



SUMMER 2011

#### IN BRIEF

#### **Statutory maternity, adoption and paternity pay increases**

*The standard weekly rate of Statutory Maternity Pay, Statutory Adoption Pay and Statutory Paternity Pay increased from £124.88 to £128.73 from 3 April 2011.*

*The weekly rate for days of sickness absence commencing on or after 6 April 2011 is increased from £79.15 to £81.60.*

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# MOSS

S O L I C I T O R S

## LEGAL REVIEW

*Your quarterly legal bulletin on news & views from Moss Solicitors LLP*

### SEXISM IN THE WORKPLACE

**T**he sacking of Sky Sports presenter Andy Gray serves as a salutary reminder to employees and employers alike that attitudes change and sexist banter is simply not acceptable.

The law protects employees from sexual harassment. Harassment is unwanted conduct that has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant or of violating the complainant's dignity. This includes behaviour by one employee towards another. The definition of harassment in the Equality Act 2010 means that employees can complain of behaviour they find offensive even if it is not directed specifically at them, and the complainant need not possess the relevant protected characteristic themselves.

When an employer is considering dismissing someone on the ground of misconduct, whether dismissal would be fair or unfair will depend on whether it is reasonable for the employer to treat the misconduct as sufficient reason for dismissing the employee.

Where an employee brings a claim of unfair dismissal, in reaching its decision the Employment Tribunal (ET) must consider whether the employer reasonably believed that serious misconduct had been committed by the employee and was the reason for the dismissal, whether the procedures followed by the employer were fair, and whether dismissal fell within the 'range of reasonable responses' open to the employer. Each case will be decided on its own merits and facts. Consideration will be



given to whether the conduct in question, be it an action or a failure on the part of the employee to do something, is specifically mentioned in the employer's disciplinary code of practice as amounting to gross misconduct, with the possible sanction of dismissal, and whether the employer has taken adequate steps to bring the code to the employee's attention.

Employers should ensure that all employees are aware that no form of harassment will be tolerated in the workplace, and have in place robust procedures for enforcing the policy. The possible sanctions should be made clear in your disciplinary code.

Failure to take action is potential evidence of non-compliance with discrimination law in any future ET claim. Where a particular act or omission is deemed gross misconduct likely to lead to dismissal, this should be clearly stated and employees made aware of the application of the code.

**We can advise you on how to create and enforce an effective anti-discrimination policy.**

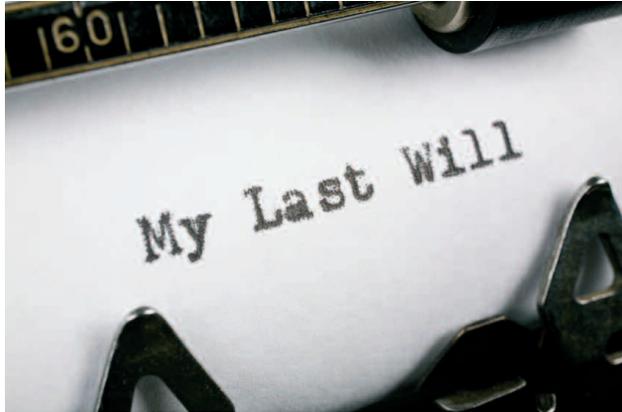
## LAW SOCIETY DEMANDS FORMAL QUALIFICATIONS FOR WILL WRITERS

The Law Society is campaigning to persuade the Government that a change to the law is necessary to protect members of the public from problems caused by using unqualified will writers.

The Law Society wants will writers to have to gain formal qualifications before being able to provide a service to consumers. The Society's President, Linda Lee, said, "The fact that most problems are detected after the individual has died is a strong argument for establishing a robust regulatory framework.

"Many of those calling themselves will writers may have purchased a franchise to do so, and are free to prepare wills without any training or insurance protection."

Unlike solicitors, unregulated will writers do not have to be legally qualified or insured. As there is no



regulatory body, there is no mechanism for bringing a complaint, and without insurance there may be no means of redress should things go wrong.

Solicitors, on the other hand, are professionally qualified to do the work, are bound by a stringent code of professional conduct and, in the very rare

event of a loss to a client, clients are protected by the solicitor's professional indemnity insurance, which is compulsory.

Hardly a week goes by without another story emerging on the problems caused by wills drafted by unqualified will writers or by the use of home-made or 'form' wills.

**If you are seeking to write or amend your will, we provide a professional service at a reasonable cost and give you the peace of mind that comes from having your will drafted by qualified specialists.**



## LANDLORD LOSES £270,000 REPAIR BILL APPEAL

Property company Daejan Investments Ltd. has failed in its bid to overturn Tribunal decisions concerning repair works carried out at the company's Queens Mansions property in Muswell Hill, London. The recent Court of Appeal ruling will cost Daejan almost £270,000 in repairs that cannot be recharged to tenants.

The Court upheld decisions made by the Lands Tribunal and the Leasehold Valuation Tribunal that Daejan had failed in its duty to engage in proper consultations with long leaseholders of apartments in Queens Mansions. It was further held that no dispensation order would be made under the Landlord and Tenant Act 1985. A dispensation order would have allowed Daejan to charge the full cost of the works to its leasehold tenants. The company is now only able to charge the statute-capped sum of £250 to each tenant.

Even though this left a bill of nearly £270,000 to be met by Daejan alone, the Court upheld the view that the financial consequences were irrelevant to the statutory requirement to consult on such matters. The statutory principle applied was that there is a clear duty for the landlords of long leasehold tenants to charge leaseholders only for maintenance and repairs that are reasonable and where the work is carried out to a reasonable standard. Before commencing the work, the landlord must give proper notice to tenants, obtain estimates of the cost of the work and allow leaseholders to make

their own submissions and otherwise consult on the plans.



Lawyers for Daejan argued that the resulting cost to the company

was unreasonable and that it should be granted a dispensation to allow it to follow the normal practice of charging the full cost of such works to its leaseholders. They argued that although consultation was indeed curtailed in error by Daejan, the leaseholders were not unduly prejudiced by the lack of proper consultation as the works were required and would have to have gone ahead regardless of any consultation. The Court disagreed and the appeal was dismissed.

This case illustrates that the courts will uphold the statutory requirement for consultation in such cases. In this instance, the leaseholders have benefited considerably by the decision, at a substantial cost to the landlord. The decision further emphasises the need to ensure that correct legal procedures are applied when planning repair and maintenance works to properties.

## TAX CO-OPERATION IN THE EU

New regulations are being introduced in January 2012, based on the EU Directive on administrative co-operation in the field of taxation, which will:

- extend the scope of the current Directive to include all national taxes and duties, local taxes and motor taxes;
- allow tax officials from one Member State to attend or participate

in administrative enquiries in another Member State;

- permit information exchanged to be used more widely than at present, subject to certain restrictions; and
- permit a range of national bodies to engage in the mutual assistance process under the general oversight of a Central Liaison Office.

In simple terms, the idea is to make sure taxes owed anywhere in the EU can be pursued in any other Member State.

**Non-residence and domiciliary issues are important for a variety of taxes, especially Inheritance Tax. Moving to another country may postpone, but not solve, current tax problems and may create new tax complexities.**

## EASEMENT ESTABLISHED BY USE LIMITED TO ACTUAL USE

When land is used over a long period of time by persons other than the owner of the land, they may acquire an easement (a legal right to use the land). Easements can also be acquired by express agreement, in which case the rights of use over the land will depend on the agreement. In cases where an easement comes into existence as a result of use, the rights of use are less clear, however.

In a recent case, a dispute arose over the right of way over a private road, which had been used by a farmer for more than 20 years. The County Court held that the use was effectively unlimited as far as his agricultural purposes were concerned. Since this included driving stock along the road, the owners of adjacent properties opposed it and appealed the decision.

The critical point was that although the use of the road by the farmer for pedestrian and vehicular access had been shown to have been permitted for more than 20 years – thus

establishing the general right of easement – the use for driving stock had not. Since this was more burdensome on the owners of the adjacent properties than pedestrian or vehicular access, the High Court ruled that the right of easement did not include the right to drive stock along the road.

Allowing other people free use of your land for a long period can mean that you lose the right to prevent such use.

**If you have concerns about others using your land, we can advise you of the appropriate steps to take.**



## ANNUAL INFLATION-LINKED CHANGES IN TRIBUNAL AWARDS – A REMINDER

Employers are reminded that changes to the limits on the compensation amounts which can be awarded by employment tribunals came into effect on 1 February 2011.

The main changes are:

- the maximum compensatory award for unfair dismissal increased

from £65,300 to £68,400;

- the maximum amount of a week's pay for the purpose of calculating a redundancy payment or for various awards, including the basic or additional award of compensation for unfair dismissal, increased from £380 to £400; and

- the minimum amount of compensation where an individual is found to have been unlawfully excluded or expelled from a trade union increased from £7,200 to £7,600.

There is no statutory cap on the amount a tribunal can award in discrimination cases.

## UNDERTAKING ENFORCEABLE WHERE GIVEN VOLUNTARILY

In order to obtain planning permission for a development, a developer will often agree to carry out other works or development wanted by the local council.

Recently, this practice led to a court appearance after a developer applied to the local council for planning permission to build a small residential development. The application was rejected by the council. The reasons for refusal included that there was a lack of contribution towards the provision of the necessary infrastructure and amenities.

On appeal, the developer provided a unilateral undertaking to make the contributions which the council sought provided that the planning permission was granted and the development commenced. The inspector who dealt with the appeal allowed it. However, he also concluded that the

council had not made out its case that the contributions it sought were necessary to comply with the local structure plan. The developer therefore requested the council to discharge it from its undertaking. The council refused.

In court, the fact that the undertaking had been given voluntarily was a telling point. The court also concluded that the inspector's view regarding the necessity for the contributions expressed in his report was not binding on the council. The council was entitled to enforce the undertaking.

If you are asked to give an undertaking as part of a planning application, the wording under which it is given can be critical.

**We can advise you on any planning matter.**

## DISABLED MAN THROWN FROM WHEELCHAIR RECEIVES £80,000

A 56-year-old man who is paralysed from the chest down after being involved in a motorbike accident when he was a teenager recently won £80,000 in compensation for injuries he suffered when he was thrown out of his wheelchair when it hit a pothole. The accident happened when the man and his brother were on their way home. His brother was pushing him over a dimly lit bridge when the front wheels of the vehicle struck the pothole. The man fell out of the wheelchair and his

brother landed on top of him.

At first, the man didn't realise he was injured because he couldn't feel any pain. The next day, however, he noticed that his hip was swollen. It was in fact broken and the fracture required surgery to insert and later remove a metal plate.

As a result, the man has lost confidence in using his hand push wheelchair as he is afraid of suffering a similar accident. He now uses a

motorised wheelchair instead. A claim was brought against the local council on the ground that it had failed in its duty to maintain the pavement in a safe condition. The council admitted liability and settled the claim out of court.

**If you have been injured because the council or organisation responsible for maintaining a road or pavement properly has failed to do so, you may be entitled to compensation.**

## WHEN IS A BOAT NOT A BOAT?

If something was described to you as a floating structure moored on a river, you would be forgiven for assuming that what was being described was a boat – but it isn't necessarily so, as a Norfolk couple found.

Using a barge as a base, they built a two-storey houseboat, which they moored at Thorpe Island on the Norfolk Broads. However, the local planning authority issued an enforcement notice requiring that the structure be dismantled as it was an 'unauthorised development' and breached planning regulations.

The couple appealed against the enforcement notice, claiming that the structure was a boat.

However, a report prepared by a local planning inspector concluded that the absence of navigational equipment or a propulsion system meant that the structure was not a boat, and the original decision was upheld. Planning authorities will generally take a very hard line if they think planning laws are being openly flouted.

We can advise you on all aspects of planning law.

## CARE ORDERS, COURT OF APPEAL BACKS COUNCIL

The decision of a local authority to place a baby born in prison in care after her mother's behaviour was believed to have put the child's life in danger, was recently backed by the Court of Appeal.

After the local authority had obtained a separation order, which it did as a matter of urgency outside normal working hours, the mother sought a declaration that the authority's action breached her human rights under Articles 6 and 8 of the European Convention on Human Rights (the right to receive due process of law and the right to respect for family life).

The Court rejected the mother's claims. The social worker, council and family judge involved all acted in good faith and made decisions that were

reasonable in the circumstances and based on the information to hand.

The welfare of the child was of paramount importance and the separation was intended to be temporary.



Decisions made under pressure and in exceptional circumstances were not to be criticised if made in good faith and on the evidence available at the time, even if a more lengthy analysis of the facts might have led to a different decision.

This case shows that the Court of Appeal recognises the pressures under which social workers operate and will support them when appropriate.

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