



Outside the Box

SUMMER
2010

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Equality Act 2010

Article by Rachel Brown



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The main provisions of the Equality Act 2010 are due to come into force in October 2010.

The aim of the Equality Act is to harmonise existing discrimination laws and strengthen equality law. The new Act brings together many of our existing discrimination laws, but it also introduces some important changes.

The key changes for employers are:

- **Introduction of dual discrimination claims.** The new rules will allow a person to bring a claim if they have been discriminated against because of a combination of two relevant protected characteristics. The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
- **An extension of the definition of discrimination and harassment to include claims by 'association' and 'perception'.** The introduction of these claims should provide protection to individuals who are subject to discrimination because they care for a disabled person or relative or are wrongly perceived to have a protected characteristic.
- **New rules to limit pre-employment health enquiries.** The new Act will prevent employers from asking job applicants questions about their health, unless they are related to the role.
- **Recruitment and promotion of under-represented groups.** The new Act will allow

employers to favour under-represented groups during the recruitment process to improve workforce diversity providing all the candidates are equally suitable.

- **Gender pay transparency.** The new rules will restrict the use of secrecy clauses in contracts of employment which seek to prevent employees from discussing their pay. Such clauses will no longer be enforceable. The Government will also be given the power to require large employers (250 employees or more) to publish information about gender pay differences.
- **Enhanced powers for employment tribunals.** The Act will allow Tribunals to make recommendations to eliminate discrimination or inequality in relation to an employer's whole workforce, not just individual employees.

The Act will also introduce new standards for service providers to prevent discrimination, harassment or victimisation in the provision of services. Under the new rules it will be unlawful for service providers to refuse to provide services, to provide different quality services or to subject a person to any other detriment because of a protected characteristic (excluding marriage and civil partnership). To prepare for these changes service providers should ensure their equality policies are up to date and employees are fully briefed on the new rules.



NEWS

Personal Best for Jane!

Jane Winfield, Partner and Head of Property, completed the Virgin London Marathon on Sunday 25 April in a personal best time of 3:48:47.

The marathon was Jane's third marathon in a year and she was delighted to shave over two minutes off her previous personal best time achieved at the Abingdon Marathon in October 2009.



Jane (pictured above with Rosemary Jensen of Helen Rollason Cancer Charity) confirms that London is a "brilliant" marathon to run because the atmosphere is "electric" and says she found it very humbling to run with so many other people running for very personal and worthwhile causes.

"Very sadly, one of my fellow runners, running for Helen Rollason Cancer Charity, was unable to run the marathon because she became very ill a couple of weeks before it. Devastatingly, we learned two days after the marathon that she had, sadly, passed away. The 2010 London marathon is therefore dedicated to Laura and her friends and family and Helen Rollason Cancer Charity who I know offered her massive support in the lead up to the marathon and during her tragic illness."

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Tracking Down Missing Internet Accounts

Article by Andrew Spearman



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There is no doubt that a log of your bank account numbers, insurance policies and other important financial and personal information will make tracking down assets considerably easier for those left behind on your death.

But what about those assets which do not have such an obvious paper trail? Keeping a simple record of account or policy numbers and contact addresses in a safe place, perhaps with a copy of your will, would enable your executors to deal with such assets. This saves time and, more importantly, ensures your beneficiaries get everything that is in your estate. An

"online" asset that materialises long after the administration has completed can cause headaches and trigger additional tax and penalties.

Good record-keeping is one aspect of general estate planning and Wortley Byers LLP has a team of experienced solicitors to assist you in sorting out your personal affairs, whether it be drafting a will or trust, advising on tax, administering an estate, preparing a lasting power of attorney and dealing with elderly and court of protection matters.

Is Your New-Build Code Compliant?

Article by John Southan



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Are you a developer, builder or buyer of a new-build dwelling covered by an NHBC, Premier or LABC guarantee?

NHBC, Premier and LABC ("the Providers") have imposed a code for reservations or purchases of new-build dwellings on or after 1 April 2010. The Providers can exclude or remove builders or developers from their registers if they fail to comply. Lenders generally require such guarantees to be in place for dwellings under 10 years old so it is important to comply.

The code refers to matters such as keeping the buyer informed of the anticipated completion date; significant changes to the design; dispute resolution arrangements; service charges; how long a purchase price or allowance/benefit remains valid; to clarify whether or not buyers rely on any statements outside

of the contract; the buyer's right to terminate the agreement in certain cases and obtaining a refund of its deposit (such as undue delay or significant and substantial changes). The code also sets out complaints procedures which the developer must disclose.

The code should assist buyers in ensuring their mortgage offer will be valid at the time required to complete by ensuring they obtain relevant information and keep some control over proposed changes before completion or at least an ability to pull out if they do not agree.

Those buying as investors, companies, partnerships or for social housing do not benefit from the provisions

Have You Considered Use of a Meanwhile Use Lease?

Article by Jane Winfield



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Meanwhile Use Leases are helping landlords and tenants to make temporary non commercial use of shops that become vacant during the recession.

The government has so far committed £5,600,000 to 107 local authorities to help them find new temporary uses for vacant shops. It is envisaged that occupiers will include voluntary or charitable groups, information centres and local artists and musicians thus contributing to town centre vitality.

MULs were introduced by Communities and Local Government (CLG) on 4 November 2009. They provide industry standard legal instruments aimed to minimise administrative and legal costs for landlords and tenants. Properties will often be occupied on a rent free basis but in return landlords are able to reduce their overheads, avoid empty property rates and ensure that the building is maintained while they seek a permanent business tenant. The intention is that the temporary occupier will occupy the property for a period of days, weeks or a few months by means of a short form "contracted out" lease that avoids rights of security of tenure and both the

occupier and the landlord will have the right to terminate the arrangement at short notice.

Where there are planning issues with a potential use of a property CLG is considering measures to allow local planning authorities to establish Local Development Orders to allow a greater freedom of movement between Use Classes without the need for specific planning permission. No specific guidance has as yet been issued but some authorities are preparing LDOs as part of a pilot scheme administered by the Planning Advisory Service and funded by the government. MULs have been used in Hastings as part of its "Meanwhile Project" to bring several empty buildings back into use and there is widespread interest in the scheme across the country.

If you would like to find out more about Meanwhile Use Leases or leasing property generally please contact Jane Winfield, or a member of our Property team.



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NEWS

The Yorkshire Three Peaks Walk

On what certainly felt like the hottest day of the year so far, 11 set out from the firm to conquer the 25 miles and total 5200 ft climb that comprises Pen-y-ghent, Wharfedale and Ingleborough.

Miz Choudhury, John Southan, Sarah Stanyer, Andrew Plumb and Lawrence Beach van-



quished all three peaks, within the 12 hour time limit, arriving back more than a little tired to be greeted by Wendy Beach and Andy Dashwood-Begg who had each bagged two Peaks. Ros Plumb, Les Adler, Andrew Moore and Marion Searles all successfully negotiated their way through 10 miles of bogs (more about that later), rock climbs and seemingly endless moorland punctuated with stiles, cattle grids and livestock to meet up with the support team by the picturesque Ribbleshead Viaduct for a well deserved rest and bite to eat.

....and so back to the bog. It didn't take Andrew Moore too long to dry out but our thanks go to two complete strangers who offered their walking poles and pulled him out of a bog. Les insists he would have come to the rescue had he been able to stop laughing for long enough.

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From 6 April 2010 the Information Commissioner (the Commissioner) will have the power to issue a Monetary Penalty Notice (MPN) against your business if it has committed a serious data protection breach.

What is an MPN?

An MPN is a notice requiring a data controller to pay a fine set by the Commissioner. The amount of the MPN determined by the Commissioner must not exceed £500,000.

Who is a data controller?

A data controller is the person (or business) who decides the purposes for which, and the manner in which, any personal data is processed.

When can an MPN be issued?

In order to issue an MPN the Commissioner must be satisfied that:

- The data controller has **seriously contravened** the data protection principles; and
- The contravention was likely to cause **substantial damage or distress**, and either:
 - The contravention was **deliberate**; or,
 - The data controller **knew or ought to have known** that there was a risk that the contravention would occur, and that it would be likely to cause substantial damage or distress, but still failed to take reasonable steps to prevent it from happening.

Before issuing the MPN the Commissioner must serve a **notice of intent** on the data controller, stating the intention to impose a fine and providing a set length of time to respond. The data controller can contest the issue of the MPN and/or the proposed size of the fine. The Commissioner must consider any representations and then decide whether to proceed with the imposition of the MPN. This is less likely where the data controller can show that reasonable preventative steps were taken.

A data controller can appeal to the Tribunals Services against the imposition of an MPN.

Serious contravention

A single breach may be sufficient to meet the threshold of a "serious contravention". For example:

- Medical records containing sensitive personal data are lost during an office move.

What is meant by the term "substantial"?

The likelihood of damage or distress suffered by an individual will have to be considerable in importance, value, degree, amount or extent. For example:

- Inaccurate personal data held by an employer is disclosed in an employment reference, resulting in the loss of a job opportunity for an individual.

What is meant by the term "damage"?

Damage is any financial loss suffered by an individual, such as loss of earnings. For example:

- Financial data is lost and an individual becomes the victim of identity fraud.

What is meant by the term "distress"?

Distress could be an injury to feelings or any anxiety

suffered by an individual. For example:

- Medical details are stolen and an individual suffers worry and anxiety that their sensitive personal data will be made public, even if it does not actually happen.

What is meant by the term "deliberate" contravention?

The contravention is deliberate or premeditated. For example:

- A marketing company collects personal data for the purposes of a competition. It then uses the same data for other commercial purposes without informing the individuals concerned.

What is meant by the term "knew or ought to have known"?

A data controller is aware or should be aware of a risk that a contravention will occur. For example:

- A data controller is warned by its IT department that employees are accessing sensitive personal data but fails to carry out a risk assessment or implement a policy of encrypting all laptops and removable media as appropriate.

What factors will determine the amount of the MPN?

A number of factors will be taken into consideration before deciding the level that the MPN will be set at, including:

- Whether the contravention was a "one-off" or part of a series of similar breaches.
- Whether there was a deliberate lack of co-operation (for example, a failure to respond to reasonable requests for information during the investigation).
- What steps were taken once the data controller became aware of the breach (for example, concealing it or voluntarily reporting the contravention).

What steps can a business take to avoid the imposition of an MPN or notice of intent?

- Ensure that you can provide evidence that your business has recognised the risks of handling personal data and has taken action to address the issue (for example, you have conducted a risk assessment).
- Put in place appropriate policies, practices and procedures to avoid potential data protection breaches within your business (for example, by establishing a robust compliance regime).
- Pay particular attention to data protection issues where personal data of large numbers of individuals or sensitive data is concerned.
- Implement any guidance or codes of practice published by the Commissioner or other regulatory bodies that may be relevant to potential data protection breaches within your business.
- Do not allow any known issues to remain unresolved (for example, rectify any problems with your IT systems as soon as possible).



NEWS

California Bike Tour

Andy, Nick, Rick and Patrick successfully completed their cycling tour from San Francisco to San Diego, raising in excess of their £5,000 target for the Cardiomyopathy Association

(www.cardiomyopathy.org).



Starting from the Golden Gate Bridge they made their way down Route 1 along the Pacific Coast of America, passing along the golf courses of the Monterey Peninsula, the cliffs of Big Sur, the vineyards of Santa Barbara and the beaches of Orange County on their way towards the Mexican border. In total (and with surprisingly few wrong turns) they cycled approximately 650 miles unsupported.

Thankfully the only real problems encountered were a severe case of sunburn and the odd puncture, as well as being stranded for a night in the one horse town of Guadalupe with no accommodation. The project as a whole has been very challenging but a complete success and the four are (slowly) turning their minds to future trips. Any further support is greatly welcome and donations can be made at www.justgiving.com/nickandandy/.

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HIPs Gone but EPCs Remain

Article by Beth Greig

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The formation of the new coalition government has brought with it swift changes in the legislation with regard to Home Information Packs (HIPs) and Energy Performance Certificates (EPCs) for residential property.

Since 2007 residential property sellers have been required to provide a HIP to prospective purchasers. In order to reduce potential seller's costs and to simplify the process, this requirement has now been suspended with effect from 21 May 2010, with primary legislation for full abolition to follow. That said, EPC's have been retained as, not only are they still required under EU law, but Communities Secretary Eric Pickle MP, on behalf of the Department of Communities and Local Government has stated that the government "is determined to reduce energy bills, improve our energy security and tackle climate change". The government has passed The Energy Performance of Buildings (Certificates and Inspections)(England and Wales)(Amendment) Regulations 2010 which also became effective on 21 May 2010.

The key change is that it is no longer necessary to have an EPC in place before a property is put on the market. You do, however, need to have

'commissioned' the certificate before marketing the property. 'Commissioned' means giving instructions to an energy assessor and either paying for the certificate or giving an undertaking to pay for the service.

There is a new duty for the agent acting on behalf of the seller of a residential property to be satisfied that an EPC has been commissioned before marketing the property. There is also a further duty on behalf of both the seller and their agent to make reasonable efforts to secure an EPC within 28 days of the property actually being placed on the market.

With the emphasis on the changes being not only to encourage properties being put onto the market and to stabilise it at such a fragile time, but also to step towards combating the impact of climate change, time will tell whether or not these intentions can be realised. With fixed penalties for failure to comply with the new regulations, it is clearly something that all parties concerned need to be prepared for from the outset of all residential property sales.

How Green is Your Lease?

Article by Jane Winfield

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Buildings are the source of half all greenhouse gas emissions in the UK. The Climate Change Act 2008 set a target of an 80% reduction in greenhouse gas levels by 2050.

Section 172 of The Companies Act 2006 imposes a new legal duty on company directors to have regard "to the impact of the company's operations on the community and the environment". The "corporate social responsibility" benefits of having a "green" lease are certainly worth investigating.

A "green lease" is a standard lease including additional clauses requiring landlords and tenants to work together to develop and improve the sustainability of the building, maximise energy savings and drive down greenhouse gas emissions thus creating an energy efficient, cost effective and sustainable space. A Memorandum of Understanding can be entered into between the parties at any time during the life of a lease and run alongside it. It is not legally binding but requires the co-operation of the parties to ensure the building is run in a sustainable and energy efficient manner.

Green lease clauses might include aspects such as co-operation in relation to energy and water consumption and waste generation; data sharing on energy and water use, waste production and recycling and maintenance records; restrictions on tenant's alterations and landlord's works which may affect the efficient use of water or energy; avoidance of adverse effects of alterations on the existing Energy Performance Certificate rating or the efficiency of a building; flexibility to allow the landlord access to perform energy saving works; rights to install sub-metering to common parts and the demised property where appropriate; restrictions on reinstatement obligations where measures have been taken to improve energy or water efficiency; establishment of a Building Management Committee to ensure the parties communicate to discuss environmental issues and agree an energy management plan and energy efficiency targets, possibly backed up by rental adjustments to reward good performance or penalise bad performance; service charge adjustments to reflect the use of individual tenants' energy and water use.

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