



This month A-Z focus - "U" - Update



With proposed and prospective new employment law and ongoing case law, it is difficult to keep track of all the changes and yet non-compliance can be expensive and cause an even bigger headache. On Wednesday 5 October, we will be running a training session, [SEELaw Update](#), to bring you up to date on changes to current legislation, forthcoming new legislation and case law developments. There will also be opportunities to ask questions.

This training is suitable for managers and HR professionals who need to keep up to date of legislative development in employment law.

Case Law

The Equality Act 2010

Is "pro-life" a "philosophical belief" under the Equality Act?

The answer to this question has not, as yet, been tested through the courts, however, a barrister has recently supported two Roman Catholic nurses in successfully challenging their employer (the NHS) to their right not to carry out abortion-related duties. In arguing their case, he invoked both the conscientious objection provision under the Abortion Act 1967 and the religion or belief protection under the Equality Act 2010. This follows on from other recent cases, which have reached the courts, and established that global warming ([Grainer plc & ors v Nicholson](#)) and belief in the ethos of the BBC ([Maistry v BBC](#)) are both capable of being described as philosophical beliefs warranting protection under the Equality Act.

As this challenge did not result in an Employment Tribunal, there is no case report or judgement, however a report of the action has been publicised by the Thomas More Legal Centre's Director, Neil Addison, the barrister who acted on behalf of the nurses. The nurses did not want either themselves or their London hospital to be named. This article appeared in [The Telegraph of 12 August 2011](#), describing what happened.



Bird v Stoke-on-Trent Primary Care Trust

Redundancy and suitable alternative employment

Can an employee refuse alternative employment when it could, on the face of it, be considered to be suitable? [Read more](#)

Evans v Universal Trade Frames Ltd

The importance of a good investigation

This case illustrates that it is more likely for an employer to be able to defend claims at tribunal when legislation and good practice has been adhered to.

[Read more](#)

Thomson and others v London Underground Ltd

Employees were not entitled to be accompanied at investigation meetings

In this case, the Employment Tribunal upheld the employer's decision that the employees concerned did not have the right to be accompanied at an investigatory meeting.

[Read more](#)

M-Choice UK Ltd v Aalders

Summary dismissal trumps notice period

In this case, the Employment Appeal Tribunal held that where an employee on notice is summarily dismissed before accruing one year's continuous service, the employee loses the right to claim ordinary unfair dismissal. [Read more](#)

Date for your diary

Discipline, Grievance and Capability
Wednesday 21 September - [Book now](#)

Case Law

Fuchs and another v Land Hessen

Age discrimination and retirement age

The European Court of Justice (ECJ) has held that German legislation requiring civil servants to retire at 65 can be justified if “appropriate and necessary” means are used to achieve the aim of balancing the employment levels of young and older civil servants to encourage the recruitment and promotion of young people. [Read more](#)

Diabetes and Disability Discrimination

The Equality Act 2010 came into force on 1 October 2010. The Act brings together and replaces the diverse strands of legislation relating to discrimination, such as The Disability Discrimination Act.

The definition of disability as ‘a physical or mental impairment which has a substantial and long-term adverse effect on a person’s ability to carry out normal day-to-day activities’ remains unchanged. The obligation to make reasonable adjustments also remains unchanged. There is not a list employers can refer to decide whether or not an employee is covered by the definition of disability and so sometimes employers can fail to notice that certain ‘invisible’ conditions are actually covered by the definition.



In many cases people with diabetes are covered by the definition as it is a life-long condition and can seriously affect a person’s ability to do normal day-to-day things.

Recently, an AA patrolman from Torquay succeeded in proving that his employer had unlawfully discriminated against him because of his diabetes. Mr Bailey was a top 100 patrol within the AA who had started working for them in 1998. He was diagnosed with type 1 diabetes in 2009 and was advised by a doctor to take a “measured approach” at work, which subsequently affected his performance. However, he remained an average performer within the company.

A series of events followed including a training support patrol being sent out with him for two weeks. The Employment Tribunal found that it had never happened before that an employee had been accompanied by a training support patrol for a period of two weeks and moreover, Bailey’s performance did not warrant a training support assessment.

The tribunal unanimously held that Bailey had been subjected to direct disability discrimination, harassment and a failure to make reasonable adjustments because of his disability.

It is worth remembering that one of the purposes of the Disability Discrimination (pre October 2010) and of the Equality Act 2010 now, is to enable disabled employees to carry out the role they are engaged to do. Making reasonable adjustments should remove disadvantages in the workplace.

Nevertheless, this does not mean that an employer has to prolong or maintain employment regardless of ability or capacity. In these kinds of situations it is important to consider the following:

- o ensure appropriate reasonable adjustments are made based on up-to-date medical reports
- o review and decide the trigger points for absence under your absence management policy or capability policy
- o follow a full dismissal procedure in accordance with the Acas Code of Practice if dismissal is to be considered

Guidance on matters to be taken into account in determining questions relating to the definition of disability can be found here: <http://www.odi.gov.uk/docs/wor/new/ea-guide.pdf>

Other Information

Eligibility of CRB checks

SEE, as a CRB “umbrella organisation”, monitor all CRB disclosure applications sent through from our service users to ensure these are eligible requests. It is impossible to stress enough that employers are legally responsible for ensuring they are entitled to ask a particular person to reveal their conviction history as it is a criminal offence to undertake an illegal check, i.e. apply for a CRB check on a position that does not fulfil the eligibility criteria set out by the CRB.

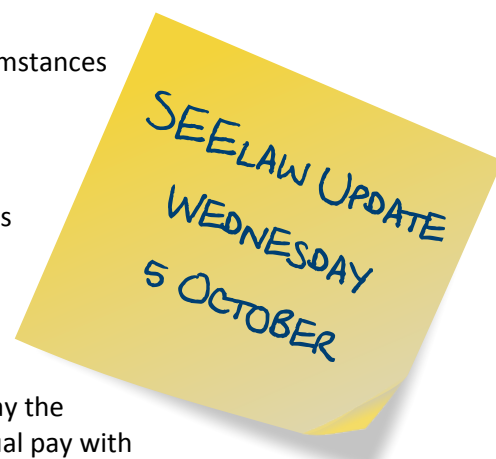
We have noticed there has been an increase in the number of applications submitted for a CRB disclosure for tradespersons and maintenance workers. If a person is carrying out the role in a general capacity, it is unlikely there would be eligibility for a CRB check to be undertaken.

In the latest issue of CRB news (issue 20), the CRB has clarified under what circumstances there will be an entitlement for a CRB check. [Read More](#)

Agency Workers’ Regulations - Amendments

A statutory instrument, the [Agency Workers \(Amendment\) Regulations 2011](#), has been made by the Government to correct some drafting errors in the original Agency Workers Regulations 2010.

One of the amendments clarifies the so-called “Swedish Derogation”. This is a derogation from the Directive, negotiated by Sweden, such that if an agency directly employs a worker (as opposed to hiring them) and also undertakes to pay the employee between assignments, then there is no requirement to pay/prove equal pay with the employees of the organisation(s) for which they work. The pay between assignments must be the greater of either half their pay on assignment or the national minimum wage. This is covered in the [BIS guidance](#) on the Agency Workers’ Regulations, in the section entitled “pay between assignments”.



Social Networking - Employer’s guide by Acas



Undoubtedly these days, most of us spend a considerable amount of time on various social media or networking websites or applications.

According to research from software security firm Clearswift, the number of employers who block staff accessing sites such as Twitter and Facebook has risen by 10% this year even though many employers still view social media as one of the useful tools to promote their businesses.

We perhaps should not be surprised by this while one of the obvious reasons is that it can cause distractions at work. In addition, social media sites have also been linked with many cases concerning high profile data leaks and dismissals.

Blocking access at work is probably not the answer to the ever-changing social media world. With the growing prevalence of smartphones and tablets, monitoring can become complicated and confusing.

So how should employers respond to the challenges posed by social networking tools? Acas commissioned the Institute for Employment Studies to undertake research which advises employers to:

- **draw up a policy on social networking**
- **treat 'electronic behaviour' in the same way you would treat 'non-electronic behaviour'**
- **act reasonably** to issues around social networking by asking 'what is the likely impact on the organisation?'

Acas has also launched its first employers’ guide to managing social media in the workplace. [Read more](#)