not appear to mean that there is a duty of reasonable adjustment on employers in respect of those workers caring for disabled people. The ECJ was careful to point out that the Directive "*includes a number of provisions which, as is apparent from their very wording, apply only to disabled people."* The provisions on reasonable accommodation specifically fall into this category.

The judgement left open two important questions. Does the DDA need to be amended or can it be interpreted in a way which is consistent with the Directive? The same Directive governs age and religion and belief. Does the same reasoning apply, for example, to the carer of an elderly relative?

The case was remitted to the Employment Tribunal for resolution and a decision was issued on 26th November 2008. Employment Judge Stacey ruled that the Disability Discrimination Act 1995 should be read to include the words "or a person associated with a disabled person" in the appropriate places, thus deciding that the Act was capable of interpretation consistent with the Directive. Although not required to answer the second question (above) the language of the tribunal affirms the idea that the Directive, in ALL its aspects, covers associative discrimination and that domestic legislation should be interpreted accordingly.

Full judgement of the ECJ can be found at: http://www.curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-303/06
The decision of the Employment Tribunal (26th November 2008) is at:
http://www.bwbllp.com/Files/Articles/Employment_Tribunal_Judgment.pdf

Legality of the mandatory retirement age
The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform (2008) C-388/07 (Heyday) Advocate General and ECJ

The issue of age discrimination is coming to the fore as the recession begins to bite. There are reports that tribunal age bias cases are set to rise by more than 27% in the year to the end of March 2009. One of the most contentious issues is the mandatory retirement age enshrined in the Employment Equality (Age) Regulations (2006) which purported to implement the age strand of the 2000 Framework Directive. The Regulations, unlike the Directive itself, permit an employer to compel an employee of 65 or over to retire, provided the correct procedure is followed. Some 260 cases have been stayed pending the outcome of the Judicial Review proceedings brought by Heyday, the membership organisation supported by Age Concern. On 6th December 2006 the High Court in London heard the claim. With the agreement of all parties, the Judge referred the case to the ECJ.

On 23rd September 2008 the Advocate General recommended that the Court should dismiss the challenge to the regulations. He agreed that the question of mandatory retirement ages fell to be decided under the Directive, but took the view that the Employment Equality (Age) Regulations 2006 could in principle be justified under Article 6(1) of the Directive. His proviso was that the mandatory retirement age "*must be objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market and it is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose*."

On 5th March, 2009 judgement was given by the ECJ. The Court agreed with the Advocate General's view and rejected the claim that the British legislation allowing employers to set a default retirement age fundamentally breaches the

European Directive. The ECJ said the practice of a national mandatory retirement age could be justified if the government was pursuing a legitimate aim related to employment and social policy. It referred the case back to the High Court in London to decide if the age limit was justified in fact.

The court said such treatment may be justified *"if it is a proportionate means to achieve a legitimate social policy objective related to employment policy, the labour market or vocational training.*" What is not allowed is forced retirement used by a company merely as a cost-cutting or competitiveness tactic. However, the court said that the UK government will have to meet a "*high standard of proof*" to establish that a compulsory retirement age is linked to legitimate social and labour market aims.

The ruling has been largely welcomed by British businesses. However, it means that the controversy over forced retirement will continue until the case returns to the High Court for a final determination. Employers will be hoping that the government can successfully argue that the current economic climate and high levels of unemployment will justify the compulsory retirement rules while allowing employers the flexibility to retain more experienced workers if they wish. The government will also argue that the age of 65 coincides with state pension age and makes the system easier to administer, and that it is embedded in UK society and culture.

Campaigners have expressed disappointment with the ECJ's judgement. Gordon Lishman, director general of Age Concern stated "*This sends the message that ageism is less important than other forms of discrimination, but we will continue our fight to ensure that older British workers are judged on their skills and abilities rather than their age… The government continues to consign tens of thousands of willing and able older workers to the scrapheap. It is time for ministers to find the courage of their convictions and abolish the default retirement age without further delay.*"

Many questions remain to be answered. Will it be possible to satisfy the High Court that a retirement age of 65 was proportionate and necessary? 70 or 75 would presumably have less discriminatory impact and be easier to justify. Given the current recession and forecasts of rising unemployment will the Court feel that the age of 65 is within the margin of appreciation?

In the meantime the immediate challenge for public sector employers (in particular) is what to do pending the decision of the High Court. If they continue to retire staff, in accordance with the statutory retirement procedure, at the default retirement age of 65, they risk challenges on a huge scale, if the decision ultimately goes against the validity of the Regulations.

Decision of the Court:
http://www.bailii.org/eu/cases/EUECJ/2009/C38807.html

Equal pay – single status agreements
Allen & Ors v GMB (2008) EWCA Civ
This is one of many cases arising out of the negotiation of a single status pay settlement. As such it has huge implications for many public sector organisations including local government, the NHS and the university sector. In particular it sends warning signals to all those engaged in dealing with the vexed issue of gender inequality in pay that they must be careful that in seeking to remedy one injustice they do not create another.

The GMB was one of the unions which negotiated new terms and conditions for employees of Middlesborough Council as part of the local negotiations arising out of the single status agreement for local authority employees. The negotiations involved parties with quite different agendas. On the one hand the union wanted to secure a measure of pay protection for staff who were disadvantaged as a result of the single status agreement; and they wished to maximize the money available for future pay increases across the board. On the other hand many female workers were concerned to secure the back pay which they were legally entitled to, following on from the re-evaluation of their jobs. GMB failed to support these claims for equal pay against the employer, and the union's subsequent treatment of members who chose to pursue their claims to the Employment Tribunal with external legal representation, resulted in claims against the union for direct and indirect sex discrimination and victimisation. The claims were upheld in the tribunal. The union appealed against the findings; the EAT upheld the appeals and substituted a finding that there had been no relevant discrimination. The EAT granted the claimants permission to appeal to the Court of Appeal on the issue of indirect discrimination (the claimants did not pursue the claims of direct discrimination or victimisation). The Court of Appeal has now reversed the EAT's decision, restored the tribunal's decision and denied the union a right to appeal to the House of Lords.

The Court acknowledged the difficult and conflicting position that the union found itself in when negotiating single status for council workers across white collar, craft and blue collar grades. *"Put very simply, the Council sought an outcome that was affordable. The Union wanted one that somehow compensated the victims of past inequality but at the same time provided a measure of pay protection for those who were disadvantaged by the job evaluation study and maximised the amount available for future pay across the board. In addition, the Union was constrained by the natural perception that, if it pushed too hard, the consequences might include job losses and contracting out, neither of which would be in the interests of its members."* (Maurice Kay, LJ)

However, *"It is beyond dispute that, faced with these conflicting pressures, the Union decided to give priority to those who needed pay protection and to achieving equality and better pay for the future rather than to maximising claims for past unequal pay."* (Maurice Kay, LJ) The union's objectives - to avoid

privatization, job losses and cuts in hours; and to secure the best possible pay protection for the "losers" – were all legitimate aims. However, the question of proportionality had to be considered. The major concern was the way in which the back pay deal was "sold" to the predominantly female affected group. The union had taken "*very little care indeed*" to explain properly the entitlements which these women would be giving up. "*Relatively unsophisticated*" union members were manipulated into accepting the offer by the use of "*alarmist information*" suggesting that if they pushed for more this would lead to job losses and make the women traitors to their colleagues – "*a marked economy of truth*". Although the union's objective was legitimate it was not the only legitimate objective. A statutory entitlement to equal pay had been in existence for over 30 years. The means used to achieve the objective were disproportionate and the Court of Appeal re-instated the Tribunal's finding that there had been unlawful indirect sex discrimination by the GMB.

Commentators have warned that this decision leaves trade unions highly vulnerable to indirect discrimination claims since it is inevitable that collective bargaining can result in one group of employees doing worse than another. Negotiators need to pay careful attention to the possibility of differentials having an adverse disparate impact on employees of a particular gender. This decision will have major ramifications for collective bargaining in the public sector.

Leave to appeal to the House of Lords was refused by both the Court of Appeal and (on 26th November 2008) by the House itself. The case is now due to be remitted back to the tribunal for a remedies hearing which, the Court of Appeal commented, "*may raise even more difficult issues than are customarily found in an indirect discrimination case against an employer*."

http://www.bailii.org/ew/cases/EWCA/Civ/2008/810.html

12. DISCIPLINE AND GRIEVANCE

One of the most eagerly-awaited questions being asked by employment lawyers in Northern Ireland at present is "what's happening to the statutory procedures here?" In Great Britain, following the Gibbons review, sections 1-7 of the Employment Act 2008 is set to introduce important changes to the law relating to dispute resolution in the workplace. In particular, from April 2009 they will repeal the existing statutory dispute resolution procedures. They will also:

- repeal associated provisions relating to unfair dismissal, reverting to the legal position before the procedures were introduced, as established in *Polkey v AE Dayton Services Ltd*
- confer on employment tribunals discretionary powers to amend awards by up to 25% if parties have failed to comply with a revised ACAS Code of Practice;

- make changes to the law relating to conciliation by ACAS, in particular by removing the fixed time limit for conciliation and providing funding to increase early availability of conciliation services;
- amend tribunals' powers to reach a determination without a hearing;
- allow tribunals to award compensation for financial loss in certain types of monetary claim.

ACAS set out its new draft Code of Practice on Discipline and Grievance for consultation purposes on 2 May 2008. The Consultation exercise closed on 25th July, having attracted 172 responses. A number of amendments were made in the light of this – see "Discipline and Grievance Code of Practice – Consultation Outcome" (October 2008).

The revised (draft) Code of Practice has now been approved by the Secretary of State for Business, Enterprise and Regulatory Reform and awaits Parliamentary approval until which time it will remain a draft. The Code is due to come into effect on 6 April 2009 alongside the other changes to dispute resolution procedures.

At 12 pages, the new code is a lot shorter than the existing one (and the LRA equivalent Code for Northern Ireland). However, ACAS has proposed supplementary guidance in detail in a draft handbook entitled "Discipline and Grievance at Work: Draft ACAS Guide" This 74-page guide was published in June 2008 and contains draft procedures, standard letters, advice on keeping records and a host of other useful advice.

What is happening in Northern Ireland?
The Employment Relations Policy and Legislation Branch of DEL is continuing a review of the corresponding procedures for resolving workplace disputes in Northern Ireland. A pre-consultation document was issued to stakeholders in February 2008, and responses were accepted until the end of April 2008. The purpose of the pre-consultation was to:

- determine whether there was appetite for reform of dispute resolution procedures in Northern Ireland;
- gain an initial steer on the appropriateness for Northern Ireland of the GB proposals;
- invite suggestions for other options which might be worth investigating for Northern Ireland

Stakeholders were invited to consider short summaries of best practice from a range of other countries and to comment.

A report on the findings from the pre-consultation document was published by DEL in late October. This report indicates some measure of consensus as regards underlying principles, but much disagreement on specifics. There was clear majority support for abolition of the statutory procedures, although there was some support for the retention of the statutory grievance procedures. These

were felt by some to have increased the chances of problems being successfully addressed at an early stage and providing employees with an important opportunity to raise complaints.

There was general agreement that if the procedures were to be retained in some form there was a need to ensure that they were simplified. Criticisms voiced in the pre-consultation echoed the Gibbons view that the procedures were unduly complex and tended to over-formalize dispute handling from the outset. They tended to elevate process above substance and encouraged an approach of going through the motions rather than addressing the real issues. The procedures were seen as particularly inappropriate for more complex cases including discrimination cases, placing procedural hurdles in the way of legitimate complaints. DEL has indicated that any fundamental review of the procedures will have to look carefully at whether they have a future at all. If they do, how can they best be modified? If not, what might replace them?

The pre-consultation looked at the role of the Industrial and Fair Employment Tribunals in some detail. There was general consensus among stakeholders that tribunals performed a necessary and useful function. There was also broad agreement that the tribunal route was often not the most appropriate or beneficial course of action. Issues of access, late settlements and time limits were explored.

A variety of Alternative Dispute Resolution options were explored, with an enhanced role for mediation emerging as a favoured option. Few respondents believed that ADR should be a mandatory step in dispute resolution but some indicated that it should be encouraged or "incentivised" in some way, perhaps requiring parties to explain to a tribunal why they have not engaged in the process, or barring tribunal access until all ADR opportunities have been exhausted.

The need for a statutory Code of Practice was endorsed, in a simplified form and principles based rather than overly prescriptive. Better information and guidance was needed for both employers and employees. The LRA helpline could play a valuable role in directing people towards early conciliation of their disputes. The creation of a proactive enforcement agency along the model of the National Minimum Wage enforcement machinery was also suggested.

It is clear that there is a desire for change and for change which is tailored to the needs of people in Northern Ireland. DEL is to undertake a full-scale dispute-resolution review. A formal public consultation process is expected to begin soon. DEL has established a steering group (CBI; Equality Commission; Federation of Small Businesses; LRA; NIC/ICTU) to establish guiding principles and contributing to scoping the options. However, it seems unlikely that any changes will be implemented here before 2010.

13. TIME TO TRAIN

On 18 June 2008 the Department for Innovation, Universities and Skills (DIUS) published a consultation paper seeking views on a proposed new right in the workplace; the right to request time to train for employees in England. Similar consultations were also carried out by the Scottish Executive and the Welsh Assembly Government on whether this right should be extended to employees in Scotland and Wales. The core of the time to train proposals is that employees should have a legal right to ask their employer to give them time away from their mainstream duties to undertake training.

The consultations sought views on the fundamental question of whether the new right would help skills development in the workplace. They also explored a range of policy questions including: to whom should the right apply; what sort of training should be covered; what sort of issues the employer should consider when reviewing requests; and whether the new right would change the behaviour of employers and their employees in respect of training.

The overall response to the consultations was positive, acknowledging the potential of time to train to change the attitudes of those businesses that offer little or no training, and to empower employees to take responsibility for their own development. The Government intends to proceed with legislating for a right for employees to request time to train for employees throughout Great Britain. Legislation is expected in 2010. Ministers in Northern Ireland are considering the position and are likely to launch a public consultation in Spring 2009.

14. EUROPEAN DEVELOPMENTS

14(a) Working-Time

In June 2008 the EU Employment and Social Affairs Council agreed a text for the revision of the Working Time Directive. This agreed compromise, which is supported by the Commission, marked real progress as discussions between the Member States had been ongoing for some years, with the future of the UK's individual opt-out from the maximum 48-hour working week proving to be a major sticking point. There was genuine optimism that a revised Working Time Directive would be published in 2009, to be followed by a three year implementation period.

That optimism now seems misplaced. On 5th November 2008 the Employment Committee of the European Parliament turned down the proposal, insisting that the time had come to end the opt-out. The full Parliament voted the proposal down on 17th December, putting the entire package of measures at risk. Peter Mandelson, the Business Secretary, in response to the Committee vote, stated that the government "will continue to stand firm to protect the opt-out to the working time directive's 48-hour maximum working week, which is essential to Britain's labour market flexibility…People must remain free to earn overtime if they wish." No changes can be made to the existing Working Time Directive

unless there is an agreement between the European Parliament and the Council. It is now up to the Council to decide how it responds to the vote. The Commission expects that it will be called upon to attempt to broker an agreement between the Parliament and the Council. The search for a solution continues.

The key points of the rejected compromise agreement were:

1. The UK 'individual opt-out' remains but is weakened.
    - All workers are allowed to opt-out of the 48 hour average limit on weekly working time, which is usually calculated over a 17 week period.
    - However, those who opt-out from the 48 hour limit will be subject to a new 60 hour cap averaged over12 weeks.
    - However - the 48 hour or 60 hour limit will not apply to seasonal workers (employed by the same company for 10 weeks or less in any single year).
    - An opt-out will be automatically void if signed before the contract commences or during the first 4 weeks of the contract.
    - Workers will be able to opt back in to the maximum working week with no notice during first 6 months of the contract or within 3 months of the end of their probation period, whichever is the longer.
    - The maximum notice for opting back in will thereafter be 2 months instead of the current 3 months.
    - Any opt-out agreement cannot run longer than a year without renewal
    - Employers will have to keep records of the hours worked by opted-out workers.

2. The reference period for calculating average Working Time may be extended to 6 months “for objective or technical reasons”. It may be extended to 12 months in the other Member States, who do not have the individual opt-out.

3. The provisions from the *SIMAP* and *Jaeger* (ECJ) rulings that all on-call time spent on the employer’s premises counted as working time are also greatly weakened. There is to be a new category of time known as “inactive on-call time” which counts as neither working time or a rest period. The 'inactive' part of on-call time will only count towards the working time limits if Member States or the relevant social partners agree. The chances of such an agreement are not good in the UK.

4. Compensatory Rest will no longer have to follow immediately after the shift to which it relates. Rather, it can be taken within “a reasonable period” after the shift. There is no guidance on what this means in practice.

Early reports that the Council agreed that all workers should have the right to ask for changes to working patterns proved incorrect. A much weaker provision: *'Taking into account workers' needs for flexibility in their working hours and patterns, the Member States shall, in accordance with national practices, also encourage employers to examine requests for changes to such working hours and patterns, subject to business needs and to both employers' and workers' needs for flexibility'* was agreed.

There will be a further review of the Working time Directive 4 years after the implementation of these changes (likely to be 2016).

Whether and to what extent any of these proposals survive is now a matter of some conjecture.

14(b) Works Councils

On 2nd July, 2008, the European Commission adopted a legislative proposal to improve the role of European Works Councils in informing and consulting employees. This was adopted by the Parliament on 16th December 2008. European Works Councils currently operate in 820 major companies across the EU, covering some 14.5 million employees. The Works Council Directive (94/45/EC) applies to companies with 1,000 or more employees, including at least 150 in two or more Member States.

The revised ("re-cast") Directive aims to add value to European Works Councils while making employees' rights more effective. In particular, it aims to encourage and foster transnational social dialogue in large enterprises, to improve corporate governance and to anticipate and manage change in a socially responsible way. With this proposal, European Works Councils will be consulted in more cases of transnational restructuring. The proposal also aims at increasing the take-up of European Works Councils while ensuring legal certainty during their set-up and the execution of their tasks. Moreover, simplification, better coherence and interplay between Community legislative instruments on workers' information and consultation will result from the initiative.

The proposed amendments to Directive 94/45/EC, which were examined by the European Parliament and the Council under the co-decision procedure, are aimed at:

- Further specifying the concepts of information and consultation;
- Defining the competences of European Works Councils and linking the national and European levels of information and consultation;
- Adapting the fall-back rules, which are used as benchmarks in defining negotiated and adapted rules at company level;
- Providing training for employee representatives, introducing a duty for them to report back to the workers and recognising the role of trade unions;
- Adapting European Works Councils in the event of significant change in the structure of companies.

BERR launched a 4-week consultation exercise on the proposal which came to an end on 6th October, 2008.

14(c) Discrimination Directive

On 2nd July 2008 the European Commission adopted a proposal for a Directive which provides for protection from discrimination on grounds of age, disability,

sexual orientation and religion or belief beyond the workplace. This new directive would ensure equal treatment in the areas of social protection, including social security and health care, education and access to and supply of goods and services which are commercially available to the public, including housing. If adopted, it would prohibit direct and indirect discrimination as well as harassment and victimisation. For people with disabilities, non-discrimination will involve general accessibility as well as the principle of "reasonable accommodation". Member States will remain free to maintain measures ensuring the secular nature of the State or concerning the status and activities of religious organisations. The directive will have no effect on generally accepted practices such as discounts for senior citizens (e.g. bus fares and entrance to museums) or age restrictions on access to certain goods (e.g. alcohol for young people) on grounds of public health.

The proposal was discussed at the Employment and Social Affairs Council meeting on 2 October 2008, with a view to moving forward on negotiations on the text. If adopted, the main impact in Northern Ireland will be the introduction of provisions outlawing Age discrimination legislation relating to goods facilities and services, and consideration of some changes to Fair Employment legislation. Although this outlaws discrimination in relation to goods facilities and services other provisions, such as those on education, are more limited. The education provisions apply only to third level colleges and universities. Legislation relating to sexual orientation and disability will also have to be scrutinized to ensure compliance.

The European Commission has also revealed proposals to revise the Pregnant Workers Directive 92/85/EEC. The minimum period of leave would increase from 14 to 18 weeks – a change which would not affect women in the UK who already enjoy entitlement to a longer period of leave. However, the 18 weeks' leave would be paid at 100% of salary - a change which would benefit many British women. In addition, women would have more flexibility about when to take their leave (other than compulsory maternity leave) and would no longer have to take a specified proportion of their leave before childbirth as is currently the case in some Member States. These proposals were announced in October 2008 and discussions are at an early stage.

15. PENSION REFORM

The Pensions Commission's 2005 report *A New Pension Settlement for the Twenty-First Century* contained a series of recommendations regarding the UK pensions system. This Report (often called the Turner Report) formed the basis for the Government's White Paper *Security in Retirement: towards a new pensions system*, published in May 2006. The Pensions Act 2007 made provision for the first part of the reform of the UK pension system. A second White Paper, *Personal accounts: a new way to save,* published in December 2006, contained

further proposals and forms the basis for measures contained in the Pensions Act 2008, which received the Royal Assent on 26th November 2008.

This Act introduces two key requirements for employers:

1. To automatically enroll eligible jobholders who are not in a qualifying pension scheme into an automatic enrolment scheme. Jobholders will be enrolled by their employers from the first day they become eligible but will retain the right to opt out of the scheme. Employers may choose the pension scheme they provide, which must meet certain criteria. The Act gives the Secretary of State powers to establish a pension scheme in which employers can choose to participate. This scheme will be run by an independent trustee body.
2. To maintain the jobholder's membership of a qualifying scheme, including making relevant contributions, so long as the jobholder chooses to be part of it. The employer must contribute at least 3% of annual earnings; the employee's contribution will be 4% and there will a 1% contribution in the form of tax relief from the state. The Act defines qualifying earnings by reference to an earnings band, with lower and upper limits of £5,035 and £33,540 per annum, on which pensions contributions will be calculated. Earning qualifying earnings (i.e. above £5,035) is a criterion of "jobholder" and so is a factor in determining whether a worker is to be automatically enrolled. The Act defines "earnings" as monetary sums comprising: wages/salary, commissions, bonuses, overtime and certain statutory benefits.

The Act also requires employers to give the Pensions Regulator information about how they will meet their obligations. The Pensions Regulator will be able to use this information to assess compliance with the duties set out in this Act. The Pensions Regulator will be given powers to enforce these duties and the Act sets out sanctions, including criminal penalties, for failure to comply.

Employers will also be obliged to keep records in a prescribed form for a period prescribed by regulations. The Act also makes it a criminal offence for employers to wilfully fail to comply with specified duties. A person who commits an offence could face imprisonment for up to two years and/or a fine. If convicted in a magistrate's court, the fine cannot exceed level 5 on the standard scale.

The Act provides a statutory right for workers not to be subjected to dismissal or detriment on specified grounds. This right would protect a worker who might have been denied promotion or training opportunities because of their decision not to opt out of pension scheme membership. An employee who is dismissed on these specified grounds shall be regarded as having been unfairly dismissed.

Amendments to the Act were tabled in the House of Lords which prevent an employer from offering an inducement to or encouraging an employee to opt out of pension scheme membership.

The legislation is unlikely to take effect for some time - personal accounts are unlikely to be introduced before 2012.

16. EQUALITY BILL (GB)

Following on from the Discrimination Law Review Report in June 2007, the government has made clear its intention to introduce new Equality legislation in the next Parliamentary session. A White Paper entitled "*Framework for a Fairer Future – the Equality Bill*" was presented to Parliament in June 2008, outlining government proposals to strengthen current discrimination laws.

According to the Executive Summary; "The purpose of the Bill and its accompanying package of measures is to strengthen protection, advance equality and declutter the law". The aim is to harmonise, strengthen and simplify the current nine discrimination law statutes and over 100 statutory instruments which it will replace. There are to be no major changes to most of the key concepts and definitions and comparisons will be retained. There are 5 main aims:

1. Introduce a new Equality Duty on the public sector
2. End age discrimination in goods and services
3. Require transparency particularly in relation to private sector pay
4. Extend the scope of positive action
5. Strengthen enforcement

1. New Equality Duty on the public sector

- A new Equality Duty on public bodies, which will bring together the three existing duties (race, gender, disability) and extend to gender reassignment, age, sexual orientation and religion or belief.
- The Equality Duty will require public bodies to tackle discrimination and promote equality through their purchasing functions
- New reporting duties on equal pay; ethnic minority employment; and disability employment.

2. Age discrimination in goods and services

Powers to outlaw unjustifiable age discrimination by those providing goods, facilities and services (exercisable at a future date) are proposed

3. Transparency particularly in relation to private sector pay

In relation to equal pay, mandatory equal pay audits have been ruled out. However, the Equality and Human Rights Commission will conduct inquiries into particular sectors, including the financial services sector and the construction industry. There is to be a new emphasis on transparency in the private sector. Other measures will include:

- A ban on secrecy clauses which prevent people discussing their own pay and improved transparency in the private sector,

- The introduction of a new "kite-mark" for equal pay audits to assist in closing the gender pay gap
- An increased emphasis on company reporting on progress on equality as an important part of explaining to investors and others the prospects for the company
- A review of progress on transparency and its contribution to the achievement of equality outcomes and if necessary the use of existing company legislation for greater transparency in company reporting on equality.

4. Extending the scope of positive action

There are proposals to extend positive action so that employers can take into account, when selecting between two equally qualified candidates, under-representation of disadvantaged groups, for example women and people from ethnic minority communities.

5. Strengthening enforcement

There are a number of proposals aimed at strengthening the enforcement provisions:

- Tribunals are to be allowed to make wider recommendations in discrimination cases, which will go beyond a remedy for the individual taking the case and ensure that there are benefits for the rest of the workforce
- There will be further consideration of how to allow discrimination claims to be brought on combined multiple grounds, such as where someone is discriminated against because she is a black woman, and
- Further consideration of how to take forward the question of introducing representative actions in discrimination law, to allow trade unions, the Commission for Equality and Human Rights and other bodies (with the permission of the Court) to take cases to court on behalf of a group of people

The Government has announced that it intends to make a significant change in the Equality Bill in respect of disability discrimination, and in particular discrimination for a "disability-related reason". This is expressly because of the decision of the House of Lords in ***Malcolm*** (noted earlier) and because of European Commission proposals for the new "goods, facilities and services" Framework Directive (also noted earlier). Jonathan Shaw, Minister for Disabled People, has announced that the Equality Bill will replace the current ban on discrimination for a disability-related reason with a prohibition against indirect disability discrimination. He said,

> *"This will ensure an appropriate level of protection for disabled people in the Equality Bill. It will also improve consistency within the Bill between the disability provisions and the provisions for people with the other protected*

characteristics, and ensure compliance with the anticipated requirements of European anti-discrimination legislation."

In accordance with the Draft Legislative Programme for 2008-09 the Equality Bill was included in the Queen's Speech on 3rd December 2008 and is to be introduced during the current Parliamentary Session. There is as yet no timetable for the introduction of single equality legislation in Northern Ireland.