

# Employment Newsletter: Health - April 2014

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Case law keeps coming thick and fast and this month has been no exception. One of the many interesting cases in this alert concerns covert recordings made by an employee of the private deliberations at her grievance and disciplinary hearings. The EAT decided that the evidence was admissible.

A number of legislative changes were made to employment law on 6 April 2014. One of these, ACAS early conciliation (EC), may turn out to be nothing more than an administrative hurdle for prospective claimants, but where ACAS do get involved in negotiations a late change to the legislation means that prospective claimants will have to fill in a separate EC form in respect of each potential respondent. This means that if individuals are named as potential respondents in, for example, potential discrimination claims these individual employees will be called by ACAS about whether the claim can be settled. This late change makes it all the more important that all organisations put in place a structure for dealing with early conciliation and let their employees know what to do if they are called by ACAS. All the April changes are outlined below.

## Legislation Update

### What changed on 6 April 2014?

- ACAS Early Conciliation: On 6 April 2014, the government's new Early Conciliation service commenced, operated by ACAS;
- Levy of up to £5000 may be imposed by the tribunal on losing respondents;
- Abolition of discrimination questionnaires;
- Immigration: Maximum penalty for employing someone who does not have the right to work increased to £20,000;
- Unfair Dismissal Compensation Cap: Increase to the maximum award;
- Whistleblowing: MPs added to the list of "prescribed persons".

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## Discrimination

### Dismissal for absence due to post-natal depression was not discriminatory

In this case the EAT found that an employee who had been dismissed after her maternity leave, because of long-term sickness absence arising from post-natal depression, had not been discriminated against either because of her pregnancy or her sex.

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## Disciplinary and grievance hearings

### Covert recordings of private deliberations were admissible

In this case the EAT decided that covert recordings of the private deliberations of a disciplinary and grievance panel should be admissible in evidence.

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## TUPE and equal pay

**Employees who transferred from a public body to an LLP could compare themselves with Council employees for equal pay purposes**

This case is relevant for NHS bodies who are putting in place alternative structures, such as a separate company, through which to provide services. The case makes it clear that those alternative vehicles may well be regarded as associated employers, so employing staff in them on less favourable terms and conditions than their NHS comparators is not without risk.

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## TUPE

**There was a service provision change where the "activity" as defined in the contract remained the same, despite the contract being performed in a different way post transfer**

In this case the EAT confirmed it had been open to a tribunal to conclude TUPE applied where the responsibility for the distribution of goods transferred from a haulage company to a brokerage.

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## Whistleblowing

**Disclosure must materially influence action taken against employee for them to win a detriment case**

This case reminds employers that when deciding whether a whistleblower has suffered a detriment because they have "blown the whistle", tribunals must consider whether the disclosure materially influenced the decision or action taken against them.

[Read more](#)

## Victimisation

**The Equality Act contains a drafting error and does prohibit post-employment victimisation**

In this case the Court of Appeal overturned an EAT decision and held that the Equality Act 2010 does provide protection against post-employment victimisation.

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