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Employment Law Newsletter

INTRODUCTION

Welcome to the 10th edition of Field Court Chambers' Employment Law Newsletter.

This edition aims to help you resolve both the day's practical issues and your clients' more unusual enquiries:

- Does the Equality Act prescribe a cause of action for post-employment victimization?
- How do you identify the effective date of termination in a wrongful dismissal?
- How much will the basic award and statutory redundancy payments be after February 2013?
- What balance is to be struck between religion and belief and other protected characteristics?
- What is the employment status of a lap dancer?

We also highlight some of the many legislative changes we will all need to be aware of after the first quarter of 2013.

As always, we hope you enjoy the e-bulletin and we welcome any comments and suggestions for improvement.

Editors
Employment Law Newsletter
Field Court Chambers Employment Group

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EMPLOYMENT TEAM

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Christine Cooper (2006)
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Victoria Flowers (2009

CASE UPDATES

Whether subjecting employees to a second disciplinary procedure, based on the same facts as the first, amounted to unfair dismissal

Christou v London Borough of Haringey [2013] EWCA Civ 178

The appellants, social workers employed by the Council, had been involved with the management and supervision of safeguarding for Baby P, who died as a result of a chronic lack of care by his mother and two others.

The appellants were subject to a simplified disciplinary procedure, by consent. In both cases the proceedings resulted in written warnings.

The newly appointed Director of Children's Services in the borough concluded that the initial disciplinary procedure against the appellants had been "blatantly unsafe, unsound and inadequate". Fresh proceedings were instigated and resulted in both appellants being summarily dismissed.

The appellants argued that they had suffered "double jeopardy" and that the doctrine of *res judicata* applied so as to bar the second disciplinary proceedings and the dismissals. They also argued that it was an abuse of process to instigate repeat proceedings.

The Court of Appeal rejected those arguments. As to *res judicata,* Elias LJ state:

> *"In my judgement it is wrong to describe the exercise of disciplinary power by the employer as a form of adjudication … the disciplinary power is conferred on the employer by reason of the hierarchical nature of the relationship."*

The question of unfair dismissal included considering whether instituting the disciplinary proceedings afresh was fair. That was "essentially the same question as whether it is an abuse of process to reopen the matter". The Tribunal's reasoning in finding justification for the second proceedings was sound.

Nikolas Clarke
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Strasbourg requires UK to legislate to allow ET claim for unfair dismissal or unlawful discrimination on grounds of political opinion or affiliation for those without unfair dismissal qualifying period of service

Redfearn v United Kingdom (2012) 33 BHRC 713

Mr Redfearn was employed to drive a minibus to transport children and adults with physical and mental disabilities in the Bradford area. Most of his passengers were of Asian origin. Mr Redfearn was highly rated at his job. He was also the BNP's candidate in the local elections and succeeded in getting elected. Soon after his election, and following complaints about his BNP membership from unions and fellow employees, he was summarily dismissed on grounds of potential health and safety risks due to the anxiety that would be caused to passengers and their carers by his continued employment. He brought a race discrimination claim which failed. He did not have sufficient qualifying service to bring an unfair dismissal claim. Following an unsuccessful result at the Court of Appeal, he complained to the ECtHR about breach of, *inter alia,* his Article 11 rights (to freedom of association).

The Court held there to be a positive obligation on states to provide protection against dismissal by private employers where the dismissal is motivated solely by the fact the employee belongs to a particular political party. For those with sufficient qualifying service to bring an unfair dismissal claim, there was such protection. However, for those without sufficient service, protection was absent. The Court accordingly found Mr Redfearn's Article 11 rights to have been breached, and held it incumbent on the UK to either bring in a further exception from the qualifying period for bringing an unfair dismissal claim covering those dismissed on grounds of political opinion or affiliation or alternatively to legislate to allow a freestanding claim for unlawful discrimination on grounds of political opinion or affiliation.

Incidentally, the Court noted that it was the lack of an appropriate recourse to potential remedy that breached Mr Redfearn's Article 11 rights. It was readily acknowledged that his employer may well be able to persuade an employment tribunal that to dismiss a BNP councillor fell within the 'some other substantial reason' category of fair reasons for dismissals on account of the impact on the employer's contracts and business.

Jason Braier
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Court decides Article 9 workplace cases should be determined on proportionality rather than on basis there's no interference if you can leave the job

Eweida & Others v UK [2013] ECHR 48420/10

The ECtHR considered four joined appeals from UK citizens claiming breach of their Article 9 right (alone and in conjunction with Article 14) to manifest their religion.

Mrs Eweida (BA check-in staff) and Mrs Chaplin (a nurse on a geriatric ward) complained about not being allowed openly to wear crosses over their work uniforms; Mrs Ladele (a registrar of births, deaths and marriages) complained about being forced to conduct signings of the civil partnership register (her claim was solely under Article 9 in conjunction with Article 14); Mr McFarlane (a Relate counsellor) complained about being dismissed for refusing to provide psycho-sexual therapy to homosexual couples.

In allowing Mrs Eweida's appeal and dismissing the rest, the ECtHR tore up 30 years of Strasbourg jurisprudence on Article 9 ECHR. In numerous previous cases, the Strasbourg institutions had held there to be no interference with an Article 9 right where a person can take steps to circumvent a limitation placed on their freedom to manifest their religion (eg in workplace cases, by leaving their job; in school cases, by moving to another school). In ***Eweida and Others***, the Court held in such cases an interference should be found and possible steps to circumvent the limitation should be considered instead under the proportionality test in Article 9.2.

In Mrs Eweida's case, whilst acknowledging the nation state's wide margin of appreciation, the Court held that the Court of Appeal had failed to strike a fair balance in weighing the proportionality of BA's uniform code against Mrs Eweida's right to manifest her religion. Extraordinarily in reaching this conclusion the Court took note and issue on fine details such as the discreetness of the cross as well as the ex post facto amendment of BA's uniform code, somewhat undermining its preceding assertion about the margin of appreciation.

In Mrs Chaplin's case, the Court held the uniform code proportionate in light of health and safety policy.

In Mrs Ladele's case, in light of the impact on same-sex couples of her desire to manifest her religion, the national court's decision fell within the wide margin of appreciation.

Finally, in Mr McFarlane's case, Relate's action was decision of the Court of Appeal was proportionate in light of the fact that Relate's policy was implemented to secure non-discrimination in the application of its services.

Jason Braier
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Effective date of termination in wrongful repudiation; elective theory preferred over automatic theory

Geys v Societe Generale, London Branch [2012] UKSC 63

G was told in a meeting on 29 November 2007 his employment would end with a payment in lieu of notice. On 18 December 2007 SG paid G a sum of money. G reserved his rights. G was deemed to have received a letter from SG explaining the payment on 6 January 2008. G received the payslips for the payment on 7 or 8 January 2008. The contract required notice and a more generous termination payment was due if the termination was in 2008. The issue was when did the dismissal take effect?

The wrongful dismissal took effect in January 2008. The majority of the Supreme Court favoured the elective theory, *'a party's repudiation terminates a contract of employment only if and when the other party elects to accept the repudiation... The automatic theory can operate to the disadvantage of the injured party in a way that enables the wrongdoer to benefit from his own wrong. The law should seek to avoid such an obvious injustice. Where there is a real choice as to the direction of travel, the common law should favour the direction that is least likely to do harm to the injured party.'* (as per Lord Hope at para 15).

The rational applies equally whether the wrongful repudiation is the employers (wrongful dismissal) or the employees (wrongful resignation) (Lord Wilson at para 63).

Toby Bishop
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A part-time recorder is a 'worker' for the purposes of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, and entitled to a pension on equivalent terms to a full-time judge's.

O'Brien v Ministry of Justice (Council of Immigration Judges intervening) [2013] UKSC 6

The Claimant was a retired recorder who was refused a retirement pension payable to full-time judges on the basis that recorders were not a category of judge that qualified under the Judicial Pensions and Retirement Act 1993 and that there was no entitlement under European

law because he was an 'office holder' and not a 'worker'. 'the Claimant complained that such refusal constituted discrimination against part time workers.

The SC made a reference to the CJEU, which held that (i) it was for the national state to define the concept of 'workers who have an employment contract or employment relationship' and to decide whether judges fell within that, and (ii) the Directive precluded national law drawing a distinction between full and part time judges unless it could be justified by objective reasons.

The SC held that (i) recorders were in an employment relationship as distinct from self-employment in view of the character of their work in the public service, the rules of appointment and removal, the way that their work was organised for them and the fact recorders were entitled to the same benefits during service as full time judges and (ii) a difference in treatment was not objectively justified - resource arguments were irrelevant because the State was to be treated as any other employer, there was no distinction on the grounds of recruitment aims because both full and part time judges had to be of a high standard and simple saving of cost was not a valid justification. Recorders were therefore entitled to pensions on terms equivalent to full time judges.

Portia Harris, Pupil
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Equality clauses: Supreme Court dismisses appeal against refusal to strike out claims brought in High Court (claims out of time for ET)

Birmingham City Council v Abdulla [2012] UKSC 47

The case involves 174 parties who brought claims against Birmingham CC founded on an alleged breach of the "equality clause" which by statute was deemed to have been included in their contracts of employment. The claimants alleged that Birmingham CC employed them on work rated as equivalent with that of certain men in the same employment but that their contracts did not provide for the payment of substantial bonuses and other additional payments for which the contracts of the male comparators provided.

The claims could not be presented to the ET as they would be out of time. The claims were brought within the six year limitation for the High Court.

Birmingham CC applied to strike out the claims pursuant to section 2(3) Equal pay Act 1970 (as amended): "where it appears to the court in which any proceedings are pending that a claim or counterclaim in respect of the operation of an equality clause could more conveniently be disposed of separately by an employment tribunal, the court may direct that the claim or counterclaim shall be struck out…". The application for strike out was dismissed in the QBD. The Court of Appeal dismissed Birmingham CC's appeal, as did the majority of the Supreme Court (Lord Sumption and Lord Carnwath dissenting).

It was held that the claims could not be more conveniently disposed of by the ET, and Birmingham CC's invocation of s.2 (3) had been rightly rejected.

Nothing could detract from the inherent jurisdiction of the court to strike out a claim in respect of the operation of an equality clause if it were to represent an abuse of its process but the subject of s.2(3) was not abuse of process. A claim in respect of the operation of an equality clause can never more conveniently be disposed of by the ET if it would there be time-barred. Parliament might well wish to consider introducing a relaxation of the usual limitation period for the presentation of a claim to the ET in cases in which a claim in respect of the operation of an equality clause has been brought, in time, before the court and, were it not for the effect of the usual limitation period, would more conveniently be disposed of by the tribunal.

Victoria Flowers
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Supreme Court considers response of CJEU to concept of "paid annual leave" for pilots. Claims remitted to ET

British Airways Plc v Williams and others [2012] UKSC 43

This dispute concerned the concept of "paid annual leave" required by the Civil Aviation (Working Time) Regulations 2004 (which were introduced to comply with the obligation to give effect to Directive 2000/79/EC and left the concept undefined). In a previous judgment the Supreme Court referred to the CJEU questions about the nature and assessment of the concept. The parties were at odds as to the consequences of the response by the CJEU which had drawn a distinction between remuneration for all activities whether basic or "inconvenient" undertaken during employment and payments "intended exclusively to cover occasional or ancillary costs".

The appellants (BA pilots) submitted that their claims should be remitted to the ET for assessment of a representative period and the relevant remuneration earned during that period, and that it should include basic pay, Flying Pay Supplement and 18% of Time Away From Base ("TAFB") allowance (which was introduced to replace meal allowances, sundries and the Gatwick Duty Allowance). BA submitted that the Regulations were too unspecific to give effect to the Directive in the absence of any relevant legislative scheme and the whole of TAFB should be excluded from remuneration for any calculation.

The Supreme Court held (unanimously) that the claims should be remitted to the ET for further consideration of the appropriate payments to be made to the pilots in respect of the periods of paid annual leave in issue. The choice of a reference period was in the first instance for BA to make (within the parameters of what could reasonably be judged to be representative). Failing such a choice BA could not complain if a court or tribunal took its own view of what best represented a representative period. The ET could make such award as it considered just and equitable to compensate for the refusal to permit a crew member an appropriate payment as part of the right to paid annual leave.

As to TAFB, the question was whether the payments by way of TAFB were "intended exclusively to cover costs". It was held that it must be for the ET to consider and determine upon what basis TAFB was agreed and paid during any relevant period. What mattered was whether there was a genuine intention in agreeing and making such payments that they should go exclusively to cover costs and it was on that the ET should focus.

Victoria Flowers
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Legal advice privilege is not extended to communications related to advice given by professionals other than lawyers, even where the professional is qualified to give legal advice

R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another [2013] UKSC 1

Prudential received legal advice from a chartered accountancy firm in relation to a tax avoidance scheme and claimed legal advice privilege (LAP) in that respect. The issue was whether or not the traditional boundaries of LAP should be extended, and if so to what extent that should happen?

In a leading judgment by Lord Neuberger P, the Supreme Court (sitting with 7 Justices) affirmed the decision of the Court of Appeal and held that extension of the principle was a policy matter best decided by Parliament (Lord Sumption and Lord Clarke dissenting). Lord Neuberger stated that the consequences of expansion could confuse a clear and well-understood principle. Further, he found that the repercussions of widening LAP would be difficult to anticipate and were suited to investigation by inquiry and consultation before making any change. Previously, on three occasions, Parliament had legislated on the assumption that LAP was limited to advice provided by lawyers and had provided statutory expansion of LAP to patent attorneys, trade mark agents and licensed conveyancers.

The Court acknowledged that there was a rational argument to allow the appeal: LAP was for the benefit of clients rather than lawyers and, logically, all of a client's communications with legal advisors should be privileged.

Sara Hunton, Pupil
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Employment tribunal's refusal of application to adjourn supported by unchallenged medical evidence

Transport for London v O'Cathail [2013] EWCA Civ 21

C's first application to adjourn on medical grounds was granted on the first day of a multi day hearing. C's application to adjourn on the first day of the adjourned hearing was refused and his claim dismissed.

It was not an error of law for the tribunal to refuse an application to adjourn supported by unchallenged medical evidence. Mummery LJ had *'never seen such a scrupulously detailed and careful decision by an ET or, indeed, by any court or tribunal, on the question whether or not to grant an adjournment.'*

'*In relation to case management the ET has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The ET's decisions can only be questioned for error of law.'* (Mummery LJ at 44). The EAT's power is not that of review as under the CPR.

Toby Bishop
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Lapdancer was not an employee pursuant to s.230 of ERA '96

Quashie v Stringfellows Restaurants Ltd [2012] EWCA Civ 1735

C worked intermittently as a lap dancer at the D's club. She was subject to D's rules and paid by customers of the club per dance. D took a commission and C paid a daily fee. The written agreement defined C as an independent contractor.

Held; there three conditions for a contract of service: (i) C agrees to provide his own work and skill in the performance of some service for D, in consideration of a wage or remuneration; (ii) C agrees, expressly or impliedly to be subject to D's control in a sufficient degree to make D master; and (iii) the other provisions of the contract were consistent with its being a contract of service.

An intermittent worker may be employed under a contract of employment for each separate engagement, even if of short duration. As to continuity of employment for qualification for protection, it would usually be necessary to show that the contract of employment continued between engagements.

It would be an unusual case where a contract of service was found to exist when the worker took the economic risk and was paid exclusively by third parties. The fact that the parties intended that C should have had self-employed status reinforced the conclusion of the tribunal. Ms Quashie has applied for permission to appeal.

Toby Bishop

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MEMBERS' CASES

A selection of recent members' cases is featured below. Details of members' cases can be found on their individual profiles

The EAT held that s.108 (7) of Equality Act expressly precludes liability for post-employment victimisation and confirmation Polkey applies in relation to automatic unfair dismissal and discrimination claims.

(1) Rowstock Ltd (2) Davis v Jessemey UKEAT/0112/12/DM

"The instant situation is one in which express provision has been made for the post-relationship landscape but subject to an equally express exception in the case of victimisation. In such a situation no judicial tool is available to make available a remedy which the words used by Parliament have simply stated shall not be available. [at 39]

If and in so far as the Employment Tribunal considered that Polkey had no application to this class of case, it was in error. That much is clear from the recent decision of this Appeal Tribunal in Compass Group v Ayodele [2011] IRLR 802 (in relation to automatically unfair dismissal) and of the Court of Appeal in Abbey National PLC v Chaggar [2010] ICR 397 (in relation to discrimination)." [at 46]

John Crosfill represented the Respondents, whose appeal was allowed in respect of Polkey and who successfully opposed the Claimant's appeal in respect of victimization.

John Crosfill

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Secret Profits, breaches of fiduciary duties and limitation

Aubrey Liley v C.A.Sperati PLC [UKET2302510/2012]

C was R's former managing director and brought claims of wrongful dismissal and unlawful deduction from wages.

Limitation:

The claim was presented on 30 March 2012. After 9 years employment, C has been summarily dismissed on 23 November 2011. If C had been entitled to statutory notice his claim was in time by operation of s.97 of the Employment Rights Act 1996, if he was not so entitled the claim was out of time. The tribunal was required to determine gross misconduct before it could determine jurisdiction.

Gross misconduct:

After summary dismissal R discovered irregularities in payments received from suppliers and email correspondence purporting to be from the Chairman. C conceded in cross examination;

1. He had accepted more than $8,000 in cash as a 'present' from a supplier

2. He had written to a supplier from the Chairman's email account, impersonating the Chairman in order to praise himself.

The Tribunal found C was in breach of his statutory fiduciary duties under s.172-176 of the Companies Act 2006 and his common law fiduciary duties through allowing a conflict to arise between his personal interests and duties to the company and that he had made a secret profit. The Tribunal found C's conduct amounted to gross misconduct.

The Tribunal applied *Boston Deep Sea Fishing v Ansell* (1888) 39 Ch D 339 entitling R to rely on misconduct discovered after the dismissal to relieve it of its obligation to dismiss with notice.

As a result of C's gross misconduct his claim was time barred. Toby Bishop represented the successful Respondent.

Toby Bishop

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Was the sending of a P45 a dismissal? Did an employer's failure to send a P60 amount to a repudiatory breach of contract entitling C to resign and claim constructive dismissal?

Wrobel v Laverick [UKET2375525/2011]

R outsourced his payroll system. C went on maternity leave. The outsourcing company removed C from the payroll system and sent a P45. C requested a P60, the outsourcing company failed to provide one. C did not return to work on the agreed date or engage in correspondence with R.

R's case was there was no dismissal, constructive or otherwise, C's job had remained open until she issued proceedings.

Sending a P45 was not a dismissal. The tribunal, applied *Frederick Ray Ltd v Davidson* EAT 678/79.

Failure to send a P60 was neither a dismissal, nor a fundamental breach entitling C to resign. Toby Bishop represented the successful Respondent.

Toby Bishop
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The requirement of fairness in terminating a redundancy redeployment trial period

McLeod v The Mayor and Burgess of the London Borough of Newham [UKET 3203781/2011]

The Claimant was an employee with a long history of good service. Her position was made redundant. She applied for re-deployment. As a result of the interviewers concerns about her suitability C was offered and accepted an extended trial period. Further concerns were raised about C's performance during the trial and she was given coaching. The day before the end of the trial period C was informed she would not be confirmed in to the post and was given 3 days to seek further redeployment opportunities before being dismissed and receiving her original redundancy package.

The tribunal held that the employer acted reasonably in not to follow the union agreed capability procedure when declining to confirm an employee in to a post at the end of the trial. Toby Bishop represented the successful Respondent.

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LEGISLATION UPDATE

Increased statutory limits

The Employment Rights (Increase of Limits) Order 2012

Where the relevant date is on or after 1st February 2013 the limit for;

- A "week's pay" increases from £430 to £450.
- Compensatory awards increases from £72,300 to £74,200.

Minimum wage (The National Minimum Wage (Amendment) Regulations 2012)

As of 1st October 2012 the national minimum wage rates rise as follows;

- Main rate from £6.08 to £6.19 per hour.
- Youth rate and the rate for workers aged 16 to 17 stay the same.
- Apprentice rate increases from £2.60 to £2.65 per hour; and
- the accommodation offset increases from £4.73 to £4.82 per day.

Parental leave (Parental Leave (EU Directive) Regulations 2013)

From 8th March 2013 the parental leave entitlement increases from 13 to 18 weeks per child for the first five years of the child's life.

Pensions auto-enrolment

The duty to auto-enroll is implemented in stages: the employer's staging date is dependent on its PAYE scheme size and reference. Employers may postpone enrolment for three months, although employees will be able to opt in during the postponement period. The staging timetable

http://www.dwp.gov.uk/newsroom/press-releases/2012/jan-2012/dwp010-12.shtml

is available on the DWP website, and the Pensions Act 2008

http://www.legislation.gov.uk/ukpga/2008/30/contents

and the Pensions Act 2011

http://www.legislation.gov.uk/ukpga/2011/19/contents/enacted

… can be viewed on the UK legislation website.

Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2010

A disclosure, made to the Pensions Regulator, relating to the Pensions Regulator's objective of maximizing compliance with the duties under Part 1, chapter 1 of the Pensions Act 2008 is added to the list of qualifying disclosures.

Smoke-free (Signs) Regulations 2012

The revocation and replacement of the Smoke-free (Signs) Regulations 2007 (SI 2007/923).

The new regulations are less prescriptive.

JACKSON REFORMS

http://www.legislation.gov.uk/uksi/2013/262/contents/made)

For those who also litigate in the civil courts many of the reforms proposed by Lord Justice Jackson will come in to force in April 2013.

PROPOSED CHANGES FOR APRIL 2013

Collective redundancy consultation periods

The consultation period where more than 100 employees are at risk will be reduced from 90 to 45 days. Employees on fixed-term contracts which have come to an end will be excluded from consultation requirements.

PROPOSED CHANGES FOR THE SUMMER 2013

Whistleblowing changes

The Enterprise and Regulatory Reform bill is expected to introduce the following changes:

- Disclosures must be in the public interest to be 'qualifying disclosures'.
- Employers will be vicariously liable for detriments by one worker towards another, reversing *NHS Manchester v Fecitt.*
- Introduction of a statutory defence for employers who take all reasonable steps to prevent such detriments.

Issue and hearing fees

The MoJ has confirmed fees will be introduced in the summer of 2013. The fee levels are:

- Level 1; issue fee £160; hearing fee £230.
- Level 2 (includes unfair dismissal, discrimination, equal pay and whistleblowing); issue fee £250; hearing fee £950.
- EAT appeals; issue fee £400; hearing fee £1,200.

There will be no fee for seeking written reasons. The present civil court's fee remission system will be extended to ET and EAT proceedings.

Revised employment tribunal rules

The government will implement new tribunal rules following the recommendations of Underhill LJ's review. The draft should be available in May 2013.

Repeals

- Statutory discrimination questionnaires under s.138 of the Equality Act 2010.
- Employer's liability for 3rd party harassment under s.40 of the Equality Act 2010.

PROPOSED STATUTORY PAYMENT RATES 2013-4

The DWP's proposed rates for:

- Maternity, paternity and adoption pay are £136.78.
- Statutory sick pay is £86.70.

CHAMBERS NEWS

Working pupils

Chambers' two working pupils, Sara Hunton and Portia Harris, will be accepting instructions in employment matters from mid-March 2013.

For more information please contact the clerks at clerks@fieldcourt.co.uk

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