

employment post

- Labour's legislative legacy
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welcome to the
spring edition
of Employment Post

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editorial

You are likely to be reading this in the middle of a general election campaign. As things stand, it is hard to identify any major changes to employment legislation that would result from a change of government. That may be partly because – like it or not – a large proportion of our domestic legislation is passed to implement EU directives.

The most significant piece of employment legislation for many years, the Equality Bill, now looks likely to make it onto the statute book just in time, and will therefore probably feature heavily in the post-election employment landscape. Although this is a domestic project, the bulk of its mainstream discrimination provisions need to be aligned with the corresponding European measures. The need to keep pace with developments in Brussels has contributed to UK law growing in a piecemeal way and is one of the major reasons why the case for a single equality act had become so compelling.

Our first main feature, dealing with the current crop of new legislation, includes a brief look at the latest developments with the Equality Bill. It also touches on another European initiative, the Agency Workers Directive, which will be implemented in the UK in October 2011. It is probably fair to say that

the purely domestic measures are relatively minor in comparison, though there are still a fair number of them to report.

The European dimension is also apparent in our second main article, looking at the latest developments on the age discrimination front. This is a new area of law, where it is fair to say that the courts on both sides of the Channel are still feeling their way. Three new important decisions of the European Court of Justice (all from Germany as it happens) have given lawyers in all member states a lot to think about.

In the rest of this issue we look at religious discrimination (another area of law heavily influenced by Europe), summarise the latest tweaks to the points-based immigration system and round up some key cases in other areas. To help you keep track of what is going on, we have included some at a glance tables in the centre pages which we hope you will find useful.

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case law round-up

Gillie Scoular rounds up some key developments not covered elsewhere in this issue.

DDA extends to associative discrimination

The Employment Appeal Tribunal (EAT) has confirmed that the employment provisions of the Disability Discrimination Act protect all workers from disability-related discrimination and harassment, even if they are not disabled. The case involves a mother who alleges that her employer has directly discriminated against her and harassed her because she has a disabled son.

The case has wider significance because in order to give effect to the underlying EU directive, the EAT has backed the employment judge's decision to re-write the definition of disability discrimination, even to the extent of adding new sub-sections into the Act. This bold approach to judicial legislation has already been followed elsewhere – for example, in a case involving the Working Time Regulations.

This decision brings disability into line with other discrimination strands such as race or sexual orientation, which the courts have already interpreted in a similarly broad way to cover associative discrimination. The decision also anticipates changes planned in the Equality Bill 2009.

No blanket exemption for service-related increments

After waiting for most of this decade we have finally got a clear ruling on whether the pay structure for inspectors in the Health and Safety Executive (HSE) complies with equal pay law. The answer is no. This conclusion was reached in a Court of Appeal judgment announced in October 2009, which represents the culmination of eight years of litigation involving Mrs Wilson and Mrs Cadman.

The main argument had been about whether the HSE could be made to justify its pay structure, which awards service-related increments to its inspectors for ten years. The Court of Appeal decided that although as a general rule rewarding employees by reference to length of service did not require justification under the Equal Pay Act, the employment tribunal was entitled to make an exception in this case. The tribunal had thought five years would have been reasonable but a period of ten years was much too long. However the main message of this case is not that a five-year period is necessarily safe, but that no pay structure which rewards length of service is immune from challenge on equal pay grounds.

Collective agreements have limited shelf-life in TUPE context

The Court of Appeal has decided that contractual terms are frozen following a TUPE transfer if they derive from a collective agreement to which the transferee is not a party. So where leisure service workers at Lewisham Council were transferred to the private sector, their new employer had to honour the rates of pay already fixed by the local authority collective bargaining machinery (including future increases already agreed) but not the new rates negotiated after the transfer date.

This decision follows a judgment of the European Court of Justice in 2006 which looked at a similar situation in Germany. It favoured a "static" interpretation of collective agreements in the context of the parent EU legislation, the Acquired Rights Directive, rather than the "dynamic" approach adopted in earlier British case-law. The Court of Appeal's judgment provides welcome clarification to employers to whom public sector workers have been transferred under TUPE: they now know the extent of their obligations at the date of the transfer, and will not have to worry about terms subsequently agreed in collective bargaining in which they are not involved.



Labour's legislative legacy

Nicola Brown and Sinead Hesp give an overview of the new employment legislation published in the last few months of the current Labour Government.

New in April

April is always a popular month for new employment legislation, and this year is no exception. Among the measures introduced on 6 April two stand out: the new "fit-note" regime and the extension of the flexible working provisions to cover time off for training.

The shake-up of the old sick-note system comes two years after the idea was suggested in Dame Carol Black's report "Working for a healthier tomorrow". The Government hopes that the new system will make some inroads into the £100 billion that sickness absence is estimated to cost the economy each year.

The new note will not give doctors the option to state definitively that an employee is fit for work, as its popular title might suggest. The main innovation is that as an alternative to signing the employee off sick, doctors will be able to specify steps that could be taken with an employer's agreement which might help an earlier return to work. Four options are pre-selected in the standard form note including altering hours and amending duties, though there is scope for GPs to make additional suggestions. As an additional measure to encourage regular reviews of the patient's progress, the maximum period a fit

note can cover will be reduced from six to three months in the first six months of an illness.

The new training-related flexible working provisions are also being introduced on 6 April, though until April next year they will apply only to employees working for organisations with 250 or more staff. The new regulations largely reflect the procedures and eligibility conditions that already apply to employees seeing flexible working arrangements to care for dependants. Among other conditions, a minimum of six months' service is required before a request can be submitted, and only one request can be made over a twelve-month period. The list of grounds on which the request can be turned down also has a ring of familiarity, though the most obvious reason for refusing a request is new, ie, because the proposed training would not improve the employee's effectiveness or the employer's business performance.

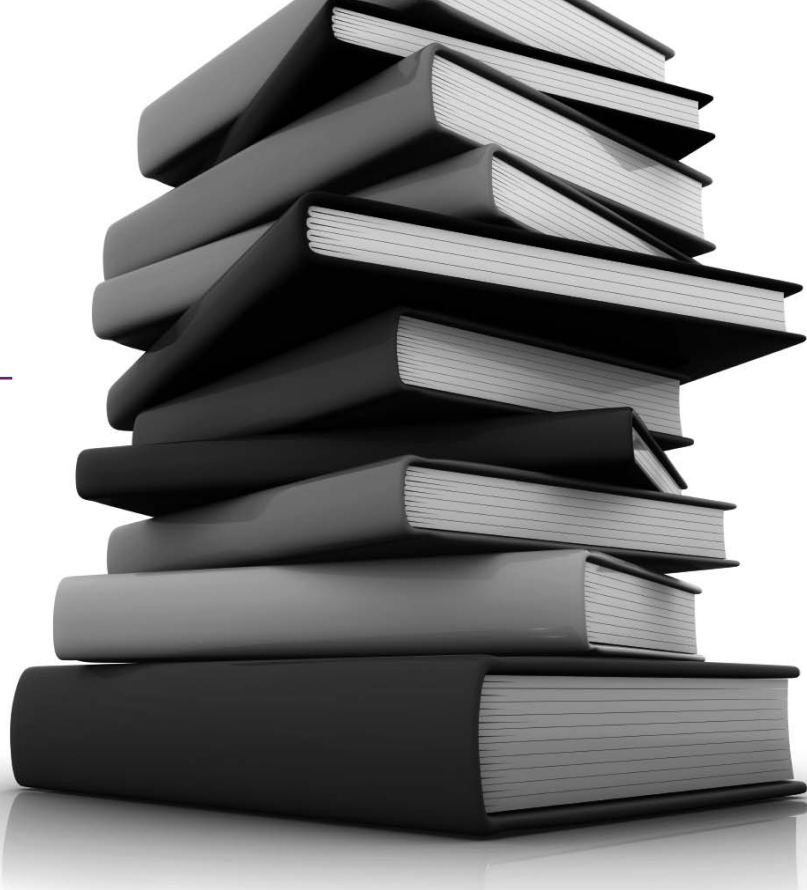
There is no obligation for an employer granting a request to pay the employee during the time taken off subject to compliance with the Working Time and National Minimum Wage Regulations. Nor does the employer have to pay for the training itself, though many will do so if they are convinced that the

training will improve performance at work.

As well as the training and fit note provisions, the Government is introducing a number of miscellaneous measures in April that could have an impact in the employment field. These include toughening the enforcement regime for breaches of the Data Protection Act, banning the use of union-related recruitment blacklists and restricting the use of contingency fees in employment tribunals. In addition rule changes will allow the tribunal service to pass on details of whistleblowing allegations direct to the relevant authorities if these are included in the ET1. Finally, on the pensions front, the normal minimum age for qualifying for a pension was raised from 50 to 55 on 6 April, subject to transitional provisions.

Deferred to 2011

Two measures that were originally planned for 2010 have been shifted to 2011 to ease the burden on employers. First to be implemented, in April 2011, will be the extension of statutory paternity leave entitlement to encourage fathers to play a more active role in childcare. In October 2011 new regulations giving limited protection to agency workers will come into force.



Regulations have already been published to implement the changes to the statutory paternity regime, which will apply to parents of babies born or children placed for adoption after 2 April next year. The aim is to make it possible for a father to take over the second half of the mother's statutory maternity, plus any remaining entitlement to statutory maternity pay (SMP) which will typically amount to approximately three months' worth. It will also be possible for the father to take over a longer period of maternity leave if the child's mother dies. Similar changes will be made to the paternity leave regime for adoptive parents and same-sex couples.

The original plan to combine this with extending the maximum SMP entitlement to 12 months has been shelved on economic grounds.

This may partly account for the low take-up expected: between four and eight per cent of eligible fathers.

Looking further ahead to October 2011, the Agency Workers Regulations were passed by Parliament in late January. The main idea is to make sure agency workers with at least 12 weeks' service benefit from the same basic terms and conditions as comparable permanent workers

engaged by the same hirer. It has been difficult to define the limits of this new right, which is why the regulations are hedged around with some quite complicated qualifications and exemptions. In common with other so-called atypical workers holding fixed-term or part-time contracts, agency workers will also have rights to information about vacancies.

The new regulations raise a significant number of compliance issues for both suppliers and hirers of agency labour, but for once the Government has given them plenty of time to plan. However the regulations are far from a blank cheque for agency workers as important benefits such as pensions, occupational sick pay, maternity pay and some bonuses are excluded from the new regime.

The Equality Bill

As well as consolidating and updating the country's discrimination legislation (currently widely scattered in nine major measures and countless statutory instruments) the Equality Bill will strengthen the obligations of public sector organisations to promote equality and extend the age discrimination legislation beyond the employment and education field to the provision of goods and services.

The Bill has now completed its passage through the House of Lords, and is set to become law before the General Election. Assuming that happens, the majority of the consolidation measures will take effect in October 2010. This first phase is not likely to change employers' obligations significantly, though some terminology will change, which will mean that equalities-related policies will need updating.

The new unified public sector duty to promote equality is likely to be introduced in April 2011. This will incorporate a number of important reporting obligations for most public sector institutions, including an obligation to publish figures on their gender pay gap. It is likely that it will no longer be compulsory to publish equality schemes. Instead we are promised new obligations that will be "less prescriptive" and "more outcome-focused".

Looking even further ahead, the extension of the age discrimination regime to goods and services should be applied to all sectors, including health and social care, in 2012.

employment legislation tracker

Estimated/actual date in force	Description	Current position (April 2010)
1 October 2009	National Minimum Wage Amendment Regulations 2009	Increased the standard rate from £5.73 to £5.80 per hour. The development rate and the rate for young workers were also increased, to £4.83 and £3.57 respectively
1 October 2009	Work and Families (Increase in Maximum Amount) Order 2009	Increased the maximum limit on a week's pay to £380
1 February 2010	Employment Rights (Revision of Limits) Order 2009	The maximum compensatory award was reduced from £66,200 to £65,300. The limit on a week's pay remained unchanged
6 April 2010	Social Security (Medical Evidence) and SSP (Medical Evidence) (Amendment) Regulations 2010	A new electronic "fit note" replaced the traditional hand-written GP's sick note
6 April 2010	Apprenticeships, Skills, Children and Learning Act 2009	Employees of organisations with at least 250 employees have a new right to request time off to train, modeled on the existing right to request flexible working arrangements to care for dependents
1 October 2010	Equality Bill 2009	The majority of the provisions of the Equality Bill are expected to be implemented, subject to the Bill receiving Royal Assent
1 November 2010	Safeguarding Vulnerable Groups Act 2006	Individuals who start work in a regulated activity must be registered with the Independent Safeguarding Authority (ISA)
April 2011	Equality Bill 2009	The new single public sector equality duty is planned to take effect
April 2011	Additional Paternity Leave Regulations 2010	These regulations (and a set of five other associated regulations) will introduce the new system of transferable maternity leave for parents of babies born or adopted after 2 April 2011
April 2011	Apprenticeships, Skills, Children and Learning Act 2009	The right to request time off to train will be extended to all employees who meet the eligibility conditions
October 2011	Agency Workers Regulations 2010	These regulations will give agency workers with at least 12 weeks' service the right to equal treatment with their permanent counterparts engaged by the organisation to which their services are provided

employment fact sheet

Compensation Limits (from 1 February 2010)	
A week's pay	£380
Compensatory award for unfair dismissal	£65,300
Basic award for unfair dismissal	£11,400
National minimum wage (from 1 October 2009)	
16 to 17-year-olds	£3.57 p/h
18 to 21-year-olds	£4.83 p/h
22 and over	£5.80 p/h
Tribunal statistics (year to 31 March 2009)	
Total number of claims	151,028
Number of unfair dismissal claims	52,711
Average/median awards for unfair dismissal	£7,959 / £4,269
Total number of discrimination claims	35,431
Average/median awards for sex discrimination	£11,025 / £7,000
Average/median awards for race discrimination	£32,115 / £5,172
Average/median awards for disability discrimination	£27,235 / £7,226
Benefit rates (from 6 April 2010)	
SMP	£124.88 p/w
SSP	£79.15 p/w
Lower earnings limit	£97 p/w
Useful links	
BIS Employment Matters	www.berr.gov.uk/whatwedo/employment/index.html
EHRC	www.equalityhumanrights.com/
Equality Challenge Unit	www.ecu.ac.uk/
ACAS	www.acas.org.uk



the European Court leads the way on age

This year has already seen three European Court decisions, following the Heyday ruling last year. There has also been plenty of action on the domestic front. Martin Brewer and James Kidd investigate.

The default retirement age limps on

Last autumn the High Court gave its decidedly unenthusiastic backing to the national retirement exemption which allows employers to retire employees compulsorily once they have reached 65 without facing age discrimination claims. Following guidance from the European Court of Justice (ECJ) on the correct approach to take, the High Court judge said the Government had produced enough evidence to show that the exemption was a proportionate way of ensuring stability in the labour market at the time the Age Equality Regulations were introduced in 2006. He added that his answer would have been different if the Government had not just announced a review of the exemption, or if he had been asked to decide whether it was justified based on the situation at the time of his judgment rather than at the date the regulations came into effect.

Since then the Government has concluded consultation on the options, which include raising the age at which the exemption applies as well as abolishing it entirely. It has fended off attempts by opposition peers to

include a clause in the Equality Bill abolishing the exemption by promising to implement the results of its review by the end of 2011.

The default retirement age in any event only applies to employees, leaving open some interesting questions about whether a corresponding age can be imposed on non-employees. More will be revealed later this year when the Court of Appeal gives judgment on an appeal involving the enforced retirement of a partner in a legal firm.

Three German cases

Since the Heyday judgment last year, we have been treated to three decisions of the ECJ answering questions posed by the German courts on the Employment Framework Directive, with which Britain's Age Equality Regulations must comply.

The best known of the three involved a firefighter who had challenged a regulation of the Land of Hesse (one of the constituent states in the Federal Republic of Germany) which limited recruitment of firefighters to applicants under the age of 30. The ECJ thought that imposing this age limit was not only justifiable in view of the intense

physical requirements of the role, but was also a genuine occupational requirement. The second limb of this decision is particularly surprising, but since it is sparsely reasoned it will probably be confined to its own facts. It is certainly not a green light for imposing upper age limits on recruitment in other jobs, not that we have needed reminding of this in the UK since the decision of an employment tribunal last year to strike down the upper age limit of 36 for training air traffic controllers.

The second decision, involving the upper age limit for state-funded German dentists, is probably too fact-specific to be of wider interest. The same is not true of the third decision, which involved the service-related notice periods under the German Civil Code. In this case a 28-year-old worker employed by a well-known multinational challenged a provision which ignored service under the age of 25, so that on the face of it she was only entitled to one month's notice. If all her service had been taken into account the minimum notice period would have increased to four months. The ECJ struck down this provision as being directly discriminatory on grounds of age.



For good measure it added that the national court was bound to disapply such a blatantly discriminatory provision, even though the dispute was between private individuals.

This last decision therefore opens the way for workers to challenge age discriminatory legislation as part of their employment tribunal claim, rather than having to bring a Heyday-style challenge to the legislation itself in judicial review proceedings. The obvious candidate for such an attack is the statutory redundancy regime, which pays older workers more for a given length of service. Many however believe that the Government has done enough to protect the scheme from challenge by removing the old disregard of service under the age of 18 in 2006, having rejected more radical change following extensive consultation.

Weeding out older workers

As well as the retirement case involving a firm of solicitors which we mentioned earlier, two other cases are due to be heard by the Court of Appeal later this year. The first is another case from the legal services sector, this time involving an advisor working for

the Police National Data Base. The question is whether the employer's requirement for a law degree to progress to the highest grade indirectly discriminates on grounds of age. The Employment Tribunal allowed the employer's appeal because the employee had produced no evidence that such a requirement put workers in his age group (between 60 and 65) at a significant disadvantage, so no question of indirect discrimination arose. Whatever the outcome, this case will remind employers to think carefully about erecting barriers to recruitment or promotion, even if the link with discrimination on a prohibited ground is not immediately apparent.

The second appeal also involves a worker at the older end of the age spectrum. This time the critical age was 50, after which a local authority employee would have been entitled to an early retirement pension if he had been dismissed on redundancy grounds. The employee claimed that his employers had shown little enthusiasm for finding him alternative employment at the end of a period of secondment because they wanted to make sure he was dismissed before he turned 50. The employers had

denied he was subjected to less favourable treatment on grounds of age, but they did not use the justification defence as a fall-back. The justification argument is however being considered in a similar case involving another 49-year-old public sector employee, due to be heard by the EAT later this year. In that case a primary care trust convinced the employment tribunal that saving public money was a factor that could be used to justify the early dismissal, but the employee is appealing.

While being of particular interest to public sector employers, this pair of cases will also have wider significance. Many private sector employers have contractual redundancy schemes which are significantly more generous to older workers, and employees who miss out because of the timing of their dismissal are likely to deploy similar arguments.



more difficult religious questions

Jog Hundle and Anna Youngs assess recent cases defining the meaning of religion and the limits of religious observance in the workplace.

What does religion or belief mean?

Some six years after the Religion or Belief Regulations came into force, the Employment Appeal Tribunal (EAT) has had to consider for the first time exactly what beliefs they protect. Up to now this issue has not arisen at appeal level, because the majority of claimants have been from the world's major religions. However the scope of the regulations is clearly wider than that, because they protect any "religious or philosophical belief".

The EAT's decision hit the headlines because it decided that a belief in the moral imperatives generated by man-made climate change would, if genuinely held, amount to a protected belief. The reasoning behind this conclusion will help protect a wide range of "cogent and serious" beliefs about a "substantial aspect of human life and behaviour". The only qualifications are that they must be genuinely held and "worthy of respect in a democratic society".

The test has already been applied to extend protection to a spiritualist police officer. But, like the climate change case, no decision has yet been made on whether there was in fact a link between the claimant's beliefs and his dismissal. Looking further ahead it is possible to foresee claims based on a political philosophy such as Marxism and Socialism, and even on membership of some of the

fringe political parties. Pending further clarification employers should avoid disciplining an employee purely on the grounds of his or her beliefs, however far-fetched or unreasonable they may appear.

Should employers allow conscientious objection?

Two cases last year illustrated the conflicts that can occur in the workplace when Christians with strong convictions about the ethics of homosexuality work in an organisation that provides services to same-sex couples.

The first of these concerned a council registrar who was troubled when called on to register civil partnerships, having taken up the post some years before the Civil Partnership Act came into force. Her employer refused to allow her to opt out entirely, but did offer a compromise which would have required her to attend to the legal formalities without being obliged to officiate at civil partnership ceremonies. Although it would have been possible to allow her to swap with colleagues and still provide an adequate service, the council would not let her; it considered that would be tantamount to sanctioning discrimination on grounds of sexual orientation.

Both the EAT and the Court of Appeal agreed in overturning the employment tribunal's decision that the registrar had been the victim of unlawful religious discrimination. In a case like

this, where the integrity of its service was in issue, the council was able to make the employee choose between her religion and her job. This approach has also been followed in a case involving a counsellor who refused to provide psycho-sexual counselling to same sex-couples, although he knew that was part of the employer's service when he applied to train for the job.

Behind both these decisions is a key distinction between discrimination on the grounds of the belief itself – which is likely to be direct religious discrimination – and discrimination on the grounds of the manifestation of that belief. The latter, at least according to all the cases decided under the regulations to date, is likely to be indirect discrimination, and therefore capable of justification. In both these cases the employers could point to a fundamental part of their service ethos, as well as their legal obligations to provide their services in a non-discriminatory manner, to justify their decision to disallow conscientious objection. It remains to be seen how generous tribunals will be to employers in other contexts. This is dangerous territory, on which employers need no reminding to tread carefully.

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points-based immigration: further changes

Alex Russell looks at the recent changes to Tier 1 of the points-based system.

More than two years have passed since the introduction of the points-based system for immigration. Immigration remains a contentious area of public policy and the Government is keen to demonstrate the new system is tough, robust and able to adapt to the UK's ever-changing immigration requirements.

The Government established the Migration Advisory Committee (MAC) as an independent body to provide evidence-based advice to the Government on immigration matters. In February 2009 the Government asked the MAC to report on a number of issues, including whether the criteria for Tier 1 should be changed in 2010–2011 to reflect changing economic circumstances. The MAC's report in relation to Tier 1 was published in December 2009. The Government recently announced that it has accepted most of the MAC's recommendations, with the changes coming into effect on 6 April 2010.

Tier 1 background

Tier 1 is the highly skilled tier that is aimed at individuals who will contribute to the UK's productivity and growth. Tier 1 consists of four categories – General, Entrepreneurs, Post-Study Work, and Investors. Tier 1 (General) is the category of most interest to employers as it involves people looking for employment but does not require the migrant to be sponsored by an employer. It is therefore an

attractive option for employers that do not wish to become a sponsor under Tier 2 (the skilled workers tier), or where an individual is unlikely to qualify under that Tier. Under Tier 1 immigration permission attaches to the individual meaning they may work as an employee for the employer of their choice, or on a self-employed basis in almost any role for the duration of their visa.

Some of the old Tier 1 (General) requirements, particularly the need to have at least a Master's degree, have prevented many individuals from being able to accrue the necessary points to qualify. This has caused frustration for some employers who have found themselves unable to recruit the talent they need. Many stakeholders provided evidence to the MAC in support of the criteria being less restrictive.

Tier 1 (General) changes

The main changes to Tier 1 are as follows:

- Individuals with an undergraduate degree as their highest qualification can potentially qualify to enter under Tier 1 (General).
- Points may be granted for professional qualifications if these qualifications have been included in the UKBA points based calculator.
- Migrants with previous annual earnings of £150,000 do not need to meet any educational requirements.
- Points will no longer awarded for

previous annual earnings of less than £25,000.

- The initial leave to remain entitlement has been reduced from three to two years, with the option of a three-year extension.

The changes are generally positive for employers who want to recruit migrant workers. The main complaint that only individuals with a Master's degree qualify has been addressed, and the changes are likely to make it easier for employers to recruit into some professions such as medicine, accountancy and law. The £150,000 salary threshold is also helpful for employers who want to recruit senior well-paid staff. However, the rise in the earnings requirement may cause difficulties for individuals in lower paid roles who have previously relied on academic qualifications in reaching the necessary points threshold. The change to the initial period of leave is also unlikely to be welcomed as it will put migrants to the cost and inconvenience of having to apply for a new visa after only two years in the UK.

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April 2010

upcoming employment seminars

Annual employment law update seminars:

- Birmingham – 24 September
- Cambridge – 21 September
- Norwich – 16 September (morning session for non-HR professionals or afternoon session for HR professionals)

Employment workshops in Cambridge:

- 16 June - All shook up!
- 29 September - The power of social networks

Employment workshops in Norwich:

- 9 July – HR Hub (a training and information forum specifically for HR professionals)
- 8 October – HR Hub

To book on to any of the seminars below please email events@mills-reeve.com quoting the seminar name, date and location or visit our website www.mills-reeve.com/events to book online.

